BRING TO MEETING

REAL PROPERTY, PROBATE & TRUST LAW SECTION
www.rpptl.org

Executive Council Meeting

AGENDA

The Ritz Carlton Beach Resort
280 Vanderbilt Beach Road
Naples, FL 34108
Phone: (239) 598-3300

Saturday, September 26, 2009
9:30 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Ritz Carlton Resort - Naples

AGENDA

I. **Presiding** — John B. Neukamm, Chair

II. **Attendance** — Michael A. Dribin, Secretary

III. **Minutes of Previous Meeting** — Michael A. Dribin, Secretary
1. Approval of May 23, 2009 Executive Council Meeting Minutes **pp. 13-53**

IV. **Chair's Report** — John B. Neukamm
1. 2009 – 2010 RPPTL Executive Council Schedule **pp. 54**

V. **Chair-Elect's Report** — Brian J. Felcoski
1. 2010 – 2011 RPPTL Executive Council Schedule **pp. 55**

VI. **Liaison with Board of Governors Report** — Daniel L. DeCubellis
1. BOG Summary – May 2009 **pp. 56-57**

VII. **Treasurer's Report** — Margaret A. Rolando
1. 2008 – 2009 Monthly Report Summary **pp. 58-64**

VIII. **Circuit Representative's Report** — Andrew O'Malley, Director
1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith
4. Fourth Circuit – William R. Blackard; Roger W. Cruce
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
11. Eleventh Circuit – Carlos A. Batlle; Thomas M. Karr; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff; Raul Ballaga
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield

13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; David M. Garten; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit – James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

X. Probate and Trust Law Division — *W. Fletcher Belcher, Director*

Action Items

1. Estate & Trust Tax Planning Committee - *Richard R. Gans, Chair*

   A. Support amending §736.0505 (Creditors' claims against settlor) of the Florida Trust Code to provide creditor protection for irrevocable inter vivos QTIP trusts where the settlor is the surviving spouse and is entitled to receive distributions as a beneficiary following the death of the settlor's spouse. This proposal will create or clarify transfer tax advantages by making the exemption amount available to both spouses and protecting the trust assets from inclusion in the settlor's gross estate. The Asset Preservation Committee also collaborated on this proposal. **pp. 65-72**

   B. Support amending Florida Trust Code by: (1) adding new §736.0902 (Prudent investor rule not to apply) to: (a) eliminate various fiduciary duties of trustees with respect to life insurance contracts held in trusts; and (b) exculpate trustees from all losses sustained with respect to life insurance contracts held in trusts; and (2) amending §518.112 (Delegation of investment functions) to: (a) expand the investment functions which may be delegated by fiduciaries, and (b) in connection with the requirement that beneficiaries be given written notice of the fiduciary's intention to delegate investment functions: (i) change the method by which written notice must be given (including the elimination of the requirement of a signed receipt); and (ii) incorporate the representation provisions contained in the Florida Probate and Trust Codes. Representatives of The Florida Bankers Association collaborated on this proposal. This proposal is not supported by the Trust Law Committee, which disapproved it by a vote of 21 to 17 **pp. 73-82**

2. Probate & Trust Litigation Committee - *William T. Hennessey III, Chair*

   Support amending the Florida Probate Code by adding new §732.805 (Spousal rights procured by fraud, duress or undue influence) to permit post-death challenges to property and inheritance rights inuring to the benefit of a surviving spouse by virtue of the marital status (i.e., intestate

share, homestead, elective share, exempt property, pretermitted spouse share, preference in appointment as personal representative, etc.) when the surviving spouse procures the marriage to the decedent by fraud, duress or undue influence **pp. 83-94**

3. Ad Hoc Study Committee on Homestead - *Shane Kelley, Chair*

Support amending §§732.401 (Descent of homestead) and 732.4015 (Devise of homestead) of the Florida Probate Code and §744.444 of the Florida Guardianship Law to allow a surviving spouse (or his or her guardian of the property) to make an election between a life estate interest or a partitionable tenancy in common interest with the owner's lineal descendants in homestead property upon the owner's death **pp. 95-115**

4. IRA's & Employee Benefits Committee - *Kristen M. Lynch, Chair*

Support amending the Florida Probate Code by adding a new section to provide that if a marriage is dissolved or declared invalid by a court, a provision made by one spouse prior to the date of the order for the payment or transfer at his or her death of an interest in life insurance policy, annuity contract, employee benefit plan, IRA account, payable-on-death account, and a security or account registered in transfer-on-death form, to or for the benefit of the other spouse, is revoked by that order and the decedent's interest shall pass as if the former spouse predeceased the decedent as of the time such order was entered **pp. 116-131**

5. Guardianship Law & Procedure Committee - *Debra L. Boje and Alexandra V. Rieman, Co-Chairs*

Support amending the definition of "income" contained in §744.604 (Definitions) of the Florida Guardianship Law to conform it to the policies of the Department of Veterans Affairs concerning commissions payable to guardians in connection with the receipt and management of Social Security benefits **pp. 132-139**

6. Advance Directives & HIPPA Committee - *Rex E. Moule, Jr., Chair*

Support amending the Florida Health Care Surrogate Act (Part II, Chapter 765) by adding new §765.2025 (Designation of a health care surrogate for a minor) to authorize a natural guardian, legal custodian or legal guardian of the person of a minor to designate a health care surrogate to make health care decisions for the minor **pp. 140-141**

7. Charitable Organizations & Planning Committee - *Thomas C. Lee, Jr., Chair*

Support repealing §1010.10 F.S. (Florida Uniform Management of Institutional Funds Act), and amending Chapter 617, F.S. (Corporations not for profit) by adding a new section (Florida Uniform Prudent Management of Institutional Funds Act) to make the prudent investor

approach applicable to funds held for charitable purposes by an entity (other than a trust) organized and operated for charitable purposes **pp. 142-178**

8. Probate Law & Procedure Committee - *Tae Kelley Bronner, Chair*

   A. Support amending §§731.110 (Caveat; proceedings), 731.201 (General definitions), 731.301 (Notice), 733.2123 (Adjudication before issuance of letters), 733.608 (General power of the personal representative) and 735.203 (Petition for summary administration) of the Florida Probate Code to clarify that "formal notice" is actually a form of notice and not just a document or method of service **pp. 179-184**

   B. Support amending §732.608 (Construction of generic terms) of the Florida Probate Code and §736.1102 (Construction of generic terms) of the Florida Trust Code to clarify that the laws for determining paternity and relationships for purposes of intestate succession are also applicable in determining whether class gifts and terms of relationship set forth in wills and trusts include adopted persons and persons born out of wedlock **pp. 185-88**

9. Trust Law Committee - *Barry F. Spivey, Chair*, and Probate Law & Procedure Committee, *Tae Kelley Bronner, Chair* (Joint Proposal)

   Support amending §§733.607 (Possession of estate) and 733.707 (Order of payment of expenses and obligations) of the Florida Probate Code, and §736.05053 (Trustee's duty to pay expenses and obligations of settlor's estate) of the Florida Trust Code, to clarify the requirement that a decedent's will and revocable trust must be read together in determining the source of payment of administration expenses and obligations of the decedent's estate, and to further clarify that the order in which gifts under a will and trust are appropriated to pay administration expenses and other obligations is as specified in §733.805 (Order in which assets abate) **pp. 189-193**

10. Trust Law Committee - *Barry F. Spivey, Chair*

   A. Support amending §§736.0206 (Proceedings for review of employment of agents and review of compensation of trustee and employees of trust) and 736.1007 (Trustee's attorney's fees) of the Florida Trust Code by deleting certain duplicative and unnecessary provisions concerning proceedings to determine reasonable compensation for the attorney for the trustee and notice in proceedings to determine reasonable compensation of trustees and persons employed by trustees, and providing that the court in such proceedings has the discretion to award a reasonable expert witness fee from the assets of the trust unless it finds that the expert testimony did not assist the court **pp. 194-204**

B. Support amending §736.0505 (Creditors' claims against settlor) of the Florida Trust Code to clarify that two annual gift tax exclusion amounts are exempt from the claims of creditors of a trust beneficiary having a power to withdraw trust assets when contributions to the trust are made by a married person whose spouse makes a "split gift election" under the Internal Revenue Code **pp. 205-210**

IX. Real Property Division— *George J. Meyer, Director*

Action Items

1. Condominium and Planned Development Committee - *Robert Freedman, Chair*

   Omnibus Bill:Proposed legislation to address various changes to Chapters 718, 719 and 720 (Association Elections,Official Records,Meeting Requirements, Assessment Collections, and Obligations of Bulk Purchasers of distressed condominium units). The proposed statutory language, White Paper and Legislative Request **pp. 211-292**

2. Development & Governmental Regulation of Real Estate – *Eleanor Wynn Taft, Chair*

   Committee proposal for Section to oppose the Hometown Democracy Constitutional Amendment. A copy of the proposed Amendment is attached **pp. 293-295**

3. Title Insurance Committee – *Homer Duvall, Chair*

   Attached are the following recommendations to the Title Insurance Study Advisory Council in an effort to assist the Council in recommending legislation to benefit and protect consumers in the State of Florida **pp. 296- 302**

Information Items

1. Landlord & Tenant – *Neil Shoter, Chair*

   Report on Simplified Residential Lease and Eviction Forms **pp. 303-305**
   Copies of revised forms can be found on the Section's Website at: *http://www.rpptl.org/Content/Committees/LandTen/LandTen_Petition_for_Approval_of_Revisions_to_Simplified_Residential_Lease_&_Eviction_Forms_08_09.pdf*

2. Legal Opinion Standards Committee - David R. Brittain, Chair

   Memo from Philip B. Schwartz and draft of the Committee's "Report on Standards for Third-Party Legal Opinions of Florida Counsel." **pp. 306- 474**

3. FAR/BAR Committee – *William J. Haley, Chair*

   Report on the action taken by the FAR Board of Directors on the proposed merged FAR/BAR Residential Contract for Sale and Purchase and discussion on possible Section response to FAR's action

http://www.rpptl.org/Content/Committees/LandTen/LandTen_Petition_for_Approval_of_Revisions_to_Simplified_Residential_Lease_&_Eviction_Forms_08_09.pdf.

General Standing Committee — *Brian J. Felcoski, Director and Chair-Elect*

Action Items

1. Possible Amicus in In Re Sarah E. Baker **pp. 475-477**

XII. General Standing Committee Reports – *Brian J. Felcoski, Director and Chair-Elect*

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs

2. **Amicus Coordination** – Bob Goldman, John W. Little, and Kenneth Bell Co-Chairs

3. **Budget** – Margaret A. Rolando, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – W. Fletcher Belcher, Chair

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha Whynot, Vice Chair; Laura Sundberg and Sylvia Rojas, Co-Vice Chairs
   A. 2009 – 2010 CLE Schedule **pp. 478**

6. **2010 Convention Coordinator** – Marilyn Polson, Chair; Katherine Frazier and R. James Robins, Co-Vice Chairs

7. **Fellowship** – Tae Kelly Bronner and Phillip Baumann, Co-Chairs; Michael Bedke, Vice Chair

8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; William Sklar, Chair Real Property Division

9. **Legislative Review** – Michael Gelfand, Chair; Debra Boje and Alan Fields, Co-Vice Chairs

10. **Legislative Update Coordinators** – Bob Swaine, Chair; Stuart Altman and Charlie Nash, Co-Vice Chairs

11. **Liaison Committees:**
    A. **ABA:** Edward Koren; Julius J. Zschau
    B. **American Resort Development Assoc. (ARDA):** Jerry Aron; Mike Andrew
    C. **BLSE:** Michael Sasso, Ted Conner, David Silberstein, Anne Buzby
    D. **Business Law Section:** Marsha Rydberg
    E. **BOG:** Daniel L. DeCubellis, Board Liaison
    F. **CLE Committee:** Deborah P. Goodall
    G. **Clerks of the Circuit Court:** Thomas K. Topor

H. **Council of Sections:** John B. Neukamm, Brian J. Felcoski
I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones
J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller
K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook
L. **Judiciary:** Judge Gerald B. Cope, Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick;Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
M. **Law Schools and Student RPPTL Committee:** Fred Dudley, Stacy Kalmanson, James Jay Brown
N. **Liaison to the OCCCRC:** Joseph George
O. **Out of State:** Michael Stafford; John E. Fitzgerald, Gerard J. Flood
P. **Young Lawyers Division**: Leslie Stewart; Alan L. Raines

12. **Long Range Planning Committee** – Brian J. Felcoski, Chair

13. **Member Communications and Information Technology** – Alfred Colby, Chair; Dresden Brunner and Nicole Kibert, Co – Vice Chair

14. **Membership Development & Communication** – Phillip Baumann, Chair; Mary Karr, Vice Chair

15. **Membership Diversity Committee** – Lynwood Arnold and Fabienne Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

16. **Mentoring Program** – Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs

17. **Model and Uniform Acts** – Bruce Stone and Katherine Frazier, Co-Chairs

18. **Professionalism & Ethics** – Paul Roman and Larry Miller, Co-Chairs

19. **Pro Bono** – Gwynne Young and Adele I. Stone, Co-Vice Chair

20. **Sponsor Coordinators** – Kristen Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi and Mike Swaine, Co-Vice Chairs

21. **Strategic Planning** – Brian J. Felcoski, Chair

XIII. Probate and Trust Law Division Committee Reports — *W. Fletcher Belcher,Director*

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela Adams, Chair

2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair

3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair

4. **Asset Preservation** – Jerome Wolf, Chair; Brian Sparks, Vice Chair

5. **Charitable Organizations and Planning** – Thomas C. Lee, Jr., Chair, Michael Stafford and Jeffrey Baskies, Co-Vice Chairs

6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co-Vice Chairs

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird Lile, Vice Chair

8. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler and Sherri M. Stinson, Co-Vice Chairs

9. **Insurance for Estate Planning** – L. Howard Payne, Chair

10. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice Chair
    A. Robertson v. Deeb Opinion **pp. 478-485**

11. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Jack Falk and Robin King, Co-Vice Chairs; Mark Middlebrook, Corporate Fiduciary Chair

12. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice Chair

13. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair

14. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher, William R. Lane Jr.

15. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice Chair

16. **Principal and Income** – Edward F. Koren, Chair

17. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs

18. **Probate Law and Procedure** – Tae Kelley Bronner, Chair, Dresden Brunner, Anne Buzby and Jeffrey Goethe, Co-Vice Chairs

19. **Trust Law** – Barry Spivey, Chair; John Moran, Shane Kelley and Laura Stephenson, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

XIV. **Real Property Division Committee Reports** — *George J. Meyer,Director*

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair
2. **Construction Law** – Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair

7. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair
8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Jo Claire Spear, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Brutin, Vice Chair

10. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon

11. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

12. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair

13. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

14. **Real Estate Certification Review Course** – Ted Conner, Chair; Arthur Menor and Guy Norris, Co-Vice Chairs

15. **Real Property Forms** – Barry B. Ansbacher, Chair; Jeffrey T. Sauer, Vice Chair

17. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair

18. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

19. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez and Steven Reynolds, Co-Vice Chairs

21. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

Special Thanks to the

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Commonwealth Land Title Insurance Co. /Lawyers Title Insurance Corp.

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The Florida Bar
Real Property, Probate & Trust Law Section

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Probate Law & Procedure Committee

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Condominium & Planned Development Committee

Pensco Trust
IRAs & Employee Benefits Committee

Management Planning, Inc.
Estate & Trust Tax Planning Committee

Northern Trust Bank of Florida
Trust Law Committee

Business Valuation Analysts
Probate and Trust Litigation

DRAFT

Minutes, Real Property, Probate and Trust Law Section Executive Council Meeting

Saturday, August 1, 2009

The Breakers - Palm Beach

References in these minutes to specified pages of "agenda materials" are references to the agenda of the August 1, 2009 meeting of the Executive Council posted at the RPPTL website.

I. **Presiding** — John B. Neukamm, Chair

John called the meeting to order at 10:40 a.m. John welcomed the new members of the Council, each of whom introduced himself or herself.

II. **Attendance** — Michael A. Dribin, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. Mike reminded the Council members that it is the responsibility of each to record his or her own attendance on the roster and to promptly bring any corrections to the attention of the Secretary.

III. **Minutes of Previous Meeting** — Michael A. Dribin, Secretary

The Minutes of the Executive Council Meeting held in St. Petersburg on May 23, 2009, included at pages 10-19 of the agenda materials were approved without change.

IV. **Chair's Report** — John B. Neukamm

1. John introduced representatives of Stuart Title and the Florida Bar Foundation, sponsors of the Executive Council luncheon, and thanked them for their support.

2. John reviewed the 2009 – 2010 RPPTL Executive Council Schedule, appearing on page 20 of the agenda materials.

V. **Chair-Elect's Report** — Brian J. Felcoski

Brian reviewed the schedule of Executive Council meetings for the 2010 – 2011 year, appearing at page 21 of the agenda materials.

VI. **Liaison with Board of Governors Report** — Daniel L. DeCubellis

Dan described John Neukamm's appearance before the Board of Governors in May. Dan also referred to projects regarding the Clients Security Fund and solicited comments on that fund and its regulation. He also described efforts on the part of The Florida Bar to monitor its financial condition. Dan referred the Council to the Report of the May, 2009 meeting of the Board of Governors appearing at Pages 22-23 of the agenda materials.

VII. **Treasurer's Report** — Margaret A. Rolando

Peggy reviewed the RPPTL Financial Summary for the fiscal year ending June 30, 2009 appearing at pages 24-29 of the agenda materials. The net result for the fiscal year was a positive $93,000, after factoring in a loss in investment value to Section reserves of about $111,000. Peggy emphasized the importance of our sponsorships and exhibitors to the Section's continued financial condition. There was no dues increase this year, as a result of both due our financial success and in consideration of the overall difficult financial situation.

John also thanked Pam Price for her long time service on the Budget Committee and the importance of her historic perspective to the budgetary process.

VIII. **Circuit Representative's Report** — Andrew O'Malley, Director

Drew reported on a successful meeting of the Circuit Representatives on July 31, 2009.

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs

2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie

3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith

4. Fourth Circuit – William R. Blackard; Roger W. Cruce

5. Fifth Circuit – Del G. Potter; Arlene C. Udick

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19. Nineteenth Circuit – Jane L. Cornett

20. Twentieth Circuit – Sam W. Boone; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

IX. **REAL PROPERTY DIVISION ACTION AND INFORMATION ITEMS-** George J. Meyer, Real Property Division Director

REAL PROPERTY DIVISION ACTION ITEMS

1. Title Issues and Standards Committee - Pat Jones, Chair, reported on behalf of the Committee on proposed revisions to the standards in Chapter 18 of the Uniform Title Standards - Homestead, which would be updated to reflect current statutes and case law. Pat indicated that the proposed revised standards appear at pages 30-48 of the agenda materials.

   The Committee motion to approve the changes to the title standards in Chapter 18, as reflected in the agenda materials at pages 30-48 was unanimously approved

   .

2. Real Property Problem Studies Committee – Wayne Sobien, Chair

   A. On behalf of the Committee, Wayne reviewed proposed legislation to cure certain defects as to documents which had been electronically recorded documents before there was specific statutory authority to do so. The proposed statutory language would ratify the validity of those recordations. The statutory wording, a White Paper and Legislative Request appear at pages 49-55 of the agenda materials. The Committee's motion to approve the proposed legislative position was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

   B. On behalf of the Committee, Alan Fields reviewed proposed legislation to address the "hidden lien" title issue. This proposed bill requires all governmental liens (other than ad valorem taxes, special assessments collected using the uniform method and liens for utility services) to be recorded in the official records before such are binding as to subsequent interests acquired for value. The bill expands the authority of local governments to enter onto property, make emergency repairs and to make special assessments as to the costs of repairs which have the same priority as ad valorem taxes and which attach notwithstanding homestead status, preserves those from elimination in foreclosure and limits the duration of the lien unless enforced. A new version of the proposed legislation was presented to the Council which supersedes the previous version appearing at pages 56-72 of the agenda materials and is reflected in Exhibit A to the minutes. A White Paper and Legislative Request appear at pages 73-79 of the agenda materials. The Committee's motion to approve the proposed legislative position as reflected as Exhibit A to the minutes was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

3. FAR/BAR Committee – On behalf of the Committee, William Haley, Chair, presented a new version of the proposed final draft of the merged FAR/BAR Residential Contract for Sale and Purchase. The new version supersedes the previous version, which appears at pages 80-88 of the agenda materials. Bill informed the Executive Council that the new version of the contract, if approved by the Executive Council, would be finalized by the Committee and that version would be attached to these minutes as Exhibit B. It was further discussed that the contract would be subject to FAR approval and any changes which may result will be brought back to the Executive Council for further consideration. Upon motion duly made, the Committee motion to approve the newest version of FAR/BAR Residential Contract for Sale and Purchase was approved by majority vote, with instructions to the Committee that the version of the final Committee version of the contract which is to be presented by the Committee to FAR be attached to these minutes as Exhibit B.

REAL PROPERTY DIVISION INFORMATION ITEMS

1. Condominium and Planned Development Committee- On behalf of the Committee, Robert Freedman, Chair, reviewed the proposed changes to Chapters 718, 719 and 720, pertaining to Association Elections, Official Records, Meeting Requirements and Assessment Collections, which appear, together with a White Paper and Legislative Request at pages 89-147 of the agenda materials.

2. Condominium and Planned Development Committee – On behalf of the Committee, Robert Freedman, Chair, reviewed the proposed draft legislation to address bulk purchases of distressed condominium units, appearing at pages 148-160 of the agenda materials.

X. PROBATE AND TRUST LAW DIVISION ACTION AND INFORMATION ITEMS

W. Fletcher Belcher, Probate Division Director

PROBATE AND TRUST LAW DIVISION ACTION ITEMS

1. Ad Hoc Study Committee on Homestead – On behalf of the Committee, Shane Kelley, Chair, reviewed a proposed amendment of the Florida Probate Code which would enact new §732.4017, F.S., and which would clarify that a valid irrevocable inter vivos conveyance of an interest in homestead real estate (outright or in trust) would not be considered a "devise", which would otherwise be subject to restrictions upon the death of the grantor. The proposed statutory language, White Paper and Legislative Request appear at pages 161-169 of the agenda materials. The Committee's motion to approve the proposed legislative position was unanimously approved. The Committee's motions to find such action to be within the

purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

2. Estate & Trust Tax Committee – **It was announced from the Chair that this matter was being deferred from consideration at this meeting and there would a discussion on this matter during the committee report portion of the agenda.** On behalf of the Committee, Richard R. Gans, Chair, reviewed proposed amendments to §736.0505 of the Florida Trust Code to secure protection from transfer taxes, by providing that the creditors of a settlor of an inter vivos QTIP trust cannot reach assets of the trust even though the settlor is a beneficiary of the trust after the death or his or her spouse. The proposed statutory language, White Paper and Legislative Request appear at pages 171-175 of the agenda materials.

3. Probate Law & Procedure Committee – Tae Kelley Bronner, Chair

A. On behalf of the Committee, Tae reviewed proposed amendments to §731.110 of the Florida Probate Code to clarify the right of an interested person (other than a creditor) to file a caveat with the clerk of court before the death of an individual and to reconcile that statute with the corresponding Probate Rule. Tae presented a revised version of the proposed statutory language, which supersedes the version appearing in the agenda materials at page 180 and which appears as Exhibit C to the minutes. The White Paper and Legislative Request appear at pages 176-179 of the agenda materials. The Committee's motion to approve the proposed legislative position was approved by a two-thirds majority. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position were unanimously approved.

B. On behalf of the Committee, Tae reviewed proposed amendments to §732.804 of the Florida Probate Code to clarify the right of a decedent to control the disposition of his or her remains and, absent specific directions from the decedent, to identify the priorities as to who is legally authorized to provide such direction. The proposed statutory language, White Paper and Legislative Request appear at pages 181-196 of the agenda materials. The Committee's motion to approve the proposed legislative position was approved by a two-thirds majority vote. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position were unanimously approved.

C. On behalf of the Committee, Tae reviewed proposed amendments to §§655.934 and 655.935, F.S., to conform durable power of attorney terminology to prior amendments to §709.08, F.S., and to require the preparation and maintenance of a record of documents removed from a decedent's safe-deposit box. The proposed statutory language, White Paper and Legislative Request appear at pages 197-202 of the agenda materials. The Committee's motion to approve the proposed legislative position was unanimously approved. The

Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

XI. **GENERAL STANDING COMMITTEES—ACTION ITEM** – Brian J. Felcoski, Director and Chair-Elect

Michael Gelfand, chair of the Legislative Review Committee, reviewed the proposed legislative consultant contract appearing at pages 203-211 of the agenda materials. The committee motion to approve the proposed legislative consultant contract was unanimously approved.

XII. **GENERAL STANDING COMMITTEE REPORTS** – Brian J. Felcoski, Director and Chair-Elect

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs—Rich reported that Actionline is doing well with articles, but the editors are always interested in topics and authors for articles. He also reported on efforts to shorten the time between Actionline appearing online and the receipt of Actionline via U.S. mail.

2. **Amicus Coordination** – Bob Goldman, John W. Little, and Kenneth Bell Co-Chairs
On behalf of the committee, John reported that, with respect to the case pertaining to the first of three amicus briefs filed on behalf of the Section with the 3d DCA, the Court recently ruled in a manner consistent with the position taken by the Section.

   On behalf of the committee, Ken announced that the Section had very recently been asked by the Fourth DCA to file an amicus brief in the case of JPG Enterprises v. McLellan. He indicated that the condo committee and construction law committees would be consulted for assistance in filing the brief. Ken moved on behalf of the Committee that the Amicus committee be authorized to prepare the brief on behalf of the Section. However, the brief would be presented to the Executive Committee before filing. With this understanding, the Committee motion to approve the preparation of an amicus brief was unanimously approved.

3. **Budget** – Margaret A. Rolando, Chair; Pamela O. Price, Vice Chair—no further report

4. **Bylaws** – W. Fletcher Belcher, Chair—no report

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha Whynot, Vice Chair; Laura Sundberg and Sylvia Rojas, Co- Vice Chairs

   On behalf of the Committee, Debbie reviewed the 2009 – 2010 CLE Schedule appearing at page 212 of the agenda materials. Debbie also acknowledged the work of her predecessor, Jack Falk, in making the activities of the Committee so successful. She also pointed out that,

as a result of litigation, the Bar can no longer automatically send updates to CLE books. Now, purchasers must affirmatively order and purchase the books. She and others urged the Council members to convey the need to make such affirmative action.

6. **2010 Convention Coordinator** – Marilyn Polson, Chair; Katherine Frazier and R. James Robins, Co- Vice Chairs. On behalf of the committee, Katherine reported that progress is being made in the plans for the Convention and she otherwise described planned activities.

7. **Fellowship** – Tae Kelly Bronner and Phillip Baumann, Co-Chairs; Michael Bedke, Vice Chair. On behalf of the committee Tae reported that the committee is looking for the second class of Fellows, to begin in January, 2010. She also introduced all four of the Section's current Fellows who described their activities on behalf of the Section.

8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; William Sklar, ChairReal Property Division—no report.

9. **Legislative Review** – Michael Gelfand, Chair; Debra Boje and Alan Fields, Co-Vice Chairs. On behalf of the Committee, Michael reported that House and Senate committees will begin their consideration of bills in September and suggested that approval of legislation for the 2010 session would be advisable by the time the Executive Council meets in Naples. He urged each committee to have their legislative representative be readily available to the Legislative Review Committee, with the ability to make prompt decisions.

10. **Legislative Update Coordinators** – Bob Swaine, Chair; Stuart Altman and Charlie Nash, Co-Vice Chairs –Sancha Whynot Brennan, as the outgoing chair, reported on the success of the Legislative Update and Case Law Review seminar which had been conducted on July 31. She thanked her Co-Vice Chairs and indicated that attendance was not materially lower than in the previous year.

11. **Liaison Committees:**

    A. **ABA:** Edward Koren; Julius J. Zschau. Jay reported on behalf of the committee and pointed out that the ABA is holding real property and probate seminars at the Annual Convention.

    B. **American Resort Development Assoc. (ARDA):** Jerry Aron; Mike Andrew—no report.

    C. **BLSE:** Michael Sasso, Ted Conner, David Silberstein, Anne Buzby. David provided a report on behalf of the Committee.

    D. **Business Law Section:** Marsha Rydberg

    On behalf of the Committee, Marsha reported that the Business Law Section had

asked that our Section participate in a liaison with the Florida Institute of Certified Public Accountants. She reviewed the FICPA Liaison Report appearing at page 213 of the agenda materials. She also reported that the Model LLC Act is being reviewed by the Business Law Section for implementation in Florida.

E. **BOG:** Daniel L. DeCubellis, Board Liaison—no further report

F. **CLE Committee:** Deborah P. Goodall—no further report

G. **Clerks of the Circuit Court:** Thomas K. Topor-no report

H. **Council of Sections:** John B. Neukamm, Brian J. Felcoski

On behalf of the Committee, John reviewed the June, 2009 Report of the meeting of the Council of Sections appearing at pages 214-233 of the agenda materials.

I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones-no report

J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller—On behalf of the Committee, David reported on the upcoming FLEA seminar on probate administration. With respect to FLSSI, David reported that comments had been received of the need to consider changing the Notice of Administration to coordinate inconsistencies between the statute and rule.

K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook-no report

L. **Judiciary:** Judge Gerald B. Cope, Judge George W. Greer; Judge Melvin B.Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.- no report.

M. **Law Schools and Student RPPTL Committee:** Fred Dudley, Stacy Kalmanson, James Jay Brown –no report

N. **Liaison to the OCCCRC:** Joseph George- no report

O. **Out of State:** Michael Stafford; John E. Fitzgerald, Gerard J. Flood-no report

P. **Young Lawyers Division**: Rhonda Chung DeCambre Stroman-no report

12. **Long Range Planning Committee** – Brian J. Felcoski, Chair-no report

13. **Member Communications and Information Technology** –Alfred Colby, Chair; Dresden Brunner and Nicole Kibert, Co – Vice Chair. On behalf of the committee, Al thanked Keith Kromash for his service as previous chair. He indicated that effort would be made to focus on making the website even more accessible and useful for Section members. He urged committee chairs to designate a committee communication liaison who would be responsible for providing a list serve for the committee and for providing committee materials to be posted.

14. **Membership Development & Communication** – Phillip Baumann, Chair; Mary Karr, Vice Chair. On behalf of the committee, Phil reported that the committee wants to fill blank screens on webinar presentations with invitations to become active in section activities.

15. **Membership Diversity Committee** – Lynwood Arnold and Fabienne Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair. Tae Kelley Bronner reported on behalf of the committee.

16. **Mentoring Program** – Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs. On behalf of the committee, Guy reported on the need for a significant increase in participation. He indicated that our Chair was going to be circulating a request to Executive Council members to encourage participation. He indicated that the Section program was particularly needed in light of the failure of The Florida Bar to fund its program.

17. **Model and Uniform Acts** – Bruce Stone and Katherine Frazier, Co-Chairs

18. **Professionalism & Ethics** – Paul Roman and Larry Miller, Co-Chairs

19. **Pro Bono** – Gwynne Young and Adele I. Stone, Co-Vice Chair. On behalf of the Committee, Drew O'Malley reported on the status of the FASH program, indicating that more volunteers were needed and urged Council members to sign up.

20. **Sponsor Coordinators** – Kristen Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi and Mike Swaine, Co-Vice Chairs. On behalf of the committee, Kristen reported that the Section has some very loyal sponsors, particularly in these difficult financial times and urged Council members to use the services of our sponsors. She indicated that there are a number of potential new sponsors. There will be a private reception at the Council's Naples meeting for Section sponsors. Sponsors will also be highlighted at the Circuit Representatives meetings.

21. **Strategic Planning** – Brian J. Felcoski, Chair

XIII. REAL PROPERTY DIVISION COMMITTEE REPORTS — George J. Meyer, Real Property Division Director

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer,

Vice-Chair

2. **Construction Law** – Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair

7. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Jo Claire Spear, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Brutin, Vice Chair

10. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon

11. S. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

12. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair

13. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

14. **Real Estate Certification Review Course** – Ted Conner, Chair; Arthur Menor and Guy Norris, Co-Vice Chairs

15. **Real Property Forms** – Barry B. Ansbacher, Chair; Jeffrey T. Sauer, Vice Chair

17. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair

18. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin

Awerbach, Co-Vice Chairs

19. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez and Steven Reynolds, Co-Vice Chairs

21. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XIV. PROBATE AND TRUST LAW DIVISION COMMITTEE REPORTS — W. Fletcher Belcher, Probate Division Director

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela Adams, Chair

2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair

3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair

4. **Asset Preservation** – Jerome Wolf, Chair; Brian Sparks, Vice Chair. On behalf of the Committee, Brian reported on proposed amendments to Section 736.0505 of the Florida Trust Code to generally provide permit the creation of "self-settled spendthrift trusts". Such trust provide, generally and subject to certain exceptions, that creditors of a settlor of the trust, from which the trustee may make discretionary distributions to or for the benefit of the settlor, could not generally look to the assets of the trust in satisfaction of a judgment. Brian referred the Council to the proposed legislation and legislative statement and white paper appearing at pages 234-258 of the agenda materials.

   Because the issue was also presented to the Trust Law Committee, Tami Conetta, at the request of Barry Spivey, Trust Law Committee chair, presented an opposing position, including some of the potentially negative policy issues involved in consideration of these issues.

5. **Charitable Organizations and Planning** – Thomas C. Lee, Jr., Chair, Michael Stafford and Jeffrey Baskies, Co-Vice Chairs

6. **E-filing** - Rohan Kelley, chair of this new committee, reported that, as part of the 2009 legislation dealing with court funding issues, the Clerk's office was mandated to provide for electronic filing of pleadings by October 1, 2009. Because probate proceedings have been designated to be the first area to implement these new procedures, Rohan had been asked to

chair this new committee and Laird Lile had been appointed Vice Chair. Rohan said that he anticipated a great deal more to report on at the Naples meeting.

6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co Vice-Chairs

A. On behalf of the Committee, Rick reviewed proposed amendments to §736.0505 of the Florida Trust Code to secure protection from transfer taxes, by providing that the creditors of a settlor of an inter vivos QTIP trust cannot reach assets of the trust even though the settlor is a beneficiary of the trust after the death or his or her spouse. The proposed statutory language, White Paper and Legislative Request appear at pages 171-175 of the agenda materials.

B. On behalf of the committee, Rick reviewed proposed amendments to the Florida Trust Code and the Prudent Investor Rule which would adding §736.0902, F.S., and amending §518.112, F.S., and would eliminate certain fiduciary duties of trustees of life insurance trusts. The proposed legislation appears at pages 259-265 of the agenda materials.

7. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler and Sherri M. Stinson, Co-Vice Chairs

8. **Insurance for Estate Planning** – L. Howard Payne, Chair

9. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice-Chair. On behalf of the committee, Kristen reported that a joint meeting with the insurance committee is being planned for the Naples meeting. She also reported that the Baker case in the Middle District of Florida suggests that a Keough plan is not considered exempt from creditor claims and is being monitored closely in the appellate process.

10. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Jack Falk and Robin King, Co-Vice Chairs; Mark Middlebrook, Corporate Fiduciary Chair

11. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice Chair

12. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair

13. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher, William R. Lane Jr.

14. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice-Chair

15. **Principal and Income Committee** – Edward F. Koren, Chair

16. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs—reference was made to materials appearing at pages 266-279 of the agenda materials, providing for proposed amendments to the Florida Probate Code which would add §732.805, F.S., to provide remedies with respect to spousal rights in marriages procured by fraud, undue influence or duress.

17. **Probate Law and Procedure** – Tae Kelley Bronner, Chair, Dresden Bronner, Anne Buzby and Jeffrey Goethe, Co-Vice Chairs

    Reference is made to proposed amendments to the Florida Probate Rules promulgated by the Probate Rules Committee of The Florida Bar, appearing at pages 283-378 of the agenda materials.

18. **Trust Law** – Barry Spivey, Chair; John Moran, Shane Kelley and Laura Stephenson, Co-Vice Chairs

19. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

XV. Adjourn

Respectfully submitted,

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Michael A. Dribin, Secretary

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ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2009 – 2010

Executive Committee	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Belcher, Wm. Fletcher, Probate & Trust Law Div. Director	X				
Diamond, Sandra F., Immediate Past Chair	X				
Dribin, Michael A., Secretary	X				
Felcoski, Brian J,, Chair-Elect	X				
Gelfand, Michael J., Legislation Chair	X				
Goodall, Deborah, Seminar Coordinator	X				
Meyer, George J., Real Property Law Div. Director	X				
Neukamm, John B., Chair	X				
O'Malley, Andrew M., Director of Circuit Representatives	X				
Rolando, Margaret A., Treasurer	X				

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Adams, Angela M.	X				
Adcock, Jr., Louie N., **Past Chair**					
Akins, David James	X				
Alexander, Bruce					
Allender, Jerry W.	X				
Allender, Steven C.	X				
Altman, Robert N.	X				
Altman, Stuart H.	X				

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Ansbacher, Barry Barnett	X				
Arnold, Jr. , Lynwood F.					
Aron, Jerry E., **Past Chair**	X				
Ashby, Kimberly	X				
Atkins, April	X				
Awerbach, Martin					
Bald, Kimberly					
Baskies, Jeffrey	X				
Batlle, Carlos Alberto	X				
Baumann, Phillip A.	X				
Beales III, Walter Randolph, **Past Chair**	X				
Bedke, Michael	X				
Bell, Honorable Kenneth	X				
Blackard, Jr., William Raymond	X				
Boje, Debra Lynn	X				
Bonnette, Jr., Harris L.	X				
Bookman, Alan Bart					
Boone, Jr., Sam Wood	X				
Brannen, J. Brecken					
Brennan, David Clark, **Past Chair**	X				
Brittain, David Ross	X				
Bronner, Tae Kelley	X				
Brown, J.J.					
Brown, Mark A.	X				
Brundage, Kristy Parker	X				
Brunner, S. Dresden	X				
Bruton, Jr., Burt	X				
Bucher, Elaine M.	X				
Butters, Sarah					

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Buzby, Anne K.	X				
Carlisle, David Russell	X				
Carter, David	X				
Caskey, J. Richard	X				
Christiansen, Pat, **Past Chair**	X				
Colby, Alfred	X				
Conetta, Tami Foley	X				
Conner, William Theodore	X				
Cope, Honorable Gerald B., Jr.	X				
Cornett, Jane L.	X				
Cruce, Roger W.					
Damonte, Jonathan James	X				
Davis, Gary	X				
DeCubellis, Dan L.	X				
Dudley, Frederick Raymond	X				
Duvall III, Homer					
Eastman, David Deane	X				
Elzeer, John S.					
Emerich, Guy Storms	X				
Falk, Jack A.	X				
Fahnestock, Fabienne E.					
Fernandez, Kristopher	X				
Fields, Alan Beaumont	X				
Fisher, Michael	X				
Fitzgerald, Jr., John Edward					
Fleece III, Joseph W.	X				
Flood, Gerard J.	X				
Foreman, Michael Loren	X				
Frank, Scott	X				

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Frazier, Susan Katherine	X				
Freedman, Robert Scott	X				
Gabbadon, Karen					
Gans, Richard Roy	X				
Garber, Julie Ann	X				
Garten, David Michael					
Gay III, Robert Norwood	X				
Gentile, Melinda					
George, James R.	X				
George, Joseph P.	X				
Goethe, Jeffrey	X				
Goldman, Robert W., **Past Chair**					
Graham, Robert Manuel					
Gray, Karla S.	X				
Greer, Honorable George W.					
Griffin, Linda S.	X				
Grimsley, John Gall, **Past Chair**					
Grossman, Honorable Melvin B.	X				
Guttmann III, Louis B., **Past Chair**					
Haley, William James	X				
Hancock, Patricia J.	X				
Hart, W. Christopher	X				
Hayes, Honorable Hugh D.	X				
Hayes, M. Travis	X				
Hearn, Steven Lee, **Past Chair**	X				
Hearne, Frank L.	X				
Henderson, Thomas	X				
Hennessey III, William Thomas	X				
Heuston, Stephen Paul	X				

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Hollister, Michelle Rachel	X				
Huszagh, Victor Lee					
Isphording, Roger O., **Past Chair**	X				
Johnson, Amber Jade F.					
Jones, Frederick Wayne	X				
Jones, John Arthur, **Past Chair**					
Jones, Patricia P. Hendricks	X				
Judd, Robert Brian	X				
Kalmanson, Stacy O.	X				
Karr, Mary					
Karr, Thomas M.					
Kayser, Joan Bradbury, **Past Chair**					
Kelley, Rohan, **Past Chair**	X				
Kelley, Sean					
Kelley, Shane	X				
Kendon, John	X				
Kessler, Andrea	X				
Kibert, Nicole C.	X				
Kightlinger, Wilhelmina F.	X				
King, Robin	X				
Kinsolving, Laurence E.					
Kinsolving, Ruth Barnes					
Koren, Edward F., **Past Chair**					
Korvick, Honorable Maria Marinello					
Kotler, A. Stephen	X				
Krier, Honorable Beth	X				
Kromash, Keith Stuart	X				
LaFemina, Rose	X				
Lajoie, John Thomas					

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Lane, William					
Lange, Jr., George W.	X				
Larson, Roger Allen	X				
Laughlin, Honorable Lauren					
Lee, Thomas C.	X				
Leebrick, Brian	X				
Lile, Laird, **Past Chair**	X				
Little III, John Wesley	X				
Lynch, Kristen M.	X				
Madorsky, Marsha G.	X				
Marger, Bruce	X				
Marmor, Seth	X				
Marshall III, Stewart Andrew	X				
Martin, Honorable Larry					
McCall, Alan K.	X				
Mednick, Glenn M.	X				
Menor, Arthur James					
Mezer, Steven H.	X				
Middlebrook, Mark Thomas	X				
Miller, Lawrence Jay	X				
Moran, John	X				
Moule, Rex E.	X				
Muir, Honorable Celeste					
Muir, William T.	X				
Murphy, Melissa	X				
Murphy, Jeanne	X				
Mussman, Jay D.	X				
Nash, Charles Ian	X				
Norris, Guy W.					

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Northrop, Andrea					
Norris, John E., **Past Chair**					
O'Ryan, Christian Felix	X				
Payne, L. Howard	X				
Pence, Scott	X				
Platt, William R.	X				
Pleus, Jr., Honorable Robert James					
Polson, Marilyn Mewha	X				
Potter, Del G.	X				
Pratt, David					
Promoff, Adrienne F.					
Price, Pamela O.	X				
Prince, Stacy					
Pyle, Michael A.	X				
Reddin, Michelle A.					
Reinhardt, Joe					
Reynolds, Stephen H.	X				
Rieman, Alexandra V.	X				
Robbins, James, Jr.	X				
Robinson, Charles F.	X				
Rojas, Silvia B.	X				
Roman, Paul	X				
Roscow IV, John Frederick	X				
Russell, Deborah L.	X				
Russick, James C.	X				
Rydberg, Marsha G.	X				
Sachs, Colleen Coffield					
Sasso, Michael Cornelius					
Sauer, Jeffrey Thomas	X				

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Schaefer, Jr. , Honorable Walter L.					
Schofield, Percy Allen	X				
Scholnik, Barry	X				
Schwartz, Robert M.	X				
Scuderi, Jon	X				
Sexton, Honorable Susan G.					
Sharp, Honorable Winifred J.					
Sharp, Jr., Joel Herbert					
Sheets, Sandra Graham	X				
Sherman, William E., **Past Chair**					
Shoter, Neil	X				
Shuey, Eugene Earl					
Silberman, Honorable Morris					
Silberstein, David Mark	X				
Sklar, William Paul					
Smart, Christopher	X				
Smith, G. Thomas, **Past Chair**	X				
Smith, Michael S.	X				
Smith, Wilson, **Past Chair**	X				
Sobien, Wayne	X				
Sparks, Brian Curtis	X				
Spivey, Barry F.	X				
Spurgeon, Susan K.	X				
St. Arnold, Honorable Jack					
Stafford, Michael P.	X				
Stephenson, Laura P.	X				
Stern, Robert Gary	X				
Stinson, Sherri M.	X				
Stone, Adele Ilene					

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Stone, Bruce M., **Past Chair**					
Stroman, Rhonda C. Decambre					
Suarez, Honorable Richard					
Sundberg, Laura K.	X				
Sutherland, John Holt					
Swaine, Jack Michael, **Past Chair**	X				
Swaine, Robert S.	X				
Taft, Eleanor W.					
Taylor, Richard W.	X				
Tescher, Donald Robert					
Thomas, Honorable Patricia Vitter	X				
Thornton, Kenneth E.	X				
Topor, Thomas Karl	X				
Tritt, Arnold					
Udick, Arlene	X				
Umsted, Hugh Charles	X				
Waller, Roland D., **Past Chair**	X				
Weintraub, Lee A.	X				
Wells, Jerry	X				
White, Dennis R.	X				
White, Jr.; Richard M.	X				
Whynot, Sancha Brennan	X				
Wickenden, D. Keith	X				
Wilder, Charles D.	X				
Williams, Jr., Richard	X				
Williamson, Julie Ann Stulce, **Past Chair**	X				
Wohlust, G. Charles	X				
Wolasky, Marjorie Ellen	X				
Wolf, Brian	X				

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded in the official records, as defined in s. 28.222, of the county where the property is located ~~according to law~~; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded, in the official records of the county where the property is located, before the accruing of the right of such creditor or subsequent purchaser. Grantees by quitclaim, heretofore or hereafter made, shall not be denied the status of a bona fide purchaser without notice within the meaning of the recording acts solely based on having received title by a quit claim deed.[1]

(2) No lien for improvements, services, fines or penalties attaching to real property by any governmental or municipal body, or such other quasi-governmental entity authorized to assess, impose or create such liens, with the exception of taxes, special assessments levied and collected under the uniform method described in s. 197.3632, and liens for utility services, shall be good against creditors and subsequent purchasers for a valuable consideration unless a copy of the lien with a valid legal description and current tax or parcel identification number is recorded in the official records in the county where the property is located. No lien shall have a priority other than based on its order of recordation unless the recorded notice of such lien clearly states such priority and includes a citation to the statute or ordinance authorizing such priority. ~~The amount of any lien shall be increased by the amount of any recording fees paid with regard to filing that lien.~~ This

(COULD LINK TO OTHER RELEVANT SECTION)

[1] This was existing language which was moved

8.1.09
ACTION ITEM
IX, 2. B.

EXHIBIT "A" - 8.1.09 MINUTES

(N/A F.S.)

provision supercedes any conflicting home rule powers and any authorities granted under the acts, ordinances or orders creating any governmental or quasi-governmental entity.

(3) Liens assessed, imposed or created by any governmental or municipal body or other quasi-governmental entity may be assigned by assignment recorded in the official records of the county in which the property is located. Any person, firm, corporation or legal entity, other than the present owner of the property involved, who pays any such unsatisfied lien shall be entitled to receive an assignment of the lien and shall be subrogated to the rights of the governmental, quasi-governmental or municipal body in respect to the enforcement of such lien, as permitted by law.

~~(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.~~

Section 2. Section 162.03, Florida Statutes, is amended to read:

162.03 Applicability.--

(1) Each county or municipality may by ordinance, at its option, create or abolish ~~by ordinance~~ local government ~~code~~ enforcement boards as provided herein.

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(2) A charter county, a noncharter county, or a municipality may, by ordinance, adopt an alternate code enforcement system that gives ~~code~~ enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances. A special magistrate shall have the same status as an enforcement board under this chapter. References in this chapter to an enforcement board, except in s. 162.05, shall include a special magistrate if the context permits. Any fines or

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EXHIBIT "A" - 8.1.09 MINUTES

liens assessed by such alternate code enforcement system must be recorded as provided in ss. 162.093 before such fine or lien shall constitute a lien on any real or personal property.

(3) In addition to any other matters addressed in its code of ordinances, each county or municipality may, by ordinance, provide that the failure to repair a property which falls into disrepair, becomes uninhabitable, or creates a danger to public health, safety or welfare ~~risk~~ is in violation of its code of ordinances and subject to enforcement action pursuant to this chapter.[2]

(4) Alienation of property and foreclosure of mortgages and liens are areas of law which have been wholly pre-empted by statute and rules of the court. No local governing body may, by ordinance or otherwise, impose any pre-conditions or limitations on the alienation of property or upon the foreclosure of mortgages or other liens, other than with regard to property, mortgages or liens owned or held by the local government. Any such ordinance is void and of no further force and effect.[3]

(5) No local government, including those with home rule powers, may require lenders to file or register ~~as to~~ abandoned, vacant, ~~or~~ foreclosed properties or ~~as to~~ properties in default.

Section 3. Sections 162.09 and 162.10, Florida Statutes, are amended to read:

162.091 Emergency Repairs; Costs of Repairs.

(1) If the code inspector has reason to believe a violation of its code of ordinances or the condition causing the violation presents a serious threat to the public health, safety, and welfare; the enforcement board is not scheduled to meet within the next 48 hours; and the ~~county or municipality~~local governing body has delegated the authority to institute emergency repairs, then:

(a) the code inspector shall make a reasonable effort to notify the record owner of the violating property and the holder or servicer of the first mortgage on the violating property; and

[2] I suspect the local government reps will want to expand the scope of this authority to address other specific problems I am not considering.
[3] This is an attempt to address the Miami style ordinances purporting to establish preconditions to land transfers.

EXHIBIT "A" - 8.1.09 MINUTES

(b) the county or municipal official to whom such authority has been delegated may institute such emergency repairs as may be necessary or appropriate to mitigate the threat to public health, safety and welfare.

(2) The enforcement board shall be advised of all costs incurred in making emergency repairs, and any costs of identifying and notifying the parties to be notified. The enforcement board shall review such costs and, if deemed reasonable under the circumstances, cause them to be assessed pursuant to s. 162.092.

(3) Making any such repairs does not create a continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the local governing body or any person engaged to make such repairs, for any damages to the property, or any special, punitive, or consequential damages resulting from or arising in the course of making such repairs.

(4) The failure or inability to notify any parties under subsection (1)(a) shall not invalidate any action taken pursuant hereto or the later assessment of costs incurred in connection herewith.

162.092 Administrative fines; costs of repair~~; liens~~.--

(1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time or upon finding that a repeat violation has been committed, may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the enforcement board for compliance or, in the case of a repeat violation, for each day the repeat violation continues, beginning with the date the repeat violation is found to have occurred by the code inspector. In addition, if the violation is a violation described in s. 162.06(4), the enforcement board shall notify the local governing body, which may

EXHIBIT "A" - 8.6.09 MINUTES

make all reasonable repairs which are required to bring the property into compliance and charge the violator with the reasonable cost of the repairs along with the fine ~~imposed~~ assessed pursuant to this section.

(2) Making such repairs does not create a continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the local governing body or any person engaged by the local governing body to make such repairs, for any damages to the property-, or any special, punitive, or consequential damages resulting from or arising in the course of making such repairs, if such repairs were completed in good faith. If a finding of a violation or a repeat violation has been made as provided in this part, a hearing shall not be necessary for issuance of the order imposing the fine. If, after due notice and hearing, an ~~code~~ enforcement board finds a violation to be irreparable or irreversible in nature, it may order the violator to pay a fine as specified in paragraph (3)(a).

(3)(a) A fine ~~impose~~assessed pursuant to this section shall not exceed $250 per day for a first violation and shall not exceed $500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1) and s. 162.091. However, if an ~~code~~ enforcement board finds the violation to be irreparable or irreversible in nature, it may ~~impose~~ assess a fine not to exceed $5,000 per violation.

(b) In determining the amount of the fine, if any, the enforcement board shall consider the following factors:

1. The gravity of the violation;

2. Any actions taken by the violator to correct the violation; and

3. Any previous violations committed by the violator.

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EXHIBIT "A" 8.1.09 MINUTES

(c) An enforcement board may reduce a fine ~~impose~~assessed pursuant to this section.

(d) A county or a municipality having a population equal to or greater than 50,000 may adopt, by a vote of at least a majority plus one of the entire governing body of the county or municipality, an ordinance that gives ~~code~~ enforcement boards or special magistrates, or both, authority to ~~impose~~assess fines in excess of the limits set forth in paragraph (a). Such fines shall not exceed $1,000 per day per violation for a first violation, $5,000 per day per violation for a repeat violation, and up to $15,000 per violation if the ~~code~~ enforcement board or special magistrate finds the violation to be irreparable or irreversible in nature. Any ordinance imposing such fines shall include criteria to be considered by the code enforcement board or special magistrate in determining the amount of the fines, including, but not limited to, those factors set forth in paragraph (b).[4]

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(3) In addition to ~~such~~ any fines assessed, a code enforcement board or special magistrate may ~~impose~~assess a special assessment against the property on which the violation exists ~~additional fines~~ to cover all costs incurred by the local government:

(a) In making any emergency repairs pursuant to s. 162.091;

(b) In making any repairs ordered by the local governing body or the enforcement board pursuant to this section;

(c) Any costs of identifying and notifying the parties to be notified;

(d) Any costs of recording the copy of the lien and any releases thereof;

(e) A reasonable charge to cover the direct costs of enforcing the violation of codes giving rise to the need for the repairs; and

[4] This section was moved unchanged.

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(f) A reasonable charge to cover the direct costs of making subsequent inspections to confirm repairs have been completed.

~~in enforcing its codes and all costs of repairs pursuant to subsection (1). Any ordinance imposing such fines shall include criteria to be considered by the code enforcement board or special magistrate in determining the amount of the fines, including, but not limited to, those factors set forth in paragraph (b).~~

Such cost assessment shall be set forth as an amount separate from any fines ~~impose~~assessed and shall specifically state that the cost assessment portion constitutes a lien on such property equal in priority to real property taxes as set forth in s. 162.093.

162.093 Liens.

(1~~3~~) A ~~certified copy of an order imposing~~lien for a fine, ~~or~~ a fine plus cost assessment, or a cost assessment alone, identifying the owner and containing a valid legal description and current tax or parcel identification number may be recorded in the Official Records as defined in s. 28.222~~, public records~~ and thereafter shall constitute a lien against the land on which the violation exists~~ and upon any other real or personal property owned by the violator~~. Upon recording notice of the lien in the central database of judgment liens on personal property maintained by the Department of State in accordance with ss. 55.201-55.209, such order shall also constitute a lien upon any personal property owned by the violator. The obligation to pay any fines or assessments shall also be a personal obligation of the owner of the property at the time the violation was noticed and assessed.

(2) The recorded lien may be in substantially the following form and must include the information and the warning contained in the following form:

WARNING!

EXHIBIT "A" 8.1.09 MINUTES

Estoppel letters, additional information regarding this lien and satisfactions of the lien are available by contacting [person], [title] at [address], phone number: [phone number].

_____ (Governmental Entity)

_____ By: (Name/Title)

Sworn to (or affirmed) and subscribed before me this ____ day of _____, 20__ by _____.

(SEAL)

_____

_____ Signature of Notary Public

_____ Personally Known _____ OR Produced Identification

_____ Type of Identification Produced

(3) The recorded lien for a cost assessment pursuant to ss. 162.091 and 162.092(4) shall constitute a lien on such property equal in priority to real property taxes and shall be deemed an obligation contracted for the improvement or repair of the property and an assessment within the meaning of Art. X, Sec. 4 of the Florida Constitution. The cost assessment will attach and may be enforced without regard to whether the land on which the violation exists is the homestead of the violator. Such lien will not be eliminated by the foreclosure of any mortgage or lien subordinate to real property taxes nor be prevented from attaching by s. 48.23 regarding lis pendens.

(4) Fines or penalties assessed pursuant to this chapter, and subsequent accruals thereon, shall take priority only as of the recordation of the lien, may be eliminated in a foreclosure of superior liens or mortgages, and shall be subject to the provisions of s. 48.23 regarding lis pendens. The elimination

EXHIBIT "A" - 8.1.09 MINUTES

properties, including but not limited to fenced yards, vacant structures and pool enclosures, for purposes of making inspections and repairs authorized hereunder. As provided in s. 810.12(5), such persons are excluded from the application of trespass laws while performing services within the scope of their employment.

162.10 Duration of lien.--No lien provided under this chapter ~~the Local Government Code Enforcement Boards Act~~ shall continue for a period longer than ~~20~~ 2 years after the ~~certified copy of an order imposing a fine~~ lien has been recorded in the Official Records, unless within that time an action is commenced pursuant to s. 162.09(3) in a court of competent jurisdiction and a lis pendens filed in the official records. In an action to foreclose on a lien or for a money judgment, the prevailing party is entitled to recover all costs, including a reasonable attorney's fee, that it incurs in the action. The local governing body shall be entitled to collect all costs incurred in recording and satisfying a valid lien. The continuation of the lien ~~effected~~ by the commencement of the action shall not be good against creditors or subsequent purchasers for valuable consideration without notice, unless a notice of lis pendens is recorded.

Section 4. Section 162.14 Florida Statutes is created to read:

162.14 Declaration of Intent. If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of this chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable, or void portion or portions of this chapter did not induce its passage, and that without

EXHIBIT "A" - 8.5.09 MINUTES

"AS IS" RESIDENTIAL CONTRACT FOR SALE AND PURCHASE

DRAFT 8/06/09 7:45PM

USE CALENDAR DAYS TO CALCULATE TIME PERIODS – SEE PARAGRAPH 13(C)

PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this Contract for Sale and Purchase and any riders and addenda ("Contract"):

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Property is located in: _____ County, Florida. Real Property Tax ID No: _____

(c) Legal description of the Real Property: _____

_____

together with all existing improvements and fixtures, including built-in appliances, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded below.

(d) Personal Property: The following items owned by Seller and existing on the Property as of the date of the initial offer are included in the purchase ("Personal Property"): (i) range(s), refrigerator(s), dishwasher(s), disposal, ceiling fan(s), intercom, light fixtures, rods, draperies and other window treatments, garage door openers and security gate and other access devices; and (ii) those additional items checked below. If additional details are necessary, specify below. **If left blank, the item is not included.**

[___] Stand-alone Ice Maker	[___] Security System	[___] Spa or Hot Tub with Heater	[___] Water Softener/Purifier
[___] Microwave Oven	[___] Window/Wall A/C	[___] Above Ground Pool	[___] Hurricane shutters and panels
[___] Washer	[___] Pool Barrier/Fence	[___] Generator	
[___] Dryer	[___] Pool Equipment	[___] Storage Shed	[___] _____
[___] Smoke Detector	[___] Pool Heater	[___] Satellite Dish/TV Antenna	[___] _____

The only other items of Personal Property included in the purchase, and any additional details regarding Personal Property, if necessary, are: _____

_____

_____

The above listed Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

_____

PRICE AND FINANCING

2. PURCHASE PRICE (U.S. currency): . . . . . $_____

(a) Initial deposit to be held in escrow in the amount of (**checks subject to COLLECTION – see "Note" below**) . . . . . $_____

The initial deposit made payable and delivered to "Escrow Agent" named below

(**CHECK ONE**):☐ accompanies offer or ☐ is to be made upon acceptance (Effective Date), or

☐ is to be made within ____ days (if blank, then 3 days) after acceptance (Effective Date)

Escrow Agent Information: Name_____

Address: _____

Phone: _____ Fax:_____

E-mail: _____

(b) Additional escrow deposit to be delivered to Escrow Agent within _____ days after Effective Date in the amount of . . . . . $_____

(The initial deposit and all additional deposits, if any, paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing: Express as a dollar amount or percentage ("Loan Amount") see Paragraph 4 below _____

(d) Other: _____ . . . . . $_____

(e) Balance to close by cash or wire transfer or LOCALLY DRAWN cashier's or official bank check(s) (not including Buyer's Closing Costs, prepaid items and prorations) . . . . . $_____

NOTE: COLLECTION means any checks tendered or received, including Deposits or funds to close, have become actually and finally collected and deposited in the account of the Escrow Agent or Closing Agent. Disbursements for Closing may be delayed until such amounts have been collected in the Escrow Agent's or Closing Agent's accounts.

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTEROFFERS; EFFECTIVE DATE:

(a) If this offer is not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, will be returned to Buyer. Unless otherwise stated, the time for acceptance of any counteroffers shall be 2 days from the date the counteroffer is delivered.

(b) The effective date of this Contract will be the date when the last one of the Buyer and Seller has signed or initialed this offer or the final counteroffer ("Effective Date").

4. FINANCING: (Check as applicable)

☐ (a) Buyer will pay cash, or may obtain a loan, for the purchase of the Property, but there is no financing contingency to Buyer's obligation to close.

☐ (b) This Contract is contingent upon Buyer obtaining a written loan commitment for a ☐ conventional ☐ FHA ☐ VA loan on the following terms within _____ days (if blank, then 30 days) after Effective Date ("Loan Commitment Date") for ☐ a fixed, ☐ an adjustable, ☐ a fixed or adjustable, rate loan in the principal amount of $_____ or ____% of the Purchase Price, at an initial interest rate not to exceed ____%, and for a term of _____ years ("Financing").

Buyer will make mortgage loan application for the Financing within _____ days (if blank, then 5 days) after Effective Date and use good faith and diligent effort to obtain a written loan commitment for the Financing ("Loan Commitment") and close this Contract. Buyer shall keep Seller and Broker fully informed about status of mortgage loan application and Loan Commitment and authorizes the mortgage broker and lender to disclose such status and progress to Seller and Broker.

EXHIBIT "B" TO 8.1.09 MINUTES

If Buyer does not receive Loan Commitment, then Buyer may cancel this Contract by delivering written notice to Seller, and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

If Buyer does not deliver written notice to Seller of receipt of Loan Commitment or waiver of this financing contingency, then after Loan Commitment Date Seller may cancel this Contract by delivering written notice to Buyer and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

If Buyer delivers written notice to Seller of Loan Commitment and this Contract does not thereafter close, the Deposit shall be paid to Seller unless the failure to close is due to: (1) Seller's default; (2) the Property related conditions of the Loan Commitment have not been met (except when such conditions are waived by other provisions of this Contract); (3) appraisal of the Property obtained by lender is insufficient to meet the terms of the Loan Commitment; or (4) the Loan is not funded due to the financial failure of lender, in which event the Deposit shall be returned to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

☐ (c) Assumption of existing mortgage (see rider for terms); or

☐ (d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).

CLOSING

5. CLOSING DATE: Unless modified by other provisions of this Contract, the closing of this transaction shall occur and the closing documents required to be furnished by each party pursuant to this Contract shall be delivered ("Closing") on _____ ("Closing Date"), at the time established by the Closing Agent. If extreme weather or other condition or event constituting "force majeure" (see Paragraph 13(d)) causes: (i) disruption of utilities or other services essential for Closing, or (ii) Hazard, Wind, Flood or Homeowners' Insurance, to become unavailable prior to Closing, Closing will be extended a reasonable time up to 3 days after the restoration of utilities and other services essential to Closing, and availability of applicable Hazard, Wind, Flood, or Homeowners' insurance. If (i) or (ii) above continues more than 14 days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other party and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

6. OCCUPANCY AND POSSESSION: At Closing, Seller will: (i) have removed all personal items and trash from the Property and (ii) deliver occupancy and possession, along with all keys, garage door openers, access devices and codes, as applicable, to Buyer.

If Property is occupied by a tenant and such occupancy is intended to continue beyond Closing Date, the fact and terms thereof and the tenant(s) or occupants shall be disclosed pursuant to Paragraph 13(b).

If Property is intended to be occupied by Seller beyond Closing, Buyer and Seller shall, at or before Closing, enter into a lease governing Seller's post-Closing occupancy ("Post-Closing Occupancy").

If occupancy is to be delivered to Buyer prior to Closing Date, Buyer and Seller shall, prior to the commencement of such occupancy, enter into a lease governing Buyer's pre-Closing occupancy ("Pre-Closing Occupancy"). Unless addressed otherwise in a lease between the parties, Buyer shall, upon occupying the Property prior to Closing: (i) assume all risks of loss to Property caused by Buyer from date of occupancy; (ii) be responsible and liable for maintenance from that date; and (iii) be deemed to have accepted Property in its existing condition as of date of occupancy, except with respect to any items identified by Buyer prior to taking occupancy which require repair, treatment or remedy as described in Paragraph 11.

7. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(a) **LOCATION:** Closing will take place in the county where the Real Property is located at the office of the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance, or, if no title insurance, designated by Seller. Closing may be conducted by mail or electronic means.

(b) **CLOSING DOCUMENTS:** At Closing, Seller shall furnish and pay for, as applicable, deed, bill of sale, certificate of title, construction lien affidavit, owner's possession affidavit, assignments of leases, and corrective instruments. Seller shall provide Buyer with paid receipts for all work done on the Property pursuant to the terms of this Contract. Buyer shall furnish and pay for, as applicable, mortgage, mortgage note, security agreement, financing statements, survey, base elevation certification, and other documents required by Buyer's lender.

(c) **PROCEDURE:** Seller shall convey marketable title to the Property pursuant to Paragraph 12. The deed shall be recorded upon **Collection** of all closing funds. If the Title Commitment provides insurance against adverse matters pursuant to Section 627.7841, F.S., as amended, the escrow closing procedure required by Standard 13(g) shall be waived, and Closing Agent shall, **subject to Collection of all closing funds**, disburse at Closing the brokerage fees to Broker and the net sale proceeds to Seller.

(d) **TAX WITHHOLDING:** If Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"), Buyer and Seller will comply with FIRPTA, which may require Seller to provide additional cash at Closing.

8. CLOSING COSTS; TITLE INSURANCE AND SURVEY COSTS; PRORATIONS; HOMEOWNER'S WARRANTY: The following are costs, fees, and charges which each of the parties may incur:

(a) **COSTS TO BE PAID BY SELLER:**

- Documentary stamp taxes and surtax, if any, on the deed
- Recording and other fees needed to cure title
- Policy and Title Charges (if Paragraph 8(c)(i) below is checked)
- Title search charges (if Paragraph 8(c)(iii) below is checked)
- HOA/Condominium Association estoppel fees
- Seller's attorneys' fees

Other: _____

_____

If, prior to Closing, Seller is unable to meet the **AS IS** Maintenance Requirement as required by Paragraph 10, a sum equal to 125% of the estimated cost to meet the **AS IS** Maintenance Requirement will be escrowed at Closing. Seller shall pay any such costs in excess of the escrowed amounts. Any unused portion of the escrowed amount(s) shall be returned to Seller.

EXHIBIT "B" - 8.1.09 MINUTES

(b) **COSTS TO BE PAID BY BUYER:**

- Taxes and recording fees on notes and mortgages
- Recording fees for the deed and financing statements
- Loan expenses
- Lender's title policy and endorsements
- Policy and Title Charges (if Paragraph 8(c)(ii) below is checked)
- Policy and Title Charges (if Paragraph 8(c)(iii) below is checked)
- Appraisal fees
- Buyer's Inspections
- Survey (and elevation certification, if required)
- All property related insurance
- HOA/Condominium Association application and transfer fees
- Buyer's attorneys' fees
- Other: _____

(c) **TITLE EVIDENCE AND INSURANCE**: At least ___ days (if blank, then 5 days) prior to Closing a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see Paragraph 12(a) for terms) shall be obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The costs of the owner's title policy and charges for title search and closing fees and services (collectively, "Policy and Title Charges") shall be paid, as set forth below (CHECK ONLY ONE):

☐ (i) Seller will select Closing Agent and pay for the Policy and Title Charges (but not including charges for closing services related to the mortgagee policy or Buyer's loan closing, which amounts shall be paid by Buyer); or

☐ (ii) Buyer will select Closing Agent and pay for the Policy and Title Charges; or

☐ (iii) **[MIAMI-DADE/BROWARD REGIONAL PROVISION]:** Seller will furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay for a continuation or update of such title evidence which is acceptable to Buyer's title insurance underwriter for reissue of coverage and tax search and lien search fees. Buyer shall obtain and pay for post-Closing continuation and the premium for Buyer's owner's policy, and if applicable, mortgagee's policy. Seller shall not be obligated to pay more than $_____ (if blank, $200.00) for the abstract continuation or title search ordered or performed by Closing Agent.

(d) **SURVEY:** At least 5 days prior to Closing, Buyer may, at Buyer's expense, have the Real Property surveyed and certified by a registered Florida surveyor ("Survey"). If Seller has a survey covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date.

(e) **PRORATIONS; CREDITS**: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date or occupancy, if occupancy occurs before Closing: real estate taxes, interest, bonds, association fees, insurance, rents and other expenses of the Property. Buyer shall have the option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on the current year's tax with due allowance made for maximum allowable discount, homestead and other exemptions. If Closing occurs at a date when the current year's millage is not fixed and current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties; failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. A tax proration based on an estimate shall, at request of either party, be readjusted upon receipt of current year's tax bill. This Paragraph 8(e) shall survive Closing.

(f) **HOME WARRANTY**: At Closing, ☐ Buyer ☐ Seller ☐ N/A will pay for a home warranty plan issued by _____ _____ at a cost not to exceed $_____. A home warranty plan provides for repair or replacement of many of a home's mechanical systems and major built-in appliances in the event of breakdown due to normal wear and tear during the agreement's warranty period.

DISCLOSURES

9. DISCLOSURES:

(a) **SPECIAL ASSESSMENTS BY PUBLIC BODIES**: The Property may be subject to unpaid special assessment lien(s) imposed by a public body ("public body" does not include a Condominium or Homeowner's Association). At Closing Seller will pay: (i) the full amount of such liens that are certified, confirmed and ratified before Closing, and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially completed as of Effective Date but that has not resulted in a lien being imposed on the Property before Closing; Buyer will pay all other assessments. **If special assessments may be paid in installments (CHECK ONE – IF NEITHER BOX IS CHECKED, THEN BUYER SHALL PAY INSTALLMENTS DUE AFTER CLOSING):**

☐ Buyer shall pay installments due after Closing.

☐ Seller will pay the assessment in full prior to or at the time of Closing.

This Paragraph shall not apply to liens imposed by a community development district (CDD) created pursuant to Chapter 190 F.S. The special benefit tax assessment imposed by a CDD shall be treated as an ad valorem tax and prorated pursuant to Paragraph 8(e). above.

(b) **RADON GAS**: Radon is a naturally occurring radioactive gas that, when it is accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

(c) **PERMITS DISCLOSURE: Except as may have been disclosed by Seller to Buyer in a written property disclosure statement, Seller does not know of any improvements made to the Property which were made without required permits or pursuant to permits which have not been properly closed.**

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(d) **MOLD**: Mold is naturally occurring and may cause health risks or damage to property. If Buyer is concerned or desires additional information regarding mold, Buyer should contact an appropriate professional.

(e) **FLOOD ZONE; ELEVATION CERTIFICATION:** Buyer is advised to verify by elevation certificate which flood zone the Property is in, whether flood insurance is required by lender, and what restrictions apply to improving the Property and rebuilding in the event of casualty. If the Property is in a "Special Flood Hazard Area" or "Coastal High Hazard Area" and the finished floor elevation is below the minimum flood elevation, Buyer may cancel this Contract by delivering written notice to Seller within 20 days from Effective Date, failing which Buyer accepts the existing elevation of the buildings and flood zone designation of the Property.

(f) **ENERGY BROCHURE**: Buyer acknowledges receipt of the Florida Energy-Efficiency Rating Information Brochure required by Section 553.996, F.S.

(g) **LEAD-BASED PAINT**: If the Real Property includes pre-1978 residential housing then a lead-based paint rider is mandatory.

(h) **HOMEOWNERS ASSOCIATION/COMMUNITY DISCLOSURE: BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THE HOMEOWNERS' ASSOCIATION COMMUNITY DISCLOSURE, IF APPLICABLE.**

(i) **PROPERTY TAX DISCLOSURE SUMMARY**: BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(j) **SELLER DISCLOSURE**: Seller knows of no facts materially affecting the value of the Real Property which are not readily observable by Buyer and which have not been disclosed to Buyer. Except as stated in the preceding sentence:(1) Seller extends and intends no warranty and makes no representation of any type, either express or implied, as to the physical condition or history of the Property; (2) Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation; and (3) Seller has no knowledge of any repairs or improvements made to the Property without compliance with governmental regulation which have not been disclosed to Buyer.

PROPERTY CONDITION/MAINTENANCE, ACCESS AND INSPECTIONS

10. PROPERTY MAINTENANCE: Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of the Effective Date, except for ordinary wear and tear and Casualty Loss ("**AS IS** Maintenance Requirement").

11. PROPERTY ACCESS, INSPECTIONS AND RIGHT TO CANCEL: (a) Buyer shall have _____ days from Effective Date ("Inspection Period") within which to have such inspections of the Property performed as Buyer shall desire and utilities service shall be made available by the Seller during the Inspection Period; (b) Buyer shall be responsible for prompt payment for such inspections and repair of damage to and restoration of the Property resulting from such inspections and this provision (b) shall survive termination of this Contract; and (c) if Buyer determines, in Buyer's sole discretion, that the Property is not acceptable to Buyer, Buyer may cancel this Contract by delivering facsimile or written notice of such election to Seller prior to the expiration of the Inspection Period. If Buyer timely cancels this Contract, the Deposit(s) paid shall be immediately returned to Buyer; thereupon, Buyer and Seller shall be released of all further obligations under this Contract, except as provided in this Paragraph 11. Unless Buyer exercises the right to cancel granted herein, Buyer accepts the Property in its present physical condition, subject to any violation of governmental, building, environmental, and safety codes, restrictions or requirements and shall be responsible for any and all repairs and improvements required by Buyer's lender.

(a) **ACCESS TO PROPERTY TO CONDUCT APPRAISALS, INSPECTIONS, AND WALK-THROUGH.** Seller shall, upon reasonable notice, provide utilities service and access to the Property for appraisals and inspections, including a walk-through (or follow-up walk-through if necessary) prior to Closing, to confirm that all items of Personal Property are on the Real Property, that the Property has been maintained as required by the **"AS IS"** Maintenance Requirement. If the transaction contemplated by this Contract does not close, Buyer will repair all damage to the Property resulting from Buyer's inspections, return the Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

(b) **WALK-THROUGH INSPECTION/REINSPECTION**: On the day prior to Closing Date or on the Closing Date, as specified by Buyer, Buyer, Buyer's representative, or both may perform a walk-through (and follow-up walk-through, if necessary) inspection of the Property solely to verify that Seller has met the **AS IS** Maintenance Requirement and all contractual obligations. If Buyer, and/or Buyer's representative, fails to conduct this inspection, Seller's **AS IS** Maintenance Requirement will be deemed fulfilled.

(c) **SELLER ASSISTANCE AND COOPERATION IN CLOSE-OUT OF BUILDING PERMITS**: If Buyer's inspection of the Property identifies open or needed building permits, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open or needed Permits, and shall promptly cooperate in good faith with Buyer's efforts to obtain estimates of repairs or other work necessary to resolve such Permit issues. Seller's obligation to cooperate shall include Seller's execution of necessary authorizations, consents, or other documents necessary for Buyer to conduct inspections and have estimates of such repairs or work prepared, but in fulfilling such obligation, Seller shall not be required to expend, or become obligated to expend, any money.

(d) **ASSIGNMENT OF REPAIR AND TREATMENT CONTRACTS AND WARRANTIES**: Except as provided in Paragraph 11(d)(ii), at Buyer's option and cost, Seller will, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

TITLE EVIDENCE AND EXAMINATION; SURVEY

12. TITLE:

(a) **TITLE EVIDENCE; RESTRICTIONS; EASEMENTS; LIMITATIONS**: Within the time period provided in Paragraph 8(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and delivered to Buyer. The Title Commitment shall set forth those matters to be discharged by Seller at or before Closing and shall provide that, upon recording of the deed to Buyer, an owner's policy of title insurance in the amount of the Purchase Price, shall be issued to Buyer insuring Buyer's marketable title to the Real Property, subject only to the following matters: (i) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (ii) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (iii) outstanding oil, gas and mineral rights of record without right of entry; (iv) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to the rear or front lines and

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7 1/2 feet in width as to the side lines); (v) taxes for year of Closing and subsequent years; and (vi) assumed mortgages and purchase money mortgages, if any (if additional items, attach addendum); provided, that none prevent use of the Property for **RESIDENTIAL PURPOSES** and there exists at Closing no violation of items identified in (ii) – (vi) above. If there exists at Closing any violation of the items identified in (ii) – (vi) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(b) **TITLE EXAMINATION**: Buyer shall have 5 days from date of receiving the Title Commitment to examine it, and if title is found defective, notify Seller in writing specifying defect(s) that render title unmarketable. Seller shall have 30 days (the "Cure Period") from receipt of notice to take reasonable diligent efforts to remove the defects. If Buyer fails to so notify Seller, Buyer shall be deemed to have accepted the title as it then is. If Seller cures the defects within the Cure Period, Seller will deliver written notice to Buyer (with proof of cure acceptable to Buyer and Buyer's attorney) and the parties will close the transaction on Closing Date (or within 10 days from Buyer's receipt of Seller's notice if Closing Date has passed). If Seller is unable to cure the defects within the Cure Period, Buyer may, within 5 days after expiration of the Cure Period, deliver written notice to Seller either: (i) extending the Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (ii) electing to accept title with existing defects and close the transaction on Closing Date (or within 10 days from Buyer's receipt of Seller's notice if Closing Date has passed), or (iii) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If, after reasonable diligent effort, Seller is unable to timely cure the defects and Buyer does not waive the defects, Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If Seller is to provide the Title Commitment and it is delivered to Buyer less than 5 days prior to Closing, Buyer may extend Closing so that Buyer shall have up to 5 days from date of receipt to examine same in accordance with this Paragraph. Nothing in this Paragraph shall require Seller to expend any sums to satisfy, cure or remove any title defect caused by the existence of any open building permit or unpermitted improvement to the Property.

(c) **SURVEY**: If a Survey obtained by Buyer or delivered by Seller, pursuant to Paragraph 8(d), discloses encroachments on the Real Property; or that improvements located thereon encroach on setback lines, easements, or lands of others; or violate any restrictions, covenants, or applicable governmental regulations described in Paragraphs 12(a)(ii) or (iv) above, Buyer shall deliver written notice of such matters, together with a copy of the Survey, to Seller within 5 days from receipt of Survey, but no later than Closing. If Buyer timely delivers such notice and Survey to Seller, such matters identified in the notice and Survey shall constitute a title defect, subject to the cure obligations of Paragraph 12(b) above. If Seller has delivered a prior Survey pursuant to Paragraph 8(d), Seller shall, at Buyer's request, execute an affidavit of "no change" to the Real Property since the preparation of such prior survey, to the extent the affirmations therein are true and correct.

STANDARDS FOR REAL ESTATE TRANSACTIONS ("Standards")

13. STANDARDS:

(a) **INGRESS AND EGRESS**: Seller warrants and represents that there is ingress and egress to the Real Property sufficient for its intended use as described in Paragraph 12(a) hereof and title to the Real Property is insurable in accordance with Paragraph 12(a) without exception for lack of legal right of access.

(b) **LEASES**: Seller shall, during the General Inspection Period, furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates, advanced rent and security deposits paid by tenant. If Seller is unable to obtain such letter from each tenant, the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit, and Buyer may thereafter contact tenant to confirm such information. If the terms of the leases differ materially from Seller's representations, Buyer may deliver written notice to Seller at least 5 days prior to Closing terminating this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all original leases to Buyer who shall assume Seller's obligation thereunder.

(c) **TIME**: Calendar days shall be used in computing time periods. Any time periods provided for herein which shall end on a Saturday, Sunday, or a national legal holiday shall extend to 5:00 p.m. (where the Property is located) of the next business day. Time is of the essence in this Contract.

(d) **FORCE MAJEURE**: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as the performance or non-performance of the obligation is delayed, caused or prevented by force majeure. "Force majeure" is defined as hurricanes, earthquakes, floods, fire, acts of God, unusual transportation delays, wars, insurrections, acts of terrorism, and any other cause not reasonably within the control of the Buyer or Seller and, which by the exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended for the period that the force majeure prevents performance under this Contract; provided, however, in the event that such "force majeure" continues to prevent performance under this Contract more than 14 days beyond Closing Date, either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

(e) **LIENS**: Seller shall furnish to Buyer at time of Closing an affidavit attesting to the absence, unless otherwise provided for herein, of any financing statement, claims of lien or potential lienors known to Seller and further attesting that there have been no improvements or repairs to the Real Property for 90 days immediately preceding date of Closing. If the Real Property has been improved or repaired within that time, Seller shall deliver releases or waivers of construction liens executed by all general contractors, subcontractors, suppliers and materialmen in addition to Seller's lien affidavit setting forth the names of all such general contractors, subcontractors, suppliers and materialmen, further affirming that all charges for improvements or repairs which could serve as a basis for a construction lien or a claim for damages have been paid or will be paid at the Closing of this Contract.

(f) **RISK OF LOSS**: If, after the Effective Date, the Property is damaged by fire or other casualty ("Casualty Loss") before Closing and cost of restoration (which shall include the cost of pruning or removing damaged trees) does not exceed 1½% of the Purchase Price, cost of restoration shall be an obligation of Seller and Closing shall proceed pursuant to the terms of this Contract. If restoration is not completed as of Closing, a sum equal to 125% of estimated cost to complete restoration (not to exceed 1½% of the Purchase Price), will be escrowed at Closing. Any portion of such escrowed funds in excess of the actual restoration cost incurred shall be returned to Seller. If the actual cost of restoration exceeds the escrowed amount, Seller shall pay such actual costs (but, not in excess of 1½% of the Purchase Price). Any unused portion of the escrowed amount shall be retumed to Seller. If the cost of restoration exceeds 1½% of

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the Purchase Price, Buyer shall elect to either take the Property "as is" together with the 1½%, or receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller's sole obligation with respect to tree damage by casualty or other natural occurrence shall be the cost of pruning or removal.

(g) **ESCROW CLOSING PROCEDURE**: Attach the "Escrow Closing Procedures" Rider if, pursuant to Paragraph 7(c), the Title Commitment does not provide for insurance against adverse matters as permitted under Section 627.7841, F.S., as amended.

(h) **CONVEYANCE**: Seller shall convey marketable title to the Real Property by statutory warranty, trustee's, personal representative's, or guardian's deed, as appropriate to the status of Seller, subject only to matters contained in Paragraph 12(a) and those otherwise accepted by Buyer. Personal Property shall, at the request of Buyer, be transferred by an absolute bill of sale with warranty of title, subject only to such matters as may be otherwise provided for herein.

(i) **1031 EXCHANGE**: If either Seller or Buyer wish to enter into a like-kind exchange (either simultaneous with Closing or deferred) with respect to the Property under Section 1031 of the Internal Revenue Code ("Exchange"), the other party shall cooperate in all reasonable respects to effectuate the Exchange, including the execution of documents; provided (i) the cooperating party shall incur no liability or expense related to the Exchange and (ii) the Closing shall not be contingent upon, nor extended or delayed by, such Exchange.

(j) **CONTRACT NOT RECORDABLE; PERSONS BOUND; NOTICE; COPIES**: Neither this Contract nor any notice of it shall be recorded in any public records. This Contract shall be binding on, and inure to the benefit of, the parties and their heirs or successors in interest. Whenever the context permits, singular shall include plural and one gender shall include all. Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A legible facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original.

(k) **INTEGRATION; MODIFICATION**: This Contract contains the full and complete understanding and agreement of Buyer and Seller with respect to the transaction contemplated by this Contract and no prior agreements or representations shall be binding upon Buyer or Seller unless included in this Contract. No modification to or change in this Contract shall be valid or binding upon Buyer or Seller unless in writing and executed by the parties intended to be bound by it.

(l) **WAIVER**: The failure of Seller or Buyer to insist on compliance with, or strict performance of, any provision of this Contract, or to take advantage of any right under this Contract, shall not constitute a waiver of such provision or right.

(m) **TYPEWRITTEN OR HANDWRITTEN PROVISIONS**: Typewritten or handwritten provisions, riders and addenda shall control all printed provisions of this Contract in conflict with them.

(n) **LOAN COMMITMENT**: "Loan Commitment" means a statement by the lender setting forth the terms and conditions upon which the lender is willing to make a particular mortgage loan to a particular borrower.

(o) **APPLICABLE LAW AND VENUE**: This Contract shall be construed in accordance with the laws of the State of Florida and venue for the resolution of all disputes, whether by mediation, arbitration or litigation, shall lie in the county in which the Real Property is located.

DEFAULT AND DISPUTE RESOLUTION

14. DEFAULT:

(a) **BUYER DEFAULT**: If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time specified, Seller may elect to recover and retain the Deposit, for the account of Seller, as agreed upon liquidated damages, consideration for the execution of this Contract and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 15, proceed in equity to enforce Seller's rights under this Contract. The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split between Listing Broker and Cooperating Broker in the same proportion as the Listing Broker's offer of compensation bears to the full commission Seller was obligated to pay.

(b) **SELLER DEFAULT**: If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive the return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach, and, pursuant to Paragraph 15, may seek to recover such damages or seek specific performance.

This Paragraph 14 shall survive Closing or termination of this Contract.

15. DISPUTE RESOLUTION: All unresolved controversies, claims and other matters in question between Buyer and Seller arising out of or relating to this transaction or this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(a) **ENTITLEMENT TO THE DEPOSIT**: Buyer and Seller will have 10 days from the date conflicting demands for the Deposit are made to attempt to resolve such Dispute, failing which, Buyer and Seller shall submit such Dispute to mediation under Paragraph 15(b) below.

(b) **MEDIATION OF DISPUTES**: Buyer and Seller shall attempt to settle all Disputes in an amicable manner through mediation pursuant to the Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S., as amended (the "Mediation Rules"). The mediator must be certified or must have experience in the real estate industry.

(c) **BINDING ARBITRATION**: ___ ___ **(SELLER),** ___ ___ **(BUYER)** If initialed here by both Buyer and Seller any Dispute not resolved pursuant to Paragraph 15(b), above, shall be settled by binding arbitration using the Real Estate Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agree to use other arbitration rules. The arbitrator may not alter the contract terms or award any remedy not provided for in this Contract. The parties shall be allowed discovery in accordance with the Florida Rules of Civil Procedure. **Unless initialed above by both Buyer and Seller, this Paragraph 15(c) shall not be a part of this Contract and arbitration of Disputes shall not be required.**

(d) **LITIGATION**: Any Dispute not settled pursuant to Paragraphs 15(a), (b) or (c) above, may be resolved by instituting action in the appropriate court having jurisdiction of the matter.

(e) **ENFORCEMENT OF DISPUTE RESOLUTION PROVISIONS; INJUNCTIVE RELIEF**: Buyer and Seller shall have the right to commence litigation or other legal proceedings with respect to the following matters without first complying with Paragraph 15(b) above: (i) enforcement of the Dispute resolution provisions of this Contract including any mediation settlement agreement, agreement to

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arbitrate, or arbitration award or (ii) request for any injunctive relief including temporary restraining orders and preliminary injunctions, against conduct or threatened conduct for which no adequate remedy at law may be available, or which might cause irreparable harm to a party.
This Paragraph 15 shall survive Closing or termination of this Contract.
16. ATTORNEY'S FEES; COSTS: In any mediation permitted by this Contract, the parties will equally divide any mediation fee, and each party to a mediation will pay their own costs, expenses and fees, including attorneys' fees, incurred in conducting the mediation. In any litigation permitted by this Contract, the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorneys' fees, incurred in conducting the litigation.
This Paragraph 16 shall survive Closing or termination of this Contract.

ESCROW AGENT AND BROKER

17. ESCROW AGENT: Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with the terms and conditions of this Contract. Failure of funds to clear shall not excuse Buyer's performance. When conflicting demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may take such actions permitted by this Paragraph 17, as Agent deems advisable. If in doubt as to Agent's duties or liabilities under the provisions of this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until the parties hereto agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will comply with provisions of Chapter 475, F.S., as amended. A licensed real estate broker's obligation under Chapter 475, FS and FREC rules to timely notify FREC of an escrow dispute and timely resolve the escrow dispute through mediation, arbitration, interpleader or an escrow disbursement order, if the broker so chooses, applies to licensed real estate brokers only and does not apply to attorneys, title companies, or other escrow companies.
Any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder, or in any proceeding wherein Agent interpleads the subject matter of the escrow, Agent shall recover reasonable attorney's fees and costs incurred with these amounts to be paid from and out of the escrowed funds or equivalent when charged and awarded as court costs in favor of the prevailing party. The Agent shall not be liable to any party or person for misdelivery of any escrowed items, unless such misdelivery is due to Agent's willful breach of the provisions of this Contract or Agent's gross negligence.
This Paragraph 17 shall survive Closing or termination of this Contract.
18. PROFESSIONAL ADVICE; BROKER LIABILITY: Broker advises Buyer and Seller to verify the Property condition, square footage, and all other facts and representations made pursuant to this Contract and to consult an appropriate professional for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract. Broker represents to Buyer that Broker does not reside in the Property and that all representations (oral, written or otherwise) by Broker are based on Seller representations or public records. **BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF THE PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER.** Buyer and Seller (individually, the "Indemnifying Party") each individually indemnifies, holds harmless, and releases Broker and Broker's officers, directors, agents and employees from all liability for loss or damage, including all costs and expenses, and reasonable attorney's fees at all levels, suffered or incurred by Broker and Broker's officers, directors, agents and employees in connection with or arising from claims, demands or causes of action instituted by Buyer or Seller based on: (i) the inaccuracy of information provided by the Indemnifying Party or from public records; (ii) the Indemnifying Party's misstatement or failure to perform contractual obligations; (iii) Broker's performance, at the Indemnifying Party's request, of any task beyond the scope of services regulated by Chapter 475, F.S., as amended, including Broker's referral, recommendation or retention of any vendor for, or on behalf of, the Indemnifying Party; (iv) the products or services provided by any such vendor for, or on behalf of, the Indemnifying Party; and (v) expenses incurred by any such vendor. Buyer and Seller each assumes full responsibility for selecting and compensating their respective vendors and paying their other costs under this Contract whether or not this transaction closes. This Paragraph will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended. For purposes of this Paragraph, Broker will be treated as a party to this Contract.
This Paragraph 18 shall survive Closing or termination of this Contract.

ASSIGNABILITY

19. ASSIGNABILITY: (CHECK ONLY ONE): Buyer ☐ may assign and thereby be released from any further liability under this Contract; ☐ may assign but not be released from liability under this Contract; or ☐ may not assign this Contract.

ADDENDA AND ADDITIONAL TERMS

20. ADDENDA: The following additional terms are included in the attached addenda and incorporated into this Contract (check if applicable):

☐ A. Condominium Assn.
☐ B. Homeowners' Assn.
☐ C. Seller Financing
☐ D. Mortgage Assumption
☐ E. FHA Financing
☐ F. VA Financing
☐ G. Coastal Const. Control Line
☐ H. Reserved
☐ I. Reserved
☐ J. Insulation Disclosure
☐ K. Mold Addendum
☐ L. Pre-1978 Housing Stmt. (LBP)
☐ M. Insurance
☐ N. Housing Older Persons
☐ O. Lease Purchase/Lease Option
☐ P. Interest-Bearing Account
☐ Q. Back-up Contract/Kick-out Clause
☐ R. Broker - Pers. Int. in Prop.
☐ S. Rentals
☐ T. Sale/Lease of Buyer's Property
☐ U. Pre-Closing Occupancy
☐ V. Post-Closing Occupancy
☐ W. Rezoning
☐ X. Prop. Disclosure Stmt.
☐ Y. FIRPTA
☐ Z. Additional Clauses
☐ AA. Escrow Closing Procedures
☐ BB. Appraisal Contingency
☐ CC. Short Sale
☐ DD. Seller's Attorney Approval
☐ EE. Buyer's Attorney Approval
☐ FF. Existing Tenants
☐ GG. Chinese/Defective Drywall
☐ HH. Radon
☐ Other _____

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21. **ADDITIONAL TERMS:** _____

_____

_____

_____

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY PRIOR TO SIGNING.

APPROVAL OF THIS FORM BY THE FLORIDA ASSOCIATION OF REALTORS® AND THE FLORIDA BAR IS PENDING. THIS FORM SHOULD NOT BE USED PRIOR TO SUCH APPROVALS.

Approval does not constitute an opinion that any of the terms and conditions in this Contract should be accepted by the parties in a particular transaction. Terms and conditions should be negotiated based upon the respective interests, objectives and bargaining positions of all interested persons

(Buyer)	(Date)	(Seller)	(Date)
(Buyer)	(Date)	(Seller)	(Date)

Buyers' address for purposes of notice _____

Sellers' address for purposes of notice _____

BROKERS: Listing and Cooperating Brokers, if any, named below (collectively, "Broker"), are the only Brokers entitled to compensation in connection with this Contract. Instruction to Closing Agent: Seller and Buyer direct Closing Agent to disburse at Closing the full amount of the brokerage fees as specified in separate brokerage agreements with the parties and cooperative agreements between the Brokers, except to the extent Broker has retained such fees from the escrowed funds. This Contract shall not modify any MLS or other offer of compensation made by Seller or Listing Broker to Cooperating Brokers.

Name: _____ _____

Cooperating Sales Associate, if any **Listing Sales Associate**

_____ _____

Cooperating Broker, if any **Listing Broker**

COUNTER OFFER/REJECTION

☐ **Seller** counters **Buyer's** offer (to accept the counter offer, **Buyer** must sign or initial and date the counter offered terms and deliver a copy of the acceptance to **Seller**.

☐ **Seller** rejects **Buyer's** offer.

Date: _____ **Seller**: _____

Print name: _____

____

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Section 731.110. CAVEAT; PROCEEDINGS

(1) Any interested person, ~~including a creditor~~, who is apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that the person's knowledge may file a caveat with the court. The caveat of an interested person other than a creditor may be filed either before or after the death of the person for whom the estate is being, or will be, administered. The caveat of a creditor may be filed only after the death of the person for whom the estate is being, or will be, administered.

(2) ~~A caveat shall contain the decedent's social security number, last known residence address, and date of birth, if they are known, as identification, a statement of the interest of the caveator in the estate, the name and specific residence address of the caveator, and, i~~If the caveator~~, other than a state agency,~~ is a nonresident of ~~the county~~ Florida, the caveator shall designate, ~~the additional name and specific residence address of~~ some person residing in the county in which the caveat is filed, ~~or office address of a member of The Florida Bar residing in Florida, designated~~ as the agent of the caveator, upon whom service may be made ,however, if the caveator is represented by an attorney admitted to practice in Florida who signs the caveat, it shall not be necessary to designate a resident agent.

(3) When a caveat has been filed by an interested person other than a creditor, the court shall not admit the will of the decedent to probate or appoint a personal representative until the petition for administration has been served on the caveator or the caveator's designated agent by formal notice and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

(4) A caveat filed before death shall expire two years after filing.

8.1.09
MOTION ITEM X,
~~IX~~ 3-A. 8.1.09

RPPTL 2009 - 2010
Executive Council Meeting Schedule
JOHN NEUKAMM'S YEAR

Date	Location
July 30 – August 2, 2009	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate $176.00 (Superior King) $189.00 (Deluxe Double) Cut-off Date: June 29, 2009
September 24 – September 27, 2009	**Executive Council Meeting** Ritz-Carlton, Naples Naples, Florida Reservation Phone # 800-241-3333 www.ritzcarlton.com/naples Room Rate $199.00 Cut-off Date: August 10, 2009
January 14 – January 17, 2010	**Executive Council Meeting** The Casa Monica Hotel St. Augustine, Florida Reservation Phone # 904-827-1888 www.casamonica.com Room Rate $199.00 Cut-off Date: December 14, 2009
March 16 – March 21, 2010	**Executive Council Meeting / Out-of-State Meeting** The Ritz-Carlton, Kapalua Lahaina, Maui Hawaii Hotel Phone # 800-241-3333 Room Rate $370.00 (Deluxe Room) $450.00 (Deluxe Ocean View) Cut-off Date: January 30, 2010
May 27 – May 30, 2010	**Executive Council Meeting / RPPTL Convention** Tampa Marriott – Waterside Hotel & Marina Tampa, Florida Reservation Phone # 800-228-9290 Room Rate $159.00 (Single/Double) $179.00 (Triple) $199.00 (Quad) Cut-off Date: April 27, 2010

RPPTL 2010 - 2011
Executive Council Meeting Schedule
BRIAN FELCOSKI'S YEAR

Date	Location
August 5 – August 8, 2010	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $185.00 Cut-off Date: July 4, 2010
September 23 – September 26, 2010	**Executive Council Meeting** Ritz-Carlton Orlando, Grand Lakes Orlando, Florida Reservation Phone # 1-800-576-5760 http://www.grandelakes.com Room Rate: $219.00 Cut-off Date: August 25, 2010
November 4 – November 7, 2010	**Executive Council Meeting** Sandpearl Resort Clearwater, Florida Reservation Phone #1-877-726-3111 http://www.sandpearl.com Room Rate: $199.00 Cut-off Date: October 1, 2010
February 23 – February 27, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Season Resort Santa Barbara, CA Reservation Phone #805-565-8299 www.fourseasons.com/santabarbara Room Rate: $350.00 Cut-off Date: January 25, 2011
May 26 – May 29, 2011	**Executive Council Meeting / RPPTL Convention** Eden Roc Hotel Miami Beach, Florida Reservation Phone # 1-800-319-5345 http://boldnewedenroc.com/ Room Rate $199.00 Cut-off Date: May 3, 2011

BOARD OF GOVERNORS REPORT

Dan DeCubellis, Board Liaison

At its July 17 meeting in Naples, The Florida Bar Board of Governors:

RPPTL SECTION REPORT
Heard a report from RPPTL Section chair **John Neukamm** who described some of the most significant efforts and accomplishments of the Section. Mr. Neukamm announced the creation of a committee to work with the Florida Courts Technology Commission to implement electronic filing.

ELECTRONIC FILING
President Jesse Diner announced a major emphasis of The Florida Bar this year to work with the court system to develop a uniform electronic filing system for Florida courts.

RPPTL SECTION ITEMS APPROVED
The RPPTL Section items approved included the following:
-Modifications to Rules of Civil Procedure Form 1.996 for Final Judgment of Foreclosure. The modified judgment will be sent to the Supreme Court for approval.
-Legislative position submitted by **Burt Bruton** opposing amendment of F.S. 607.1202 or 608.4262 to require publication of a notice of proposed sale of assets outside the ordinary course of business or to publish notice of dissolution.
-Contract with **Pete Dunbar** for legislative consulting services.
-Proposed amendments to the Probate Rules. It is anticipated that they will be filed with the Supreme Court on February 1, 2010.

IDENTITY THEFT REGULATIONS
Endorsed, on the recommendation of the Legislation Committee, the ABA position opposing the Federal Trade Commission's efforts to include lawyers and law firms in its Red Flag regulations requiring extra efforts by creditors to protect debtors from identity theft. The ABA argues that existing ethical rules protect client information and that providing legal services to clients does not make lawyers creditors.

FLORIDA BAR FOUNDATION
Heard a report from Florida Bar Foundation President **Adele Stone** that Foundation IOTA revenues have been declining, from $44 million three years ago, $24 million two years ago, and $11 million last year to an anticipated $5.7 million in the coming year. The Foundation is pushing to increase lawyer pro bono efforts and also to get more private donations, she said.

JUDICIAL CANDIDATE VOLUNTARY SELF-DISCLOSURE STATEMENT
Heard a report by Circuit Judge John Marshall Kest on behalf of the Judicial Administration and Evaluation Committee and approved a "judicial candidate voluntary self-disclosure statement". The statement will be given to all trial court candidates in future elections and their answers posted on the Bar's website. The approval included

providing copies of the self-disclosure statement to candidates in Creole and Spanish, but it will be up to candidates to provide translations of their answers.

MEMBER BENEFITS

Approved, on the recommendation of the Member Benefits Committee, an agreement with Affiniscape Merchant Solutions, which provides credit card services for law firms. Affiniscape, when attorneys accept credit card payments for retainers, will automatically deposit the retainer it the attorney's trust account but take the expenses related to the transaction from the law office operating account, as required by Bar rules. Under the agreement, Affiniscape, which has similar arrangements with 40 other state and local bars, will offer discounted rates for Bar members.

LAWYER REGULATION

Received on first reading proposed rule amendments that would impose additional requirements on lawyers who are suspended and have not been reinstated for a period of three years or longer. The proposed rule amendments will come back to the board for final reading at its September meeting. Among the proposed new requirements, lawyers would have to show that they have taken 10 hours of CLE for each year or part of a year during which they are ineligible to practice, show familiarity with the law, and if they waited more than 5 years to seek reinstatement retake the MPRE and Florida portions of the bar exam.

ISSUES FACING THE FLORIDA BAR

Heard President Jesse Diner announce what he sees as the major issues confronting the Bar this year. Those include: Working to implement electronic filing for the courts; continuing to advocate for adequate funding for the courts; defending SB 2108 which passed this year and put the funding of court-related functions of elected clerks of the court under legislative overview; pushing to address the legal needs of children, especially carrying out recommendations from the Commission on the Legal Needs of Children; and helping lawyers address the current difficult economic conditions.

RPPTL FINANCIAL SUMMARY

2009 – 2010 [*July 1, 2009 – August 31, 2009*[1]]

Revenue:	*$395,727**
Expenses:	*$221,016*
Net:	*$174,711*

** $41,225 of this figure represents revenue from corporate sponsors.*

RPPTL Fund Balance (8-31-08)
1,083,370

RPPTL CLE
RPPTL YTD Actual CLE Revenue ***$2,675***
RPPTL Budgeted CLE Revenue ***$180,000***

[1] **This report is based on the tentative unaudited detail statement of operations dated 8/31/2009.**

RPPTL Financial Summary from Separate Budgets

2009 – 2010 [July 1, 2009 – August 31, 2009[1]]
FINAL YEAR END REPORT

General Budget

Revenue:	**$ 368,475**
Expenses:	**$ 151,324**
Net:	**$ 217,151**

Attorney / Trust Officer Liaison Conference

Revenue:	**$ 12,457**
Expenses:	**$ 976**
Net:	**$ 11,481**

Legislative Update

Revenue:	**$ 14,758**
Expenses:	**$ 76,008**
Net:	**($61,250)**

Convention

Revenue:	**$ 37**
Expenses:	**$ (7,329)**
Net:	**$ (7,292)**

Roll-up Summary (Total)

Revenue:	**$ 395,727**
Expenses:	**$ 221,016**
Net Operations:	**$ 174,711**

Reserve (Fund Balance):	**$ 1,083,370**
GRAND TOTAL	**$1,258,081**

[1] **This report is based on the tentative unaudited detail statement of operations dated 8/31/2009**

		August 2009 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total	Real Prop Probate & Trust				
31431	Section Dues	83,150	437,150	465,000	94.01
31432	Affiliate Dues	350	1,800	1,750	102.86
31433	Admin Fee to TFB	(29,260)	(153,745)	(163,450)	94.06
Total	Dues Income-Net	54,240	285,205	303,300	94.03
32001	Registrations	(200)	11,475	140,000	8.20
32006	Live Web Cast	7,000	7,000	8,500	82.35
32010	Legal Span On-line	0	173	750	23.07
32191	CLE Courses	0	0	180,000	0.00
32205	Compact Disc	4,700	5,405	19,200	28.15
32207	DVD	1,880	1,880	10,000	18.80
32293	Section Differential	1,100	2,675	20,000	13.38
32301	Course Materials	420	600	3,500	17.14
34704	Actionline Advertise	0	900	12,000	7.50
35003	Ticket Events	38,868	39,164	0	*
35101	Exhibit Fees	0	0	33,000	0.00
35201	Sponsorships	8,075	41,225	235,000	17.54
35603	Bd/Council Mtg Regis	0	25	160,000	0.02
38499	Investment Allocatio	0	0	17,654	0.00
Other	Income	61,843	110,522	839,604	13.16
Total	Revenues	116,083	395,727	1,142,904	34.62
36998	Credit Card Fees	0	0	(5,896)	0.00
51101	Employee Travel	641	2,814	14,435	19.49
61201	Equipment Rental	6,934	6,934	15,000	46.23
62202	Meeting Room Rental	0	(889)	0	*
71001	Telephone/Direct	0	0	1,000	0.00
71002	Telephone Distributi	0	200	0	*
71005	Internet Charges	206	287	0	*
75102	1st Class & Misc Mai	37	37	300	12.33
75401	Express Mail	1,547	1,696	1,500	113.07
81411	Promotional Printing	0	0	2,000	0.00
81412	Promotional Mailing	0	0	14,000	0.00
84001	Postage	349	580	11,500	5.04
84002	Printing	0	62	4,950	1.25
84006	Newsletter	0	11,308	40,000	28.27
84009	Supplies	0	0	500	0.00
84010	Photocopying	18	62	500	12.40
84012	Registration Support	0	0	3,000	0.00
84015	Officers Conference	0	0	1,200	0.00
84051	Officers Travel Expe	0	359	3,000	11.97
84054	CLE Speaker Expense	0	0	3,000	0.00
84061	Reception	785	785	67,500	1.16
84062	Luncheons	29,936	29,936	60,000	49.89
84064	Golf Tourn Expenses	0	0	11,000	0.00
84101	Committee Expenses	4,304	3,940	50,000	7.88

		August 2009 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total	Real Prop Probate & Trust				
84106	Realtor Relations	0	0	5,000	0.00
84107	Diversity Initiative	1,322	2,025	15,000	13.50
84109	Spouse Program	0	92	0	*
84110	Exhibitor Fees	0	0	250	0.00
84115	Entertainment	0	0	20,000	0.00
84201	Board Or Council Mee	73,064	80,658	400,000	20.16
84238	Council Mtg Recreati	4,213	4,213	35,000	12.04
84239	Hospitality Suite	4,457	5,092	20,000	25.46
84241	Spouse Functions	268	268	0	*
84253	Sleeping Rooms	0	0	2,500	0.00
84254	Speaker Gifts	0	0	2,000	0.00
84258	Web Services	0	0	6,000	0.00
84279	Council Members Hand	0	0	3,500	0.00
84310	Law School Liaison	0	0	7,500	0.00
84322	Fellowships-Exc Cou	787	1,550	10,000	15.50
84422	Website	10,750	11,250	50,000	22.50
84501	Legislative Consulta	25,000	25,000	100,000	25.00
84503	Legislative Travel	0	0	12,000	0.00
84524	Memorial Tributes	0	0	500	0.00
84701	Council Of Sections	0	0	300	0.00
84998	Operating Reserve	0	0	79,684	0.00
84999	Miscellaneous	1,549	1,549	500	309.80
85064	Service Recognition	174	1,202	5,000	24.04
86432	Time Taping Editing	0	0	4,500	0.00
88211	Steering Committee	0	0	1,500	0.00
88230	Speakers Expense	486	486	7,000	6.94
88233	Speakers Hotel	625	2,518	3,700	68.05
88241	Outline Prt-Inhouse	0	0	7,000	0.00
88242	Outline Prt-Contract	0	9,936	13,000	76.43
88252	Course Credit Fee	0	0	150	0.00
88262	Meeting Meals	(5,130)	(6,403)	84,800	(7.55)
88265	Refreshment Breaks	9,334	9,334	13,000	71.80
88269	Breakfast	9,457	9,457	38,000	24.89
88281	A/V Ctr Dup/Prod	7	42	1,600	2.63
Total	Operating Expenses	181,120	216,380	1,247,473	17.35
83431	Time CLE Courses	0	0	500	0.00
86431	Meetings Administrat	290	370	5,988	6.18
86532	Advertising News	0	0	4,958	0.00
86543	Graphics & Art	1,388	4,211	12,686	33.19
86623	Registrars	22	55	2,500	2.20
Total	TFB Support Services	1,700	4,636	26,632	17.41
Total	Expenses	182,820	221,016	1,274,105	17.35

	August 2009 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust				
Net Operations	(66,737)	174,711	(131,201)	(133.16)
21001 Fund Balance	0	908,659	882,682	102.94
Total Current Fund Balance	(66,737)	1,083,370	751,481	144.16

* * * * * End of listing * * * * *

	August 2009 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
31431 Section Dues	83,150	437,150	465,000	94.01
31432 Affiliate Dues	350	1,800	1,750	102.86
31433 Admin Fee to TFB	(29,260)	(153,745)	(163,450)	94.06
Total Dues Income-Net	54,240	285,205	303,300	94.03
32191 CLE Courses	0	0	180,000	0.00
32293 Section Differential	1,100	2,675	20,000	13.38
34704 Actionline Advertise	0	900	12,000	7.50
35003 Ticket Events	38,445	38,445	0	*
35101 Exhibit Fees	0	0	15,000	0.00
35201 Sponsorships	8,075	41,225	210,000	19.63
35603 Bd/Council Mtg Regis	0	25	160,000	0.02
38499 Investment Allocatio	0	0	17,654	0.00
Other Income	47,620	83,270	614,654	13.55
Total Revenues	101,860	368,475	917,954	40.14
36998 Credit Card Fees	0	0	(3,672)	0.00
51101 Employee Travel	0	0	6,525	0.00
71001 Telephone/Direct	0	0	1,000	0.00
71002 Telephone Distributi	0	200	0	*
71005 Internet Charges	206	287	0	*
84001 Postage	210	441	7,000	6.30
84002 Printing	0	62	2,500	2.48
84006 Newsletter	0	11,308	40,000	28.27
84009 Supplies	0	0	300	0.00
84010 Photocopying	18	62	500	12.40
84015 Officers Conference	0	0	1,200	0.00
84051 Officers Travel Expe	0	359	3,000	11.97
84054 CLE Speaker Expense	0	0	3,000	0.00
84101 Committee Expenses	4,304	3,940	50,000	7.88
84106 Realtor Relations	0	0	5,000	0.00
84107 Diversity Initiative	1,322	2,025	15,000	13.50
84109 Spouse Program	0	92	0	*
84201 Board Or Council Mee	73,064	80,658	400,000	20.16
84238 Council Mtg Recreati	4,213	4,213	35,000	12.04
84239 Hospitality Suite	4,457	5,092	20,000	25.46
84241 Spouse Functions	268	268	0	*
84279 Council Members Hand	0	0	3,500	0.00
84310 Law School Liaison	0	0	7,500	0.00
84322 Fellowships-Exc Cou	787	1,550	10,000	15.50
84422 Website	10,750	11,250	50,000	22.50
84501 Legislative Consulta	25,000	25,000	100,000	25.00
84503 Legislative Travel	0	0	12,000	0.00
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	0	0	300	0.00
84998 Operating Reserve	0	0	79,684	0.00

	August 2009 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
84999 Miscellaneous	0	0	500	0.00
85064 Service Recognition	174	1,202	5,000	24.04
Total Operating Expenses	124,773	148,009	855,337	17.30
86431 Meetings Administrat	290	370	4,456	8.30
86543 Graphics & Art	1,217	2,945	9,388	31.37
Total TFB Support Services	1,507	3,315	13,844	23.95
Total Expenses	126,280	151,324	869,181	17.41
Net Operations	(24,420)	217,151	48,773	445.23
21001 Fund Balance	0	908,659	882,682	102.94
Total Current Fund Balance	(24,420)	1,125,810	931,455	120.87

IT IS HEREBY PROPOSED THAT SECTION 736.0505, FLORIDA STATUTES, BE AMENDED TO READ AS FOLLOWS:

736.0505 Creditors' claims against settlor.--

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or

2. Section 2503(b),

of the Internal Revenue Code of 1986, as amended.

(3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in

(a) a trust described in section 2523(e) of the Internal Revenue Code of 1986, or a trust for which the election described in section 2523(f) of the Internal Revenue Code of 1986 has been made; and

(b) another trust, to the extent that the assets in the other trust are attributable to a trust described in (a),

shall, after the death of the settlor’s spouse, be deemed to have been contributed by the settlor’s spouse and not by the settlor.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property Probate and Trust Section, Estate and Trust Tax Planning Committee

Address c/o Richard R. Gans, Esq. Chair (Estate and Trust Tax Planning)
1515 Ringling Blvd., Ste. 1000, Sarasota, Florida 34236

Position Type RPPTL Section

CONTACTS

Board & Legislation Committee Appearance
Michael Gelfand, Esq., Gelfand & Arpe
1555 Palm Beach Lakes Blvd., Ste. 1220, West Palm Beach, Florida 33401
(561) 655-1361 mjgelfand@gelfandarpe.com

Appearances before Legislators
Peter M. Dunbar, Esq.
P. O. Box 10095, Tallahassee, Florida 32302-2095
(850) 222-2126 pete@penningtonlawfirm.com

Meetings with Legislators/staff
Michael Gelfand, Esq., and Peter M. Dunbar, Esq.

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* be filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format – Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

_____ _____
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _____ Support _____ Oppose _____ Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

The legislative proposal would clarify the rights of the settlor's creditors in the assets of a so-called "inter vivos QTIP trust." An inter vivos QTIP trust is commonly used as an estate tax planning technique. By making clear that a settlor's creditors have no rights in the trust assets after the death of the settlor's spouse as the beneficiary of the trust, there will be no question that the inter vivos QTIP trust will produce the expected federal tax results.

Reasons for Proposed Advocacy:

See attached White Paper

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None known

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

Others
(May attach list if More than one) N / A

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations – Standing Board Policy 9.50(c). Please include all responses with this requested form.

Referrals

1. The Tax Law Section of The Florida Bar

   _____ (Support, Oppose or No Position)

2. The Florida Bankers Association

   _____ (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised.

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Revision to Florida Statutes Section 736.0505

I. SUMMARY

The proposed legislation is the product of study and analysis by The Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Section of The Florida Bar (the "RPPTL Section"). The Asset Preservation Committee of the RPPTL Section was also involved.

The proposed legislation would amend Florida Statutes Section 736.0505 by adding new Sub-section 736.0505(3) to provide that, for purposes of Florida Statutes Section 736.0505, assets contributed to an inter vivos marital trust that is treated as qualified terminable interest property under Section 2523(f) of the Internal Revenue Code of 1986, as amended (the "Code"), or to an inter vivos marital trust that is treated as a general power of appointment trust under Code Section 2523(e), are not deemed to have been contributed by the settlor's spouse (and not by the settlor) even if the settlor is a beneficiary of the trust following the death of the settlor's spouse. Therefore, the assets held for the benefit of the initial settlor after the death of his or her spouse would not be subject to Florida Statutes Section 736.0505(1)(b), which, if applicable, would allow the settlor's creditors to reach the trust assets. The proposed legislation would not apply, however, if the initial transfer of the assets to the trust by the settlor was a fraudulent conveyance under Chapter 726, Florida Statutes (the Uniform Fraudulent Transfer Act).

II. CURRENT SITUATION

Irrevocable inter vivos trusts created under Code Section 2523(e), known as "general power of appointment trusts," and under Code Section 2523(f), known as "qualified terminable interest property trusts," or "QTIP trusts", will be used with greater frequency as a result of the increase in the federal estate tax exemption to $3.5 million for the year 2009 (and beyond?). In order for a married couple to take full advantage of the estate tax exemption, each spouse must have sufficient assets at his or her date of death. Under current law, the exemptions are not "portable," so if one spouse underutilizes his or her exemption, the surviving spouse cannot enhance his or her estate tax exemption with any unused portion of the exemption of the first spouse to die.

Many planners suggest the use of inter vivos QTIP trusts to allow for the full use of the donee spouse's estate tax exemption without compromising the ability of the donor spouse to control the disposition of the trust assets after the donee spouse's death. The assets in the inter vivos QTIP trust will benefit the donor's beneficiaries after the death of the donee spouse, and not the donee spouse's beneficiaries. To the extent of the estate tax exemption, assets in the inter vivos QTIP trust will pass free of estate and (probably) generation-skipping transfer taxes upon the death of the donee spouse.

In some situations, the settlor of the trust will not take advantage of the estate planning benefits of a QTIP trust unless the trust is structured so that he or she could be a beneficiary of the trust if the settlor's spouse predeceases. Commonly, the inter vivos QTIP trust gives the donee spouse a non-general power to appoint the assets among the settlor's descendants and the settlor. This can be done without sacrificing the tax planning objectives sought to be accomplished by the trust. If the settlor has sufficient assets of his or her own, the QTIP trust assets can pass to the children of the initial settlor upon the death of the donee spouse. However, if the donee spouse believes that the donor may be in need of the assets in the QTIP trust, the spouse can exercise his or her testamentary power of appointment in favor of the donor, typically to create a trust that will not be included in the taxable estate of the initial settlor for gift and estate tax purposes.

In this case, the donor spouse's creditors may argue that the donor was in fact the settlor of the new trust created by the exercise of the donee spouse's power of appointment. If this were so, under Florida Statutes Section 736.0505(1)(b), the assets in the trust created by the exercise of the spouse's power of appointment would be considered as held for the benefit of the donor in a self-settled trust, and would not be protected from the claims of the donor's creditors after the donee spouse's death. There is theoretical support for this approach under the so-called "relation back doctrine."[1]

Other states have addressed this issue by providing broad creditor protection for certain self-settled trusts.[2] Arizona[3] and Michigan[4]have enacted, legislation providing that the settlor of an inter vivos QTIP trust is not treated as the settlor of any trust created at the donee spouse's death for the benefit of the initial settlor. Florida law is presently unclear on this point; this uncertainty has a chilling effect on the use of this otherwise very effective planning technique. Florida residents who want a predictable outcome are forced to create inter vivos QTIP trusts in states, such as Arizona, that provide greater protection from the initial settlor's creditors.

III. EFFECT OF PROPOSED CHANGES
(DETAILED ANALYSIS OF PROPOSED REVISIONS)

The legislative proposal would amend Florida Statutes Section 736.0505 to provide, in effect, that (assuming the settlor's transfer to the trust was not subject to the Uniform Fraudulent Transfer Act) the donor of an inter vivos QTIP trust will not be treated as the settlor of that trust after the death of the donor's spouse; instead, after that time the donor's spouse will de considered to have contributed the assets to the trust. Thus, if the statute applies the provisions

[1] The relation back doctrine provides that the instrument exercising a donee's power of appointment is to be read as part of the instrument that created the power of appointment. This would mean the appointee of the property would take directly from the donor of the power, rather than from the donee. *See* 3 Restatement of Property (1940) §318 Comment (b)." *See also* In re Estate of Wylie, 342 So. 2d 996, 998 (Fla. Ct. App. 4th Dist., 1977); In the Matter of the Estate of Chester W. Stephens, Deceased, 49 Misc. 2d 1003 (Surrogate's Ct. of N.Y., Broome Cty., 1966).

[2] Alaska, Delaware, Rhode Island, Nevada, New Hampshire, South Dakota, Missouri, Oklahoma, Utah, Tennessee, and Wyoming. Such legislation is currently under considerable study by the Asset Preservation Committee of the RPPTL Section.

[3] Arizona Statutes Section 14-10505.

[4] Michigan Statutes Section 7506, effective April 1, 2010.

of Section 736.0505(1)(b) – which provide that the creditors of the settlor of an irrevocable trust can reach the maximum amount that can be distributed to or for the settlor's benefit – will not apply to the inter vivos QTIP trust because the donor's spouse, and not the donor, will be treated as the "settlor" of the trust for purposes of the statute.

Creditors' rights, property interests and transfer taxes are frequently inter-related. An outcome as to one of these three areas frequently dictates the outcome of the other two; for example, if certain property is treated as subject to one's creditors, it is also treated as being owned by that person for purposes of transfer taxes.

For example, Treasury Regulations Section 25.2523(f)-1(f), Example 11, entitled "Retention by donor spouse of income interest in property", provides that trust assets will not be includible in the settlor's estate under Code Section 2036 or 2038 in the following case:

> Settlor creates a trust with income payable to the Settlor's spouse for her life, and upon the spouse's death, income to the Settlor for his life, with the trust corpus payable to the Settlor's children upon the Settlor's death. If the Settlor elected to treat the trust property as qualified terminable interest property under Code Section 2523(f), the trust corpus will be includible in his spouse's estate at her death in accordance with Code Section 2044. Under Code Section 2044(c), property included in a decedent's estate is pursuant to that Section is treated as property passing from the decedent for estate and gift tax purposes. Therefore, *the Settlor's spouse is treated as the transferor* [i.e., the owner] *of the trust property for estate and gift tax purposes*. Thus, when the Settlor dies, the property will not be included in his estate.[5]

The proposed legislation brings the Florida creditor protection aspects of the type of inter vivos QTIP trust discussed above in line with the federal tax treatment of the trust. Under the proposed legislation, a settlor who establishes a Code Section 2523(e) inter vivos trust, or a trust as to which the QTIP election under Code Section 2523(f) is made, and who, upon the death of the settlor's spouse, becomes a beneficiary of the trust, will not be treated as the settlor of the trust for purposes of Florida Statutes Section 736.0505. Instead, the initial settlor's spouse will be treated as the settlor of the trust, just as the donee spouse is treated as the owner of the trust assets for federal tax purposes.

If the donor spouse simply gives his or her spouse assets outright, and if after the donee spouse's death those assets are used to fund a spendthrift trust for the benefit of the surviving spouse, few would take seriously the proposition that the assets in the trust would be subject to the donor / surviving spouse's creditors. There is nothing about an inter vivos general power of appointment or QTIP trust that compels a different result.[6]

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[5] *See also* PLR 200406004.

[6] Any transfer to the trust by the initial settlor that is a fraudulent transfer under Florida Statutes Chapter 726, the Uniform Fraudulent Transfers Act, will render the proposed statute inapplicable to the settlor's interest in the trust after the death of his or her spouse.

Finally, assuming the absence of a fraudulent transfer, if the assets in the inter vivos marital QTIP or general power of appointment trust held for the initial settlor after the donee spouse's death are subject to the claims of the settlor's creditors, this effectively eliminates the use of this technique in Florida. If after the death of the settlor's spouse the trust assets can be reached by the settlor's creditors, those assets will likely be included in his or her estate for federal estate tax purposes, which entirely defeats one of the primary purposes of establishing the trust. There is no other compelling benefit to be derived by putting Floridians at such an estate tax planning disadvantage.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposed legislation will lend clarity to an uncertain area of the law, and will enable Floridians to obtain finality and predictability of results in connection with a useful estate planning technique.

VI. CONSTITUTIONAL ISSUES

The Committee believes that the legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar and the Florida Bankers Association.

736.0902. Prudent Investor Rule Not to Apply –

(1) Notwithstanding the provisions of s. 518.11 or s. 736.0804, with respect to any contract of life insurance acquired or retained on the life of a qualified person, a trustee shall have no duty to:

(a) Determine whether the trust has an insurable interest in the life the insured.

(b) Determine whether any contract of life insurance is, or remains, a proper investment.

(c) Investigate the financial strength of the life insurance company;

(d) Determine whether to exercise any policy option available under the contract of life insurance;

(e) Diversify any such contract of life insurance, or diversify the assets of the trust with respect to the contract of life insurance: or

(f) Inquire or investigate the health or financial condition of the insured or insureds.

(2) For purposes of this section a "Qualified Person" is any person, or the spouse of any person, who has provided the trustee with funds that are used to acquire or pay premiums with respect to a policy of insurance on the life of that person, or on the life of the spouse of that person, or on the lives of that person and the spouse of that person.

(3) In all cases where this section shall apply, the trustee shall not be liable to the beneficiaries of the trust or any other person for any loss sustained with respect to such contract of life insurance.

(4) Unless otherwise provided in the trust instrument, paragraph (a) of subsection (1) of this section shall apply to any contract of life insurance on the life of a qualified person.

(5) Unless otherwise provided in the trust instrument, paragraphs (b) through (f) of subsection (1) of this section shall apply if either:

(a) the trust instrument by reference to this section, makes this section applicable to contracts of life insurance held by the trust, or

(b) the trustee has given notice that this section shall apply to a contract of life insurance held by the trust.

1. The notice of the application of this section shall be given to the qualified beneficiaries and shall contain a copy or restatement of this section.

2. Notice given to a person who represents the interests of any of the persons set forth in subparagraph 1, pursuant to any of the provisions of Part III of this Chapter shall be treated as notice to the person so represented.

3. Notice shall be given in the manner provided in s. 736.0109.

4. If any person notified pursuant to this paragraph objects to the application of this section in a writing delivered to the trustee within 30 days of the date such notice was received, then paragraphs (b) through (f) of subsection (1) shall not apply until the objection is withdrawn.

5. There shall be a rebuttable presumption that any notice sent by United States Mail is received three days after depositing the notice in the United States Mail system with proper postage prepaid.

(6) This section shall not apply to any contract of life insurance purchased from any affiliate of the trustee, or with respect to which the trustee or any affiliate of the trustee receives any commission unless the duties have been delegated to another person in accordance with s. 518.112. An "affiliate" of the trustee is any person who controls, is controlled by or is under common control with the trustee.

518.112. Delegation of investment functions -

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent as provided in subsection (3), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2) (a) The requirements of subsection (1) notwithstanding, a fiduciary that administers an insurance contract on the life or lives of one or more persons may delegate without any continuing obligation to review the agent's actions, certain investment functions with respect to any such contract as provided in subsection (3), to any one or more of the following persons as investment agents:

1. The trust's settlor if the trust is one described in > s. 733.707(3);

2. Beneficiaries of the trust or estate, regardless of the beneficiary's interest therein, whether vested or contingent;

3. The spouse, ancestor, or descendant of any person described in subparagraph 1. or subparagraph 2.;

4. Any person or entity nominated by a majority of the beneficiaries entitled to receive notice under paragraph (3)(b); or

5. An investment agent if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation.

(b) The delegable investment functions under this subsection include:

1. A determination whether the owner of any insurance contract has an insurable interest in the life of the insured.

~~1.~~ 2. A determination of whether any insurance contract is or remains a proper investment;

3. Any duty to investigate the financial strength of the life insurance company.

~~2.~~ 4. A determination of whether or not to exercise any policy option available under such contracts;

~~3.~~ 5. A determination of whether or not to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or

~~4~~ 6. An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.

(c) Until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under this subsection is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts.

(3) A fiduciary may delegate investment functions to an investment agent under subsection (1) or subsection (2), if:

(a) In the case of a guardianship, the fiduciary has obtained court approval.

(b) In the case of a trust or estate, the fiduciary has given written notice, of its intention to begin delegating investment functions under this section, to all beneficiaries, or their legal representative, eligible to receive distributions from the trust or estate within 30 days of the delegation unless such notice is waived by the eligible beneficiaries entitled to receive such notice. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust or distributions from the estate at the time are notified to the contrary, authorize the trustee or legal representative to delegate investment functions pursuant to this subsection. This discretion to revoke the delegation does not imply under subsection (2) any continuing obligation to review the agent's actions.

1. Notice to beneficiaries eligible to receive distributions from the trust from the estate, or their legal representatives shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.

2. Additionally, as used herein, legal representative includes one described in > s. 731.303, without any requirement of a court order, an attorney-in-fact under a durable power of attorney sufficient to grant such authority, a legally appointed guardian, or equivalent under applicable law, any living, natural guardian of a minor child, or a guardian ad litem.

3. Written notice shall be given as provided in Part III of Chapter 731, Florida Statutes as to an estate, and as provided in s. 736.0109, and Part III of Chapter 736, Florida Statutes as to a trust. ~~Written notice shall be:~~

~~a. By any form of mail or by any commercial delivery service, approved for service of process by the chief judge of the judicial circuit in which the trust has its principal place of business at the date of notice, requiring a signed receipt;~~

~~b. As provided by law for service of process; or~~

~~c. By an elisor as may be provided in the Florida Rules of Civil Procedure.~~

~~Notice by mail or by approved commercial delivery service is complete on receipt of notice. Proof of notice must be by verified statement of the person mailing or sending notice, and there must be attached thereto the signed receipt or other satisfactory evidence that delivery was effected on the addressee or on the addressee's agent. Proof of notice must be maintained among the trustee's permanent records.~~

(4) If all requirements of subsection (3) are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated.

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

421315

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property Probate and Trust Section, Estate and Trust Tax Planning Committee

Address c/o Richard R. Gans, Esq. Chair (Estate and Trust Tax Planning)
1515 Ringling Blvd., Ste. 1000, Sarasota, Florida 34236

Position Type RPPTL Section

CONTACTS

Board & Legislation Committee Appearance Michael Gelfand, Esq., Gelfand & Arpe
1555 Palm Beach Lakes Blvd., Ste. 1220, West Palm Beach, Florida 33401
(561) 655-1361 mjgelfand@gelfandarpe.com

Appearances before Legislators Peter M. Dunbar, Esq.
P. O. Box 10095, Tallahassee, Florida 32302-2095
(850) 222-2126 pete@penningtonlawfirm.com

Meetings with Legislators/staff Michael Gelfand, Esq., and Peter M. Dunbar, Esq.

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* be filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format – Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

_____ _____
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _____ Support _____ Oppose _____ Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

The legislative proposal would permit grantors of life insurance trusts created after the enactment of the statute to narrow a trustee's fiduciary duties over certain policies of insurance owned by the trust. The legislative proposal would also create a procedure for trust beneficiaries to release the trustee from certain duties with regard to a policy of insurance owned by the trust, and would make

clear that a trustee can delegate certain duties related to management of a life insurance policy under Section 518.112, Florida Statutes.

Reasons for Proposed Advocacy:

See attached White Paper

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None known

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

Others
(May attach list if More than one) N / A

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations – Standing Board Policy 9.50(c). Please include all responses with this requested form.

Referrals

1. The Tax Law Section of The Florida Bar

   _____ (Support, Oppose or No Position)

2. The Florida Bankers Association

   _____ (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised.

Fiduciary Duties in Insurance Trusts
WHITE PAPER

PROPOSED NEW FLORIDA STATUTE 736.0902

Estate and Trust Tax Committee
Real Property, Probate and Trust Law Section

September 1, 2009

I. SUMMARY

The purpose of the proposed addition of new section 736.0920 F.S. to the Florida Statutes, to be titled "Prudent Investor Rule Not to Apply," is to relieve the trustee of an Irrevocable Life Insurance Trust (ILIT) from a duty to determine whether decisions made by the Settlor in the selection of a life insurance company, a particular type of life insurance policy, and the continuing payment of policy premiums from funds provided by the Settlor, are appropriate investments and in the best interest of the beneficiaries.

II. CURRENT SITUATION

The settlor of an ILIT selects the insurer and the applicable policy. The trustee has a continuing duty to the beneficiaries to make certain that the insurance company is financially sound and the policy is still a prudent and viable investment. However, it is the settlor who makes the initial choice of the insurer and the policy, and the one who contributes the funds to pay the annual premiums. It is also the settlor who chooses the trustee and with whom he/she has a client relationship.

Presently, s. 518.112 F.S. permits the trustee of an ILIT to delegate some responsibilities for life insurance held as an asset of the trust. After giving 30 days' notice to the beneficiaries, the trustee may delegate to an agent the responsibility for monitoring the insurer and the policy, exercising policy options, tracking the health of the insured, and diversifying the investment. However, it is not appropriate to hold the trustee responsible for decisions made by the settlor, nor practical for the trustee to follow the formal delegation and notice procedure required by the statute in the following two activities: 1) selection by the settlor of the insurer or the policy upon creation of the trust, and 2) paying annual premiums from funds provided by the settlor.

Pursuant to s. 627.404 F.S., an insurance policy purchased by a trustee is invalid unless the proceeds of the policy are primarily for the benefit of persons who have an "insurable interest" (i.e. close relationship) with the insured. However the trust settlor, not the trustee, selects the policy, selects the trustee, names the beneficiaries of the trust and provides the funds to pay the premiums. These choices are often made before the trust is created. The settlor then funds the trust with funds sufficient only to pay the premium on the policy, in most cases immediately before the premium payment is due. It

is not reasonable to impose a duty on the trustee to review these particular decisions made by the settlor or his advisors, nor practical to force the trustee to utilize the delegation process for these particular decisions.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would create s. 736.0902 F.S. providing that in the absence of contrary language in the governing ILIT instrument, the trustee would have no duty to determine whether the trust has an insurable interest in the life of the insured where the insured or the insured's spouse provides funds to purchase the policy. The new section also contains elective provisions that would release the trustee from any duty to determine whether any life insurance policy owned by the trust is a proper investment when the funds to acquire or carry the policy are provided by the insured or the spouse of the insured. To avoid any conflict of interest or self dealing, this new statute would not apply to any life insurance policy purchased from an affiliate of the trustee or from which the trustee or an affiliate receives any commission.

The proposal does not otherwise diminish the trustee's ongoing responsibilities to monitor all other types of life insurance. The proposal also corrects inconsistencies in the notice provisions of the Prudent Investor Act, Trust Code and Probate Code.

IV. ANALYSIS

The primary purpose of an ILIT is to purchase and maintain insurance on the life of the settlor that will pay a highly leveraged amount at the settlor's death that will not be includible in the settlor's gross estate. Since the settlor chooses the insurance carrier, the policy, and whether to continue to make annual exclusion gifts to the trust to pay premiums on the policy, it is most appropriate and practical to relieve the trustee of the duty and liability for those decisions or to be forced to delegate those decisions to an agent. This would be accomplished by the proposed new s. 736.0902 F.S. which is attached.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS--None

VI. DIRECT IMPACT ON PRIVATE SECTOR--None

VII. CONSTITUTIONAL ISSUES—None apparent

VIII. OTHER INTERESTED PARTIES—None known at this time

A bill to be entitled

An act relating to spousal rights procured by fraud, duress, or undue influence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 732.805, Florida Statutes, is added to read:

732.805. Spousal rights procured by fraud, duress, or undue influence

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent, unless both spouses subsequently ratify the marriage:

(a) any rights or benefits under the Florida Probate Code, including but not limited to entitlement to elective share, preference in appointment as personal representative, family allowance, inheritance by intestacy, homestead, exempt property, or inheritance as a pretermitted spouse.

(b) any rights or benefits under a bond, life insurance policy, or other contractual arrangement of which the decedent was the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) any immunity from the presumption of undue influence that the surviving spouse may have under Florida law.

(2) Any of the rights or benefits listed in paragraphs (a), (b), and (c) of subsection (1) that would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence pursuant to this section, shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent

in any proceeding in which the fact of marriage may be material, either directly or indirectly.

(4) The contestant shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. In the event ratification is raised as a defense, the surviving spouse shall have the burden of establishing, by a preponderance of the evidence, a subsequent ratification of the marriage by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligations is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless it is commenced within four years after the decedent's date of death. A cause of action under this section shall accrue on the decedent's date of death.

Section 2. This act shall take effect [TBD].

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By	William T. Hennessey, Chair, Probate and Trust Litigation Committee of the Real Property Probate & Trust Law Section
Address	Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: whennessey@gunster.com
Position Type	Probate and Trust Litigation Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

William T. Hennessey, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: whennessey@gunster.com
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone: (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone: (850) 222-3533

Appearances Before Legislators N/A at this time
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff N/A at this time
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A at this time
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support legislation that would permit a challenge to certain property and inheritance rights that inure to a surviving spouse who procures a marriage to a decedent by fraud, duress, or undue influence."

Reasons For Proposed Advocacy:

The mere status of being a surviving spouse affords a myriad of significant default financial benefits under Florida law, including the right to homestead property, an elective share in decedent's augmented estate, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative. However, when a marriage to a decedent is procured by fraud, duress, or undue influence, it is unfair and against public policy for a surviving spouse to receive these default benefits solely due to their status as a surviving spouse.

Under current law, the surviving beneficiaries or heirs of a decedent may have no remedy to address the inequities that result when an individual procures a marriage to decedent by fraud, duress, or undue influence. The proposed legislation is intended to resolve this situation by permitting challenges to certain default property and inheritance rights that inure to a surviving spouse as the result of a marriage procured by fraud, duress, or undue influence solely by virtue of that individual's status as a surviving spouse. The proposed legislation addresses this issue without disturbing Florida's treatment of the institution of marriage. For further explanation and analysis, see the attached White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

N/A at this time
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED LEGISLATION REGARDING CHALLENGE TO SPOUSAL RIGHTS PROCURED BY FRAUD, DURESS, OR UNDUE INFLUENCE

I. SUMMARY

The mere status of being a surviving spouse affords a myriad of significant financial benefits under Florida law, including rights in homestead property, an elective share in decedent's augmented estate, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative. In most cases, these substantial benefits are well-deserved and work to further Florida's strong public policy in protecting a decedent's surviving spouse.

However, when an individual procures a marriage to a decedent by fraud, duress, or undue influence, it is unfair and against public policy for a surviving spouse to receive these default benefits solely due to their status as a surviving spouse. Under current Florida law, the beneficiaries or heirs of a decedent may have no remedy to address the inequities that result when an individual procures a marriage to a decedent by fraud, duress, or undue influence. The proposed legislation addresses this problem without disturbing the validity of the marriage itself. In particular, the proposed legislation permits a challenge to various default property and inheritance rights that inure to a surviving spouse who has procured a marriage through fraud, duress, or undue influence.

II. CURRENT FLORIDA LAW

Currently there is no Florida statute that authorizes a challenge to the validity of a marriage after the death of one of the spouses. Nevertheless, a number of Florida cases have touched on this issue. Under existing Florida case law, an invalid marriage may be void, or merely voidable, depending on the cause and nature of the invalidity. The definitions of void and voidable marriages are critical because the ability for interested third parties to challenge the marriage after death turns on the distinction between the two.

A. Void Marriage

Florida case law has made it clear that an action challenging a marriage can be maintained after the death of the spouse only if the marriage is *void*. Kuehmsted v. Turnwall, 138 So. 775, 777 (Fla. 1932). A void marriage is an absolute nullity and its invalidity may be shown either during the lifetime of the parties to the marriage, or after their deaths. Id. at 778. Upon proof of facts rendering a marriage void, the marriage will be disregarded or treated by nonexistent by the court. Id.; Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946).

A marriage is void *ab initio* ("from the start"), and will be treated as if no marriage had taken place, when:

- it is a bigamous marriage, § 826.01, et. al. Fla. Stat.;
- it is an incestuous marriage, § 741.21, Fla. Stat., § 826.04, Fla. Stat.;

- it is a marriage between persons of the same sex, § 741.212, Fla. Stat.;

- it is a common-law marriage entered into after January 1, 1968, § 741.211, Fla. Stat.;

- there is a prior existing marriage that is undissolved at the time the parties enter the marriage, see Smithers v. Smithers, 765 So. 2d 117 (Fla. 4th DCA 2000); or

- one or both parties lack the requisite mental capacity at the time the marriage is actually contracted, Kuehmsted, 138 So. at 778; Bennett, 26 So. 2d at 651.

Because an essential element for marriage is the possession of sufficient mental capacity to consent to the marriage, the marriage of a person who is insane or otherwise mentally incompetent to consent to the marriage is void *ab initio*. Kuehmsted, 138 So. at 778; Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994), see also 4 Am. Jur. 2d Annulment of Marriage § 30 (2009).

B. Voidable Marriage

A voidable marriage, unlike a void marriage, may be attacked only in a direct proceeding during the life of the parties. Arnelle, 647 So. 2d at 1048 (citing Kuehmsted, 138 So. at 777). Upon the death of either party, a voidable marriage is deemed valid from the outset. Id. The right to annul a voidable marriage has been held to be a personal right, and an action to annul such a marriage can only be maintained by a party to the marriage contract, or where the spouse seeking annulment is under legal disability, by someone acting on his or her behalf. See Kuehmsted at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. Arnelle 647 So. 2d at 1048-49; see also 91 A.L.R. 414, Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable (2007 update).

A marriage has been held to be voidable when:

- consent to the marriage was obtained by undue influence, Arnelle, 647 So. 2d at 1048-49; Hoffman, 385 So. 2d at 1069;

- consent to the marriage was obtained by duress, In re Ruff's Estate, 32 So. 2d 840, 842 (Fla. 1947) (where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); Tyson v. State, 90 So. 622, 623 (Fla. 1922) (evidence showed that marriage was procured by fraud and effected as a result of coercion); or

- consent to the marriage was obtained by fraud, Cooper v. Cooper, 163 So. 35 (Fla. 1935) (marriage voidable where the marriage ceremony was procured by fraud). *But see* Savage v. Olsen, 9 So. 2d 363 (Fla. 1942) (holding that gross fraud coupled with diminished capacity may render a marriage void).

The above cases hold that the existence of undue influence, duress, or fraud, which are the three most common methods for exploiting an elderly and infirm, but arguably competent

person, would only render a marriage voidable. In these situations, the surviving family members cannot challenge the marriage after the death of one of the parties to the marriage. Because the marriage cannot be challenged, the accompanying default rights of the surviving spouse are protected under Florida law despite the surviving spouse's fraudulent actions.

C. Examples of Injustice Under Current Law

Hoffman v. Kohns illustrates the tremendously unfair outcome that can result under existing Florida law. 385 So. 2d 1064 (Fla. 2d DCA 1980). In Hoffman, the decedent, Herbert Kohns died at the age of 84. He had no children or other lineal descendants. His closest living heir was his niece, Dorothy Hoffman. Approximately 7 years before his death, Herbert established a revocable trust with himself and his niece, Dorothy as co-trustees. Herbert also executed a pour-over will at that time.

In the years that followed, Hebert's mental capacity began to diminish. He became "extremely forgetful, paranoid, and suspicious, expressing distrust of all banks, doctors, trust officers and others." Id. at 1066. In 1974, at the age of 82, Herbert was hospitalized for a lack of blood to the brain and senility. His diagnosis at that time was "acute organic brain syndrome." Herbert subsequently moved into a nursing home, but later returned home, where he needed 24 hour nursing care.

Herbert's long-time attorney put an ad in the newspaper for a live-in housekeeper to provide Herbert with transportation, buy food, pay his bills, and handle his routine financial matters. During this time, the Court found that Herbert was "frail and feeble, disoriented at times, forgetful, sometimes hostile and irate, suspicious and paranoid. He was withdrawn at times, sitting for hours staring into space." Id.

During the last week of August, 1975, a woman named Eloise was hired as Herbert's housekeeper. She was 55 years old – almost 30 years younger than Herbert. Within days after taking the job in early September, Eloise took Herbert to the bank where she closed out his safe deposit box, which had $40,000 worth of bearer bonds. Within two weeks of taking the job, Eloise drove Herbert to the courthouse and applied for a marriage license. Three days later, she drove him back to the courthouse and had a marriage ceremony performed by a notary.

The day after the marriage, less than three weeks after she began working for Herbert, Eloise took Herbert to her lawyer (not his lawyer of the last 10 years) to have a new will drawn up naming Eloise as the sole beneficiary of his estate. Shortly thereafter, Eloise took Herbert to the bank and arranged for the withdrawal of Herbert's savings account, transferring all of the funds into joint names. Ultimately, all but two of Herbert's accounts were closed and transferred into joint accounts with Eloise.

Dorothy and her family attempted to contact Herbert several times in September, October, and November 1975, but each time were told that he was indisposed or out walking. Eloise assured them that Herbert was doing fine, but she never indicated that she had married him.

Herbert's physician saw him for the last time in October 1975, about a month after the marriage. Eloise told the doctor that she was Herbert's housekeeper. Herbert's doctor later

testified that Herbert was incompetent and had been for some time. Eloise's physician started seeing Herbert around the same time and treated him through his death about 10 months later. He testified that he felt Herbert was competent, but he said he would change his opinion if the medical history given to him by Eloise, was materially incorrect. Herbert was hospitalized on multiple occasions over the next 10 months. In July 1976, he went in for surgery, had a stroke, and went into a coma. Herbert died in September 1976.

After Herbert's death, Dorothy filed a petition to revoke probate of the September 1975 will on the basis of undue influence. Dorothy also attacked the validity of the marriage between Herbert and Eloise. The matter went to trial and the court found that:

> The evidence establishes that [the housekeeper] completely dominated Kohns both before and after September 27, 1976, the date the new will was executed, by taking control of all his business affairs, taking over the writing of checks and balancing of his checkbook, and changing his attorney, doctor, accountant, and stockbroker. The systematic transfer of all of Kohns' assets to [the housekeeper] is further evidence of her undue influence. There is no evidence that Kohns made a single independent decision after the marriage . . . Kohns' marriage to a woman thirty years younger than he, whom he had known for less than a month; the complete cancellation of his entire long-standing estate plan; and the changing of his doctor of over fifteen years, his lawyer of ten years, his accountant, and his stockbroker, all within a few weeks, are highly unusual, and the trial court quite properly found that these actions were taken as a result of the undue influence of [the housekeeper].

Id. at 1068-69.

As set forth above, the Court concluded that the September 1975 Will prepared by Eloise's lawyer was procured by undue influence and was therefore invalid. The Court also found that the marriage was procured by undue influence. However, the Court held that the marriage could not be attacked after Herbert's death on the grounds of undue influence because a *voidable* marriage can only be attacked during the lifetimes of both spouses. The Court found that the conflicting testimony on lack of capacity prevented the court from declaring the marriage *void* on capacity grounds. Accordingly, the Court held that the Eloise's marriage to Hebert was *valid*. Because the will admitted to probate, which favored Hebert's niece, was executed before the marriage, Eloise was deemed a "pretermitted spouse" under Florida law which entitled her to inherit Herbert's *entire* estate. Id.

Thus, even though the court found that Eloise had procured the marriage by undue influence for the purpose of gaining inheritance rights, the court found that Eloise was nevertheless entitled to take Herbert's *entire estate* as a pretermitted spouse. A similar result under similar facts can be found in Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994).

III. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed legislation adds a new section to the Florida Probate Code that would permit a challenge to certain default property and inheritance rights that inure to a surviving spouse who has procured a marriage by fraud, duress, or undue influence without a challenge to the validity of the marriage itself. This new section is similar to Florida's existing "Slayer Statute", Florida Statutes § 732.802, which prevents a person who kills a decedent from profiting from their crime. A section-by-section analysis of the proposed legislation captioned "Section 732.805. Spousal rights procured by fraud, duress, or undue influence" follows:

A. Effect of Subsection (1) to § 732.805

The effect of Subsection (1) of the proposed statute is that a surviving spouse found to have procured a marriage to a decedent through the means of fraud, duress, or undue influence will not be entitled to certain default rights that accrue solely by virtue of the marriage or that person's status as surviving spouse.

Under Subsection (1)(a) rights that will no longer be available to the offending surviving spouse include any rights or benefits under the Florida Probate Code. This includes, but is not limited to, the entitlement to elective share under § 732.201, Fla. Stat., preference and appointment as personal representative under § 733.301, Fla. Stat., entitlement to a family allowance under § 732.403, Fla. Stat., inheritance by intestacy solely by the virtue as surviving spouse under § 732.102, Fla. Stat., an automatic interest in the decedent's homestead property under § 732.401, Fla. Stat., entitlement to exempt property under § 732.402, Fla. Stat., and inheritance as a pretermitted spouse under § 732.301, Fla. Stat.

In addition, Subsection (1)(b) would preclude a surviving spouse who procured a marriage or their status as surviving spouse through fraud, duress, or undue influence from receiving default rights or benefits under a bond, life insurance policy, or other contractual arrangement in which the decedent was the principal obligee. For example, a surviving spouse who wrongfully procured a marriage would not be entitled to benefits under an insurance policy or annuity contract which provides for a spouse of the decedent as the default beneficiary. However, the statute has no effect when a surviving spouse is specifically designated as a beneficiary by name. For example, if the decedent specifically names his or her spouse as a beneficiary of an insurance policy by name, the statute would have no effect on the rights of the spouse. The reason for this distinction is that law already provides a remedy for challenging a beneficiary designation that was wrongfully procured by undue influence, duress, or fraud. Subsection 1 is only intended to address rights which a surviving spouse receives solely by virtue of the marriage.

Subsection (1)(c) provides that a surviving spouse who procures a marriage by fraud, duress or undue influence will not be entitled to rights or benefits under a will, trust, or power of appointment where the document simply uses the default language "spouse." For example, if the decedent's wealthy father created a trust for the benefit of the decedent during his lifetime with remainder to the decedent's "surviving spouse", the mere status as a surviving spouse would create rights for the spouse in the decedent's father's trust. The decedent's father may have executed this trust years before the decedent met the undue influencing spouse so that trust

provision could likely not be challenged on the grounds of fraud or undue influence. Subsection 1(c) further provides that, if the surviving spouse is provided for by name, the statute will not preclude that individual's entitlement to those property rights. For example, if a decedent makes specific provision for "my spouse, Jennifer", the statute will have no effect on the devise. Again, the reason for this dichotomy is that an offending provision in a will or trust which was procured by the undue influence, fraud, or duress can be challenged under current law.

Under current Florida law, a surviving spouse is immune from the presumption of undue influence on the basis that every marriage involves confidential disclosures. Jacobs v. Vaillancourt, 634 So. 2d 667, 672 (Fla. 2d DCA 1994); Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981). Under Subsection (1)(d) of the proposed statute, a surviving spouse who is found to have procured a marriage to the decedent by fraud, duress or undue influence will no longer receive the immunity from the presumption of undue influence.

Finally, Subsection (1) permits a surviving spouse to raise the fact that the marriage was subsequently ratified as a defense. Accordingly, if both spouses subsequently ratify the marriage, such ratification may be raised as a defense even though the marriage was originally procured through the means of fraud, duress or undue influence.

B. Effect of Subsection (2) to § 732.805

Subsection (2) of the proposed statute provides that if a surviving spouse is found to have procured the marriage to the decedent by fraud, duress, or undue influence, the property that would otherwise have passed solely by virtue of the marriage to the surviving spouse shall now pass as if the spouse had predeceased the decedent.

C. Effect of Subsection (3) to § 732.805

Subsection (3) of the proposed statute makes it clear that a challenge of a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent. Further, a defense, objection, or cause of action under this section may be brought in any proceeding in which the fact of marriage may be material, either directly or indirectly. For example, it may make sense for the issue of spousal rights procured by fraud, duress or undue influence to be raised in response to a surviving spouse's petition for elective share. However, it is also possible that challenge under this statute may take the form of a civil action or other cause of action for declaratory relief.

D. Effect of Subsection (4) to § 732.805

Subsection (4) addresses the burden of proof applicable to a challenge to spousal rights under this statute. Under Subsection (4), the contestant to the spousal rights shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress or undue influence. In the event that ratification is raised in the defense, the surviving spouse shall have the burden of establishing, by preponderance of the evidence the subsequent ratification of the marriage by both spouses, which is authorized by Subsection (1).

E. Effect of Subsection (5) to § 732.805

Subsection (5) provides that the court shall award taxable cost as in chancery actions, including attorney's fees. When awarding fees and costs, the court has discretion to direct all or part of the payment from a party's interest in the estate, or to enter a judgment that may be satisfied from other property of the party. This subsection is intended to deter spurious claims by providing a shifting of fees to the losing party.

F. Effect of Subsection (6) to § 732.805

Subsection (6) provides that an insurance company, bank, or other obligor that makes a payment according to the terms of its policy or obligations will not be held liable for making payments to the surviving spouse, unless prior to payment it has received at its home office or principal address written notice of a claim under this section. This subsection was added to provide protection for institutions making payments in good faith without notice of the challenge to spousal rights.

G. Effect of Subsection (7) to § 732.805

Subsection (7) provides that the proposed statute does not limit the rights that any litigant may have under existing Florida law. There may be other defenses and causes of action available to beneficiaries of an estate when a spouse has procured a marriage by undue influence, fraud, or duress. For example, there may be equitable defenses which would prevent the spouse from inheriting or, alternatively, a beneficiary may be able to state a claim for tortuous interference with an expectancy. This statute is not intended to limit such claims or defenses.

H. Effect of Subsection (8) to § 732.805

Subsection (8) provides that an interested person is barred from bringing an action to challenge spousal rights under the proposed statute, unless such an action is commenced within four years after the decedent's date of death. Subsection (8) contemplates that such an action may be barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules. For example, if a surviving spouse files a petition for elective share and the contestant receives notice of such a petition yet fails to raise the invalidity of the marriage as a defense at that time, a later challenge under this section may be barred.

Further, Subsection (8) makes it clear that a cause of action under this section accrues on the decedent's date of death. Accordingly, unless there is an earlier triggering period limiting the application of the statute, there is an outside four-year time frame following the decedent's death within which a contestant is entitled bring a claim under this section.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will prevent financial benefits from passing to an undeserving surviving spouse, in favor of the innocent beneficiaries. Therefore, no net impact on the private sector is expected.

VI. CONSTITUTIONAL ISSUES

There do not appear to be any constitutional issues that arise as a result of this proposal.

VII. OTHER INTERESTED PARTIES

To be determined

732.401. Descent of homestead

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes. The surviving spouse may elect to take an undivided one-half interest as tenant in common in the homestead in lieu of the life estate provided under this section, in which event, the remaining undivided one-half interest shall vest in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(2) (a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. The court shall determine the election as the best interests of the surviving spouse, during the surviving spouse's probable lifetime, require.

(b) The election shall be made within six months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in subsection (2) (d).

(c) Once made, the election shall be irrevocable.

(d) A petition by an attorney in fact or guardian of the property for approval to make the election shall toll the time for making the election until the

later of six months after the decedent's death or 30 days after the rendition of an order authorizing the election.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead real property for recording in the office of the clerk of the Official Record Books in the county or counties where the homestead real property is located. The election shall be in substantially the following form:

ELECTION OF SURVIVING SPOUSE
TO TAKE A ONE-HALF INTEREST OF
DECEDENT'S INTEREST IN HOMESTEAD REAL
PROPERTY

STATE OF _____

COUNTY OF _____

1. The decedent, _____, died on _____. The decedent was married on the date of the decedent's death to _____, who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property which Affiant believes to be homestead real property described in Article X s. 4 of the Constitution of the State of Florida, that real property being in _____County, Florida, and described as:

(the "Homestead")

3. Affiant elects to take one-half of Decedent's interest in the Homestead in lieu of a life estate.

4. If Affiant is not the surviving spouse, Affiant is the surviving spouse's attorney-in-fact or guardian of the property and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

_____
Affiant

Sworn to or affirmed and subscribed before me on _____, 20__ by Affiant.

_____
[print name]
Notary Public
State of Florida at Large
My Commission Expires:
Affix Notary Seal

Check applicable statement:

☐ Affiant is personally known to me, or

☐ Affiant produced as identification _____

(3) Unless and until an election is made, the expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with c. 738, Florida Statutes. If the election under subsection (1) is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to c. 739, the interests of the decedent's descendants shall not be divested.

~~(2)~~(5) ~~Subsection (1)~~ This section shall not apply to property that the decedent ~~and the surviving spouse~~ owned ~~as~~ in tenan~~ts~~cy by the entiret~~y~~ies or joint tenancy with rights of survivorship.

732.4015 Devise of Homestead.

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) If an interest in homestead has been devised to the surviving spouse as permitted by law and the Florida Constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with c. 739.

744.444. Power of guardian without court approval

Without obtaining court approval, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(1) Retain assets owned by the ward.

(2) Receive assets from fiduciaries or other sources.

(3) Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities.

(4) Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons.

(5) Execute and deliver in his or her name as guardian any instrument necessary or proper to carry out and give effect to this section.

(6) Pay taxes and assessments on the ward's property.

(7) Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval.

(8) Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward. This subsection does not authorize the guardian of a minor to expend funds for the ward's living expenses if one or both of the ward's parents are alive.

(9) Elect whether to dissent from a will under the provisions of s. 732.2125(2), seek approval to make an election in accordance with s. 732.401, or assert any other right or choice available to a surviving spouse in the administration of a decedent's estate.

(10) Deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent investments. The guardian may redeem or sell such deposits or investments to pay the reasonable living expenses of the ward as provided herein.

(11) Pay incidental expenses in the administration of the estate.

(12) Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(13) When reasonably necessary, employ persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.

(14) Execute and deliver in his or her name as guardian any instrument that is necessary or proper to carry out the orders of the court.

(15) Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held.

(16) Pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian pursuant to subsection (13) from the assets of the guardianship estate, subject to obtaining court approval of the annual accounting.

(17) Provide confidential information about a ward that is related to an investigation arising under part I of chapter 400 to a local or state ombudsman council member conducting such an investigation. Any such ombudsman shall have a duty to maintain the confidentiality of such information.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Shane Kelley, Chair, Ad Hoc Study Committee on Homestead Life Estates of the Real Property Probate & Trust Law Section

Address 3365 Galt Ocean Drive, Ft. Lauderdale, FL 33308
Telephone: (954) 563-1400

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Shane Kelley, The Kelley Law Firm, PL,3365 Galt Ocean Drive, Ft. Lauderdale, FL 33308, Telephone (954) 563-1400.
Michael J. Gelfand, Gelfand & Arpe, 1555 Palm Beach Lakes Blvd., Ste. 1220, West Palm Beach, Florida 33401
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendments to F.S. §§ 732.401, 732.4015, and 744.444. The constitutional restrictions on the devise of homestead, as well as the forced descent of homestead which is not validly devised pursuant to s. 732.401, present practical difficulties for the very persons intended to benefit from the restrictions. The proposed changes to sections 732.401 and 732.4015 of the Florida Statutes are intended to offer planning alternatives, reduce confusion in a difficult area of law, and provide the surviving spouse with an election to take alternative form of ownership. The election would function similar to the elective share election (see s. 732.732.201) and would allow a surviving spouse to elect between a life estate interest or a tenancy in common interest in the homestead property. If a surviving spouse elected to take a tenancy in common interest in the property (as opposed to a life estate interest), either the descendants or the surviving spouse could then force a partition of the property. That remedy is not presently available under the current statutory scheme."

Reasons For Proposed Advocacy:

Article X, Section 4(c) of the Florida Constitution prohibits the devise of homestead property if the owner is survived by a spouse or minor child. F.S. § 732.401 provides that homestead which has not been devised in accordance with the constitutional restrictions descends to the surviving spouse for life, with a remainder interest to the lineal descendants then living, per stirpes. This creates a difficult situation when the surviving spouse has certain economic duties (such as property taxes, insurance, ordinary maintenance, and mortgage interest) which the surviving spouse cannot afford. The rights of the decedent's descendants are jeopardized when the property is not maintained, taxes are not paid, or the mortgage payments are not paid. Florida's laws relating to partition do not permit the holder of a life estate or the remainder beneficiaries to force the sale of the home. Some practitioners have attempted to solve this dilemma through the use of a disclaimer under Chapter 739, Florida Statutes, resulting in a situation that has not been addressed consistently by the courts. *In re: Estate of Frances N.* Janien, 12 Fla. L. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15th Cir. Ct., (December 6, 2004); In *Re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15th Cir. Ct., June 17, 1993), aff'd, per curiam, No. 93-2074 (Fla. 4th DCA July 20, 1994). *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12th Cir. Ct. March 25, 1994), aff'd, per curiam, No. 94-02102 (Fla. 2d DCA, March 10, 1995) held to the contrary. The proposed legislation clarifies the impact of a spouse's disclaimer in homestead real property and allows the surviving spouse to make an election within a limited time to take an undivided ½ interest in the homestead, as opposed to a life estate (which would then allow a partition of the property if necessary). An amendment to s. 744.444 is also being proposed to clarify that if the surviving spouse is incapacitated, his or her guardian may seek approval to make the election. Please see attached White Paper for further analysis and explanation.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

Others
(May attach list if more than one) NONE

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

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WHITE PAPER

PROPOSED AMENDMENTS TO §§ 732.401, 732.4015 and 744.444, FLA. STAT.

I. SUMMARY

The proposed changes are submitted to address problems that result from the forced descent of homestead pursuant to F.S. § 732.401, while preserving the underlying public policy of the Florida Constitution and the statute designed to protect surviving spouses and minor children. The restrictions on the devise of homestead, as well as the forced descent of homestead which is not validly devised or which cannot be devised, present practical difficulties for the very persons intended to benefit from the restrictions. F.S. § 732.401 provides that homestead which has not been devised in accordance with the constitutional restrictions descends to the surviving spouse for life, with a remainder interest to the lineal descendants then living, per stirpes. This creates a difficult situation when the surviving spouse has certain economic duties (such as property taxes, insurance, ordinary maintenance, and mortgage interest) which the surviving spouse cannot afford. The rights of the decedent's descendants are jeopardized when the property is not maintained, taxes are not paid, or the mortgage payments are not paid. Florida's laws relating to partition do not permit the holder of a life estate or the remainder beneficiaries to force the sale of the home.

The proposed changes to sections 732.401 and 732.4015 of the Florida Statutes are intended to offer planning alternatives, reduce confusion in a difficult area of law, and provide an alternative form of ownership for a surviving spouse. The election would function similar to the elective share election (see s. 732.732.201) and would allow a surviving spouse to elect between a life estate interest or a tenancy in common interest in the homestead property. If a surviving spouse elected to take a tenancy in common interest in the property (as opposed to a life estate interest), either the descendants or the surviving spouse could then force a partition of the property. That remedy is not presently available under the current statutory scheme. While the restrictions on the devise of homestead are addressed in Article X, Section 4 of the Florida Constitution, the Florida Constitution does not address how devise restricted property descends upon the death of the owner. That matter is solely addressed by the Florida Statutes, specifically

F.S. 732.401, and as a result, the proposed legislation will have no effect on the provisions of Article X, Section 4 of the Florida Constitution and will present no constitutional concerns.

II. SECTION-BY-SECTION ANALYSIS

A. Section 732.401

Current Situation

Restrictions on the Devise of Homestead. The Florida Constitution provides for restrictions on the devise of homestead, designed to protect surviving spouses and minor children. Article X, section 4 provides:

> (c) The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child.…

While the devise restrictions on the homestead property are contained in Article X, Section 4 of the Florida Constitution, the Florida Constitution does not address how that property descends upon the death of the owner of the homestead. The descent of devise restricted homestead property is controlled by F.S. 732.401. Specifically, if the owner of homestead real property attempts to devise homestead in a manner not permitted by the constitution, or fails to make a devise of the homestead, ownership descends as provided in section 732.401, Florida Statutes, which provides:

> ... the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

When homestead cannot be devised, or is improperly devised so the devise is ineffective, the surviving spouse takes a life estate with a vested remainder in the decedent's descendants, per stirpes. This arrangement can create great burdens on the surviving spouse and the lineal descendants regarding the expenses and upkeep of the property which can actually result in the life estate / remainder ownership becoming a burden on the very people the law is designed to

protect. [1] It is important to note that while the restrictions on the devise of homestead are addressed in Article X, Section 4 of the Florida Constitution, the Florida Constitution does not address how devise restricted property descends upon the death of the owner. The provisions regarding how the homestead property descends are addressed solely in the Florida Statutes, specifically F.S. 732.401, and therefore, any proposed changes to how the devise restricted homestead property descends upon the death of the owner is properly within the purview of the legislature.

Allocation of Ownership Expenses. Expenses are allocated between the life tenant and the remaindermen under the Florida Uniform Principal and Income Act.[2] The spouse, as life tenant, is responsible for paying the interest portion of mortgage payments, property taxes, insurance, and ordinary repairs. The decedent's descendants, as the remaindermen, are responsible for paying the principal portion of the mortgage payments, and to make extraordinary repairs. This creates a difficult economic partnership, especially when the decedent's descendants are not children of the surviving spouse. Often the surviving spouse cannot afford the obligations of the life estate. Other times, the remainder beneficiaries cannot or will not make the principal payments due on the mortgage, or make extraordinary repairs on the property. While this allocation of expenses applies to other life estates and remainder interests created intentionally by deed, will, or trust. , the life estate and remainder interests created by section 732.401 are forced upon the spouse and descendants.

A Life Estate the Spouse Can't Afford. Because the surviving spouse only has a life estate, he or she has a duty to the remaindermen to maintain the property. If the surviving spouse cannot afford to do so, selling the home may be an option, but is possible only if the remaindermen agree. The sale, however, creates complex estate and gift tax issues affecting all parties involved. The remedy of a partition action under Chapter 64, Florida Statutes, is not available to force the sale of the property since the remaindermen (descendants) do not have a current possessory interest in the property.

[1] Jeffrey A. Baskies, *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 Fla. Bar J. 69 (June 2007).
[2] §§ 738.701-738.705; § 738.801, Fla. Stat. (2009).

Value of the Surviving Spouse's Life Estate. Even if all parties involved agree to sell the home, valuation of the interests of the life tenant and remaindermen is very difficult. The spouse generally thinks the life estate is worth a great deal, the remaindermen think the life estate is worth little (since it could end at any moment), and the IRS, except in limited circumstances, will apply its actuarial tables which do not take into account other relevant circumstances.[3]

Gift Taxes Upon Sale of the Home. There may be federal gift tax consequences resulting from the sale of homestead real property when certain estate tax elections have been made. The spouse's life estate is eligible for the marital deduction against the estate tax which postpones the estate tax on the homestead property until the death of the surviving spouse.[4] If an election has been made to qualify the life estate for the marital deduction, the home is later sold and the proceeds are divided between the spouse and descendants, the spouse will be considered to have made a gift of the entire proceeds (less the value of what the spouse retained in the division of the sale proceeds). The only way to avoid this potential gift tax trap would be to put the entire proceeds in a trust meeting the requirements of Section 2056(b)(7) of the Internal Revenue Code,[5] an unsatisfactory result in most cases. If the marital deduction has not been claimed for the homestead property, there will still be gift tax ramifications to a sale of the homestead if the proceeds are split between the spouse and descendants other than pursuant to the IRS' actuarial tables.

Disclaimers When Homestead is Not Validly Devised. In the past, some practitioners have attempted to use disclaimers as a way to cure an invalid devise of homestead and avoid the application of section 732.401. In reviewing the effect of a spouse's disclaimer, circuit courts have reached conflicting results. This issue needs to be resolved.[6]

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[3] The IRS tables may not be used for a person suffering from a terminal illness with a 50% probability of dying within one year. Treas. Reg. s. 25.7520-3(b)(3).

[4] The qualified terminable interest property ("QTIP") election.

[5] The spouse would be entitled to all the income for life. The descendants would receive nothing until after the death of the spouse.

[6] *See* R. Craig Harrison, *Homestead – The Post-Death Spousal Disclaimer: A Cure for a Constitutionally Prohibited Devise?*, 70 Fla. Bar J. 42 (April 1996).

Effect of Proposed Changes to Section 732.401

Subsection (1) – Election Between a Life Estate or a 50% Share. Subsection (1), as amended, would provide the surviving spouse with a choice upon the death of the first spouse. The spouse could accept the life estate currently provided under section 732.401(1) or elect to take an undivided one-half interest in the homestead, with the decedent's descendants receiving the other undivided one-half interest. This alternative creates a tenancy in common relationship between the spouse and the decedent's descendants. The law applicable to tenancy in common interests is clearer in the areas of valuation, allocation of ownership expenses, and division of sale proceeds. In addition, the surviving spouse could utilize the partition procedures under Chapter 64 which are not available to a life tenant. One half of the net proceeds of the partition action would be payable to the surviving spouse and the balance would be payable to the vested remaindermen.

The proposed change to subsection (1) would not jeopardize the marital deduction against estate taxes currently available for homestead property interests passing to the surviving spouse. A review of law from other jurisdictions suggests that the value of property received by the surviving spouse as a result of an election under state law should qualify for the marital deduction. The key is that the rights under the state law election must be contingent only upon the spouse's election, and not subject to a discretionary award by the court or the actions of third parties.[7] It is also important to note that Florida's homestead rights exist at the moment of the decedent's death. The purpose of creating an election by the spouse is to avoid jeopardizing the qualification of the present life estate in homestead for the marital deduction while providing an alternative form of ownership if the election is made. The spouse's election of the one-half tenant in common interest should qualify for the marital deduction as to the spouse's interest.[8]

The proposed election should not jeopardize any homestead-related property tax provisions as to the surviving spouse's interest. Florida Statutes section 193.155 provides that a change of ownership in homestead real property results in the reassessment of homestead

[7] Rev. Rul. 72-153, 1972-1 CB 309; *Miller v. U.S.*, 35 AFTR 2d 75-1571, 74-2 USTC 13039 (DC OH 1974); TAM 7511120080A, 1975 WL 38616 (Nov. 12, 1975); Rev. Rul. 76-166, 1976-1 CB 287.

[8] The spouse's life estate in homestead qualifies for the marital deduction for up to 100% of the value of the homestead.

property values to current just value as of January 1 in the year following the change of ownership. Section 193.155(c)(3) provides that there is no change of ownership when the change in ownership is by operation of law under section 732.4015. Under section 193.155(8) a homestead owner can apply the benefits of the Amendment 10 Cap to a new homestead. This would benefit the surviving spouse who elects an undivided one-half interest in the homestead, sells his or her interest, and then establishes a new homestead.

Subsection (2). Subsection (2) in the present statute would be moved and renumbered as subsection (5). The new subsection (2) describes who may make the election, when the election must be made, and the manner of making the election.

New subsection (2)(a) provides that the surviving spouse may make the election. When the election is made by the surviving spouse's guardian or attorney-in-fact, the election can be made only after the court finds that the election is necessary for the spouse's best interests, taking into account the surviving spouse's life expectancy. The proposed amendment is patterned after the elective share procedures found in section 732.2135, Florida Statutes.

New subsection (2)(b) addresses the time for making the election by the surviving spouse. Subsection (2)(b) provides that the election must be filed within six months of the decedent's death. The time for making the election is tolled when a guardian or attorney in fact petitions the court for approval to make the election, as provided in subsection (2)(d). Although the surviving spouse would have a short period of time to make the election, he or she would still benefit from the constitutional protections by receiving a life estate in the homestead if no election is made.

When the decedent's estate is required to file a federal estate tax return and pay estate tax (which is due within 9 months after the date of death), it is critical to know whether the homestead election has been made in advance of the due date for the filing of the return and payment of tax. The life estate provided to the surviving spouse under section 732.401 is eligible for the marital deduction to the extent of the full value of the property under Internal Revenue Code section 2056. The election to take an undivided one-half interest would result in only the value of a ½ interest in the homestead being eligible for the marital deduction. Whether the spouse accepts a life estate or elects a ½ interest, persons other than the spouse could be affected

significantly by the reduction in the estate tax marital deduction by the value of a ½ interest in the homestead.[9]

The time for making the homestead election differs from the provisions of Florida's elective share statute. Consideration was given to the distinctions between the two elections. The surviving spouse potentially takes nothing under the elective share statutes if the time requirements are not met. The proposed changes to the homestead statute, by contrast, still provide the surviving spouse with a life estate if no election is made so the underlying constitutional policy is preserved whether or not an election is made.

New subsection (2)(c) provides that the election is irrevocable. This avoids the potential title problems that would be created if the election were made and then withdrawn.

New subsection (2)(d) requires that the election be made within 30 days of the court order authorizing the election by a guardian or attorney in fact or within the time otherwise provided by law, whichever is later.

Subsection (2)(e) provides that the election may be made by recording a notice of the election in the public records for the county or counties in which the homestead is located. This allows the surviving spouse to exercise the election even if probate proceedings have not been initiated. The homestead election procedure differs from the elective share procedures which require a pending probate proceeding. The homestead election might not require a full probate proceeding because protected homestead is not considered an asset of the probate estate.[10] Similarly, the procedures for making a disclaimer under Chapter 739 account for situations where no active probate proceeding is pending by providing for delivery of the disclaimer to the person or entity having a specific relationship to the asset.[11]

[9] Protected homestead property is exempt from estate tax apportionment under Florida Statutes section 733.817, so others pay the tax, if any.

[10] § 733.608, Fla. Stat. (2009).

[11] § 739.301, Fla. Stat., Fla. Stat. (2009).

Subsection (3) – Allocation of Ownership Expenses. The responsibility for expenses allocated to a life tenant differs from that of a tenant in common. The following chart illustrates differences in the usual allocation of ownership expenses under the two forms of ownership.[12]

	Life Tenant Obligations	Obligation as 50% Tenant in Common
Mortgage Principal:	None	50%
Mortgage Interest:	100%	50%
Property Taxes	100%	50%
Ordinary Maintenance	100%	50%
Long-term Maintenance	None	50%

The proposed change provides that while the surviving spouse holds a life estate, he or she is responsible for the costs of ownership normally allocated to a life tenant. Upon electing an undivided one-half interest as tenant in common, the ownership expenses would then shift accordingly, as of the date the election is filed. The change in the allocation of expenses should not jeopardize the marital deduction against estate taxes if the election is made. Of course, there is no change in allocation of expenses if no election is made.

Subsection (4) – Effect of a Disclaimer under Ch. 739. New subsection (4) has been added to codify the ruling in the circuit court's *Ryerson* decision, which involved a surviving spouse's disclaimer of her interests in homestead which had been invalidly devised.[13] The proposed change would provide certainty for the courts, probate and real estate practitioners, as well as the parties involved, clarifying the interplay between the law of disclaimers and constitutional homestead protections.

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[12] The chart is for illustration purposes only and the allocation of expenses can be adjusted by the specific facts of any given situation as provided by current law.

[13] *Ryerson* held that where homestead was invalidly devised, a post death disclaimer of the surviving spouse's life estate in homestead did not divest the decedent's descendants of their vested remainder interests. At least one other circuit court has held that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to the otherwise invalid devise. The *Ryerson* decision is correct under the constitution. *In re: Estate of Frances N.* Janien, 12 Fla. L. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15th Cir. Ct., (December 6, 2004); In *Re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15th Cir. Ct., June 17, 1993), aff'd, per curiam, No. 93-2074 (Fla. 4th DCA July 20, 1994). *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12th Cir. Ct. March 25, 1994), aff'd, per curiam, No. 94-02102 (Fla. 2d DCA, March 10, 1995) held contrary to *Ryerson*.

Subsection (5) – When Section Not Applicable. Section 732.401(2) currently provides that the restrictions on the devise of homestead are not applicable to homestead owned by the decedent and surviving spouse as tenants by the entireties. Case law provides for the same result where the homestead is owned by the decedent and surviving spouse as joint tenants with right of survivorship.[14] The change clarifies that property owned by the decedent as a joint tenants with rights of survivorship is not subject to the restrictions on devise and is being added to prevent the argument that its omission in the statute reflects the legislature's intent to treat such interests differently.

B. Section 732.4015

Current Situation

Different considerations apply when a decedent makes a devise permitted by Article X, Section 4 of the Florida Constitution and Section 732.4015, Florida Statutes. Florida law provides that if the owner of homestead real property is survived by a spouse but no minor children, the homestead may be devised to the surviving spouse. When the devise to the surviving spouse is valid, no vested remainder passes to the decedent's descendants at death, in contrast to the situation with an invalid devise.

A spouse's disclaimer of a valid devise of homestead real property has the effect of treating the interest in homestead as if the surviving spouse predeceased the decedent. The disclaimer statute, section 739.201, provides that the interest then passes according to the decedent's will or trust, as if the surviving spouse died immediately before the decedent. (As noted in the *Ryerson* decision, a disclaimer does not cure an *invalid* devise of homestead.)

The use of a disclaimer under Chapter 739 of the Florida Statutes and Section 2518 of the Internal Revenue Code may play an important role in estate tax planning. Although a person making a disclaimer ordinarily cannot accept the benefits of the property disclaimed, there are exceptions for the surviving spouse.[15] Even if the disclaimed interest ultimately passes to the

[14] *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984).

[15] Treasury Regulations Section 25.2518-2(e)(2) provides that a disclaimer is qualified if (1) the interest passing to the surviving spouse is limited by an ascertainable standard, such as the normal provisions of a credit shelter trust; or (2) the interest passing to the surviving spouse will be included in the surviving spouse's estate for federal estate tax purposes.

surviving spouse under state intestacy law, the spouse's disclaimer can be tax-qualified. Section 739.501, Florida Statutes, provides that if the disclaimer is a tax-qualified disclaimer satisfying the requirements of section 2518 of the Internal Revenue Code, the disclaimer is effective for purposes of Florida law.

Effect of Proposed Changes to Section 732.4015

New subsection (3) is intended to eliminate confusion in situations where a devise of homestead to the surviving spouse is a valid devise. In such cases, a disclaimer of the devise by the surviving spouse results in the disclaimed interest passing as if the surviving spouse had predeceased the decedent. The decedent's will or trust would then determine to whom the homestead passes. If the devise of homestead to the spouse is valid, the decedent's descendants do not receive a vested remainder in the homestead at the moment of death. The surviving spouse's disclaimer of a valid devise to the surviving spouse does not cut off any vested rights of the decedent's descendants under the constitution because they had none to start with. Further, because the spouse is the one disclaiming, the public policies behind the constitutional restrictions on devise are satisfied. The purpose of this proposal is to clarify this area of the law to ensure that estate planning techniques will not be frustrated by inconsistent application of the law.

B. Section 744.444

Current Situation

Section 744.444 enumerates the powers that may be exercised by a guardian without obtaining a court order authorizing a specific power. The statute presently does not grant a guardian the authority to seek permission to make an election under section 732.401 for an incapacitated surviving spouse.

Effect of Proposed Changes to Section 744.444

The proposed changes to section 732.401 provide that a guardian can only make the election for the surviving spouse to receive an undivided one-half interest in the homestead after the guardian petitions the court for authorization to make the election. The proposed change

section 744.444 would coordinate the statute with the proposed changes to section 732.401 and would specifically provide the guardian the right to file a petition requesting that an election be made on behalf of the surviving spouse.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The restrictions on the devise of homestead are found in Article X, section 4 of the Florida Constitution. The homestead ad valorem property tax exemption is found in Article VII, section 6, as implemented in chapter 193, Florida Statutes. The Florida Supreme Court, in *Snyder v. Davis*,[16] noted that there are three categories of homestead, each with distinct constitutional and statutory provisions: creditor protection, restrictions on devise, and exemption from ad valorem property taxes. As the proposed changes are only dealing with the restrictions on devise, the proposed changes will have no impact on ad valorem property taxes or the exemptions relating thereto. Accordingly, there will be no impact on state and local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector. In certain individual situations, the proposed changes could result in a benefit by providing alternatives for surviving spouses and lineal descendants of decedents in situations which would otherwise create a conflict of economic interests for the parties involved.

V. CONSTITUTIONAL ISSUES

Article X, section 4 of the Florida Constitution prohibits the devise of homestead real property when the decedent is survived by a spouse or minor child, but permits a devise to the surviving spouse if the decedent is not survived by a minor child. The descent of homestead property which cannot be devised, or which is the subject of an invalid devise, is controlled by the Florida Statutes and is not addressed in the Florida Constitution. Accordingly, the proposed changes do not conflict with constitutional provisions and are consistent with the public policy underlying the constitutional restrictions on the devise of homestead.

[16] 699 So. 2d 999 (Fla. 1997).

VI. OTHER INTERESTED PARTIES

The title insurance companies will be interested in this matter as it will have some effect on the issuance of title insurance.

Proposed F.S. 732.xxx

Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death

(1) As used in this section, unless the context requires to the contrary:

(a) "asset," when not modified by another word or phrase or other words or phrases, means an asset described in subsection (3).

(b) "beneficiary" means any person designated in the governing instrument to receive an interest in an asset upon the death of the decedent.

(c) "death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) "governing instrument" means a writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

(e) "payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(f) "primary beneficiary" is a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a "primary beneficiary."

(g) "secondary beneficiary" is a beneficiary designated under the governing instrument to receive an interest in an asset if the interest of the primary beneficiary is revoked as provided in this section.

(2) If the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, a provision made by or on behalf of the decedent relating to the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is revoked by that order if the provision was made prior to the date of said order, and the decedent's interest in the asset shall pass as if the former spouse predeceased the decedent as of the time such order was entered. Nothing in this section applies to any asset that is subject upon the death of the decedent to the decedent's will, or to any trust established by the decedent during the decedent's lifetime. For purposes of this section, an individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986 is not a trust.

(3) Subsection (2) shall apply to the following assets in which a Florida resident has an interest at the time of the resident's death:

(a) A life insurance policy, annuity or other similar contract;

(b) An employee benefit plan, which, for purposes of this section, is any funded or unfunded plan, program or fund established to provide an employee's beneficiaries with benefits that may be payable on the employee's death;

(c) An individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986;

(d) A payable-on-death account; or

(e) A security or other account registered in transfer-on-death form.

(4) Subsection (2) shall not apply:

(a) To the extent that controlling federal law so provides;

(b) If the governing instrument expressly provides that benefits will be payable to the decedent's former spouse notwithstanding the order of dissolution or declaration of invalidity;

(c) If the order of dissolution or declaration of invalidity requires that the decedent maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, and other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(d) If, under the terms of the order of dissolution or declaration of invalidity, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(e) If the instrument directing the disposition of the asset at death is governed by the laws of a state other than Florida;

(f) To an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or

(g) If the decedent remarries the person whose interest would otherwise have been revoked hereunder and the decedent and that person are married to one another at the time of the decedent's death.

(5) In the case of an asset described in subsection (3)(a), (b) or (c), unless payment or transfer would violate a court order directed to, and served as required by law on, the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at the time of his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at the time of his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to a secondary beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.xxx(1)(f), Florida Statutes. Affiant and Decedent were married on (date of marriage), and were legally married to one another on the date of the Decedent's death.

_____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of_____)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a

payment on account of, or for transferring an interest in, that portion of the asset to the secondary beneficiary upon delivery to the payor of an affidavit validly executed by the secondary beneficiary affidavit in substantially the following form:

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.xxx(1)(g), Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.xxx(1)(f), Florida Statutes.

_____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of_____)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

(6) In the case of an asset described in subsection (3)(d) or (e), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator or other third party.

(9) This section shall be effective for deaths occurring after _____.

330466

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Kristen M Lynch, Esquire, Chair, IRA and Employee Benefit Committee of the Real Property Probate & Trust Law Section

Address 4800 N. Federal Highway, Suite 200E, Boca Raton, Fl 33431
Telephone: (561) 394.0756

Position Type IRA and Employee Benefit Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

[Main Contact Person], Kristen M. Lynch, Esquire, Ruden McCloskey 4800 N. Federal Highway, Suite 200E, Boca Raton, Fl. 33431, 561.394.0756.
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendment of a new statute F.S. § 732.xxxxx to provide that when an individual dies after a divorce there is a statutory presumption that if the former spouse is named as a beneficiary under certain contracts the former spouse is deemed to have predeceased the decedent."

Reasons For Proposed Advocacy:

This proposal is intended to address a public policy concern and address an inequity within the Florida Statutes as they currently exist. Currently a statutory presumption exists for wills and trusts that when a decedent divorces prior to death but does not amend a will or trust to remove a former spouse, the former spouse is presumed to have predeceased the decedent. However there is no statutory presumption in regard to certain non-probate or non-trust assets in situations where the decedent is divorced prior to date of death. This proposed statute creates such a presumption for several types of non-probate and non-trust assets.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position No Prior Positions

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

Others
(May attach list if more than one)

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Tax Section	Position Unknown At This Time
(Name of Group or Organization)	(Support, Oppose or No Position)
Florida Banker's Association	No Position
(Name of Group or Organization)	(Support, Oppose or No Position)
Family Law Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR
WHITE PAPER
ON
A PROPOSED BILL TO CREATE FLORIDA STATUTE § 732.xx
(Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death)

I. SUMMARY.

This proposal is intended to address a public policy concern and address an inequity within the Florida Statutes as they currently exist. Presently, there is a statutory presumption for wills and trusts that when a decedent divorces prior to death but does not amend a will or trust to remove a former spouse, the former spouse is presumed to have predeceased the decedent; but there is no similar statutory presumption with regard to certain non-probate or non-trust assets in the same situation. This proposed statute creates such a presumption for several types of non-probate and non-trust assets, and carves out certain exceptions, including but not limited to accounts subject to qualified domestic relations orders, settlement agreements and certain jointly owned accounts.

II. CURRENT SITUATION.

It is currently estimated that approximately $15 trillion dollars are currently held in Individual Retirement Accounts and Employee Benefit accounts in this country, and an even larger amount of money is currently invested in life insurance contracts and similar arrangements. These accounts do not normally pass by way of will or trust, but rather by some form of beneficiary designation as provided for in the contract. These assets are more prevalent among individuals who do not seek out traditional estate planning. Many times retirement accounts are funded by employers, as are some insurance policies. Pay-on-death and transfer-on-death accounts are a simple and inexpensive substitute for a will or trust. Both wills and trusts are provided protection under a statutory presumption created in F.S. § 736.1105 for trusts, and F.S. § 732.507(2) for wills, revoking the rights of a former spouse by treating the former spouse as if he or she had predeceased the grantor or testator.

Many times, individuals holding only IRAs, retirement plan assets, insurance policies and annuities, which all pass by way of beneficiary designation, do not perceive a need for professional advice in regard to these assets, and do not seek out the help of an estate planning attorney or financial planner. A search of Florida case law reveals a prolific number of cases concerning these types of accounts, predominantly regarding disputes over beneficial rights in such accounts in situations where the decedent owned an interest in such accounts, divorced, and then subsequently died without changing the beneficiary designation to remove the former spouse. In some instances, individuals take a "pro se" approach to estate planning insofar as pay-on-death and transfer-on-death accounts are established intentionally to avoid the perceived expense and delay inflicted by the probate process. It could be argued or debated that a failure to change a beneficiary or pay-on-death designation could be attributed to poor planning or no planning on the part of the decedent, misunderstanding of the requirements to effect such a change, an oversight, an error, bad timing or, in the extreme, bad legal advice. Regardless of the

cause, the intended beneficiaries of such accounts are the individuals being harmed by a lack of consistent treatment between classes of assets within the Florida statutes, and it could be argued that the only residents of Florida that are afforded protection are those that seek out the help of an attorney to draft a will or trust.

Florida Case Law

The leading case in Florida in this regard is *Cooper v. Muccitelli*, 682 So. 2d 77, 78 (Fla. 1996) which involved life insurance proceeds. The spouses had divorced, and then the husband changed one of the policies to reflect his sister as the beneficiary, but died without changing the beneficiary designation on the second policy to someone other than his former spouse. The Appellate Court certified a question to the Florida Supreme Court regarding the Court's holding that, without specific reference in a property settlement to life insurance proceeds, the beneficiary of the proceeds is determined by looking only to the insurance contract. The Florida Supreme Court examined the dissolution terms as well as the insurance documentation. It determined that the husband was free to name anyone he liked as beneficiary of the insurance policy and that the instructions were clear as to how to accomplish a change. He did not take any steps to effectuate a change on the second policy prior to his death and, therefore, the former spouse remained as the beneficiary. The Court said:

> "The analysis that the general language in the separation agreement trumps the specific language in the policy would place the insurance carrier in an impossible position – the carrier could never be certain whom to pay in such a situation without going to court, in spite of what the policy said or how clearly it was worded." Id. at 79.

It is clear that this situation may be avoided with specific language in the settlement agreement, although there are various cases that address what language is sufficient. Recent Florida cases include:

Vaughan v. Vaughan (741 So.2d 1221) Fla. App. 2 Dist., 1999 – Decedent's daughter sought declaratory relief to determine distribution of proceeds of decedent's life insurance policy and his individual retirement account. Decedent's former wife filed a counterclaim contending she was entitled to the entire proceeds of the insurance policy and to the IRA funds free of any claims of the daughter. The former spouse was named as the beneficiary on the life insurance policy and the IRA. The Court ruled that the wife was not entitled to the IRA, because the settlement agreement specifically referred to her forfeiture of rights in the IRA, but the Court ruled that the former spouse was entitled to the life insurance proceeds because the life insurance was not specifically mentioned.

In Re Estate of Dellinger (760 So.,2d 1016) Fla.App. 4 Dist., 2000 – In an action between the former wife, who was named as beneficiary of the decedent's IRA, and the personal representative of the decedent's estate, the lower court entered an order in favor of the estate. The former wife appealed. 4th DCA found in favor of the former spouse because the settlement agreement executed by the decedent and the former wife did not reference the IRA.

Luszcz v. Lavoie (787 So.2d 245) Fla.App. 2 Dist., 2001 – The personal representative of the decedent's estate brought an action against the former husband, seeking repayment to the estate of funds the husband received as beneficiary of the wife's IRA. The 2nd DCA held that, because the settlement agreement did not call for a change of beneficiary on the IRA, and there was no specific release of claims, the husband was entitled to the IRA proceeds. The dissenting judge in this case made the following observation:

> "The Florida Legislature has thus expressed the public policy of this state with regard to inheritance and trust rights of former spouses. I would have concluded that the courts had fashioned a similar rule, so that when assets are distributed by a final judgment of dissolution, the final judgment controls over the beneficiary designation unless expressly provided otherwise. In today's opinion, however, this court reaches a contrary conclusion. Thus, the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust." Id. at 250.

Smith v. Smith, (919 So.2d 525), Fla.App. 5 Dist., 2005. The fact pattern is very familiar. The spouses divorce and sign a marital settlement agreement, in which the wife waives all rights and responsibilities regarding certain assets, including life insurance policies, an IRA and an interest in a retirement plan. Not only did this court not follow the Luszcz case, but this court also receded from the Vaughan case. The Court determined that the insurance proceeds should go to the former wife, because she had not waived her right to the *proceeds* in the policies. The Court further determined that the waiver of rights in the retirement plan fell short of an effective ERISA waiver, therefore making it payable to the former spouse. Finally, the Court determined that the IRA should also go to the former spouse because an IRA is a contract with a third party. The Court goes on to say that IRAs should be payable to the beneficiary named unless changing the beneficiary designation is a condition of the dissolution agreement.

Barker v. Crawford, 2009 WL 2243961 (Fla. App. 3 Dist.), 34 Fla. L. Weekley D 1518 was decided as recently as July 29, 2009. This case addressed a beneficiary of a deferred compensation agreement prior to the death of either party. In Barker a mediation agreement was signed that stated that the husband, Barker, would retain retirement money and the deferred compensation agreement fund. The court determined that the language was "sufficient to waive the former husband's pre-dissolution designation of the former wife as a beneficiary". Apparently in the negotiations of the mediation agreement the parties agreed that the husband would receive such benefits, however he did not change the beneficiary designation. Because Barker did not reaffirm that designation of Crawford confirms that his intent was the he was the beneficiary of the deferred compensation fund. This court cited Cooper v. Muccitelli and Smith v. Smith.

It is apparent that there is much confusion in this area and a statute would clarify and give certainty to the parties and the court.It is also apparent from this sampling of holdings that the prospects of a decedent's assets ending up in the hands of the intended beneficiary is dependent not only upon the type of assets involved (probate versus non-probate or trust versus non trust) but also depends in large part upon which DCA the

case will be filed in.

Other States

Other states have the same type of case law history. A listing of some recent cases in this regard would include:

Pardee v. Pardee, (112 P,3d 308), Okla.Civ.App. Div. 2, 2004;
In re Estate of Sbarra, (17 A.D.3d 975), N.Y.S.2d 479, N.Y. 2005;
Foster v. Hurley, (444 Mass. 157), Mass., 2005;
Stephenson v. Stephenson, (163 Ohio App.3d 109), Ohio App.9 Dist., 2005;
In re Estate of Freeberg, (130 Wash.App., 202, 122 P.3d 741), 2005;
In re Estate of Wellshear, (142 P.3d 994), Okla.Civ. App.Div. 4, 2006.

The one thing all of the above cases have in common is a dispute between the estate or beneficiaries of the decedent, and a former spouse, over insurance proceeds, retirement accounts or IRAs. The holdings in all of the above cases vary, much as they do here within the state of Florida. In some cases, more weight is given to the contractual agreement, in other cases the intent of the decedent is taken into account. UPC section 2-804 provides a model divorce revocation statute, which has been followed so far by Colorado, Utah, Wisconsin, Arizona, Washington, Michigan, Minnesota, Montana, New Mexico, South Dakota and North Dakota. States that have enacted statutes that do not completely follow the UPC include Ohio, Pennsylvania, and Texas. Our proposed statute is loosely modeled after the UPC, but specifically identifies the types of interests that the statute is intended to cover.

Potential problems

There are two potential problems with regard to a statute of this nature. The first potential problem involves the pre-emption clause contained within the Employee Retirement Income Security Act of 1974 (ERISA). The pre-emption clause operates in such a way that state law cannot override or dictate the administration of a plan that is covered by ERISA. In regard to the proposed statute at hand, the only type of account that this would effect is a retirement plan that would fall within the scope of ERISA. The proposed statute provides an exception in regard to revocation "to the extent that controlling federal law provides", and therefore should not be perceived to attempt to have the dreaded "impermissible connection with ERISA plans" alluded to in the Egelhoff case. **Egelhoff v. Egelhoff** (121 S. Ct. 1322), U.S. Wash., 2001.

The other potential problem has to do with constitutional protection of contractual rights. Although there does not appear to be a clear consensus among other states of the correct approach, the biggest potential problem appears to occur when states have attempted to retroactively apply a statute, such as the one proposed here. So long as the beneficiary or pay-on-death designation is in place prior to the enactment of the statute, the party to the contract has not had any right impaired. The current draft of this statute does not contemplate retroactive application. The majority of states also seem to indicate

that a beneficiary is not a party to a contract and has merely expectancy in an inheritance. Additionally, there has always been an exception available in regard to the contract clause when the contemplated action is in furtherance of public policy. In furtherance of public policy, the proposed revocation statute would actually complement and support the augmented elective share statute insofar as the new augmented estate includes the assets contemplated by this proposed statute. In a situation where a former spouse is still named as a beneficiary and there is a current spouse of the decedent who subsequently files for an elective share, the proposed statute would support the public policy argument underlying the need for an elective share to protect spousal rights.

III. EFFECT OF PROPOSED CHANGES.

The proposed legislation is designed to provide a means for determining the rightful beneficiary or, in the alternative, provides a basis for a cause of action for the rightful beneficiary in the following manner:

A. Purpose – The purpose of this proposed statute is to create a presumption, in Section 2, that the former spouse predeceased the decedent, subject to certain exceptions.

B. Scope – The intended scope of this statute is to cover life insurance policies, annuities and similar contracts; employee benefit accounts; individual retirement accounts; pay-on-death accounts, and transfer-on-death accounts. Section 3 specifies the type of assets, held by a Florida resident at the time of their death, subject to this statute. Section 4 addresses the exceptions. Mindful of the pre-emption clause of the constitution, this statute is not intended to supersede any governing federal law that would otherwise control, nor does it apply if the governing document expressly provides that the interest will be payable to the designated former spouse regardless of dissolution or invalidity of the decedent's marriage. **This statute will not apply if a court order or decree required the decedent to maintain the asset for benefit of the former spouse of children of the marriage, nor will this apply if the decedent did not have the ability to unilaterally change the beneficiary or pay-on-death designation.** This statute is not intended to cover any agreements that are otherwise governed by state law other than Florida, and this statute will also not apply to jointly owned accounts. This statute will not preclude a former spouse that has remarried the decedent and is married to the decedent at time of death from receiving benefits, nor does this statute apply to any asset that would otherwise be conveyed through the decedent's will or trust.

C. Procedures for determining beneficiary – In section 5, the statute sets forth procedures for determining who the proper payee of the account should be. If the governing document does not specify the relationship between the designated beneficiary and the decedent, the payor may pay the account to the named beneficiary without further inquiry. If the governing document specifies the beneficiary to be the spouse of the decedent, the payor must first look to the death

certificate. If the death certificate states that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor may pay the interest out to the secondary beneficiary under the governing document. If the death certificate is silent as to marital status of the decedent, then there are two form affidavits provided in the statute. One affidavit is for execution by someone alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, stating that they are the surviving spouse of the decedent and that the decedent was married to them at the time of the decedent's death, the payor may pay the account to such individual without further inquiry. Similarly, the other affidavit is for execution by a secondary beneficiary, stating that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly executed affidavit. In regard to pay-on-death and transfer-on-death accounts, the payor may pay out those interests without further inquiry.

D. No liability for Payor - This statute is not intended to create any additional liability for any payor. In regard to why affidavits are required for certain accounts and not others, it was determined in the drafting of this statute that certain due diligence would already be required on the part of the payor with regard to life insurance, annuities and similar arrangements, employee benefit accounts, and individual retirement accounts. Such due diligence was not already required for pay-on-death or transfer-on-death accounts.

E. Creation of the basis for a cause of action – The primary purpose of this statute is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries. A general cause of action is intended to be created by the presumption that the former spouse was not the intended beneficiary, with the exception of the situations listed in Section 4. A specific cause of action may be created if an affiant makes a false statement with regard to the marital status of the decedent.

IV. FISCAL IMPACT ON STATE OR LOCAL GOVERNMENTS.

The proposal will not have any fiscal impact on state or local governments.

V. CONSTITUTIONAL ISSUES.

No constitutional issues are expected to arise under the proposal.

A bill to be entitled

An act relating to veteran guardians to amend the definitions of s.744.604 and providing for an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. s. 744.604, Florida Statutes, is amended to read

744.604 Definitions.--As used in this part, the term:

(1) "Adjudication by a court of competent jurisdiction" means a judicial decision or finding that a person is or is not incapacitated as provided in s. 744.331.

(2) "Adjudication by the United States Department of Veterans Affairs" means a determination or finding that a person is competent or incompetent on examination in accordance with the laws and regulations governing the United States Department of Veterans Affairs.

(3) "Secretary" means the Secretary of Veterans Affairs as head of the United States Department of Veterans Affairs or her or his successor.

(4) “Benefits” means arrears of pay, bonus, pension, compensation, insurance, and all other moneys paid or payable by the United States through the United States Department of Veterans Affairs by reason of service in the Armed Forces of the United States and any other moneys due from the United States Government, payable through its agencies or entities.

(5) "Estate" means income on hand and assets acquired in whole or in part with income.

(6) "Guardian" means any person acting as a fiduciary for a ward's person or the ward's estate, or both.

(7) “Income” means moneys received from the United States Department of Veterans Affairs and any other moneys due from the United States Government, payable through its agencies or entities as benefits, and revenue or profit from any property acquired in whole or in part with such moneys.

(8) "Person" means an individual, a partnership, a corporation, or an association.

(9) "United States Department of Veterans Affairs" means the United States Department of Veterans Affairs or its predecessors or successors.

(10) "Ward" means a beneficiary of the United States Department of Veterans Affairs.

Section 2. This act shall take effect July 1, 2010.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Debra Boje and Alexandra Rieman, Co-Chairs, Guardianship Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address _____
Telephone: (___) _____

Position Type Guardianship Law and Procedure Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Debra Boje, Ruden McClosky, 401 East Jackson Street ,Suite 2700 Tampa, FL 33602, Telephone 813-222-6614
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME) and Alexandra V. Rieman, 954-831-7560
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendment of §744.604, Fla. Stat., with regard to definition of income for Veteran's guardianships."

Reasons For Proposed Advocacy:

The legislation is proposed to amend the definition of income for veteran's guardianships to reduce the filing of requests for extraordinary attorney's fees based upon the Veteran's Affairs policy with regard to income from which the guardian is entitled to receive a fee.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER
Legislative Changes to §744.602 et. seq.

I. SUMMARY

The issue presented is a set of technical amendments to §744.604(4) and (7). Specifically, these sections of the statutes relate to definitions of "Benefits" and "Income" under the VA Guardianship Law.

These changes are required to correct an inconsistency in existing statute and its unfair interpretation by the Department of Veterans Affairs Regional Office in Florida related to the payment of commissions to professional guardians/fiduciaries on receipt and management of Social Security benefits paid on behalf of disabled veterans. These changes have no fiscal impact on state funds.

II. CURRENT SITUATION

The Department of Veterans Affairs (DVA) has the statutory power to appoint VA guardians of disabled veterans who the DVA considers incompetent to manage their government benefits. This power results in the appointment by a judge of VA Guardians for incompetent veterans, such guardians reporting to both the Florida court and the DVA. (§744.602 et. seq.)

Some years ago an issue of receipt and management of Social Security benefits by VA Guardians was resolved by adoption of §744.622, which provides that the VA Guardian may claim and manage moneys due from the U.S. Government, *payable through its agencies and entities"* (emphasis supplied). The section was adopted to clarify that the VA Guardian should have priority to receive Social Security funds, which otherwise could be paid directly to the veteran or to another representative payee. The purpose was to assure that such funds would be in the hands of a single responsible party who is accountable to the courts and the DVA, providing additional financial safeguards for the veteran.

§744.641 provides for payment of VA Guardian fees as a commission of 5% on the monthly income received and managed by the VA Guardian for the veteran's benefit. These payments are automatic, in that they may be taken each month without petition to the court having jurisdiction over the guardianship.

In November 2006 the DVA Regional Office in St. Petersburg assumed a limited interpretation of §744.641 that *excluded* Social Security as commissionable income for which fees may be automatically taken. The DVA's reasoning was that Social Security was not specifically defined as "income" in the definitions section of the statute.

§744.604 (4) and (7).

A) Impact of the Current DVA Policy

The result of excluding Social Security income from the aggregate commissionable income has resulted in denial of legitimately earned fees for services provided to disabled veterans, or alternatively, the requirement of unnecessary legal services and court hearings to vindicate the right of the VA Guardian to be paid for managing Social Security benefits for his/her veteran ward.

While in individual cases exclusion of Social Security income commissions is anywhere from $100 to $650 a year, in the aggregate over 20 or more guardianships this amounts to a loss of thousands of dollars in fee income each year. The guardian's loss of Social Security fee income does not necessarily benefit the ward, as the guardian is doing a sometimes very difficult job managing the care of each disabled veteran, most of whom have psychiatric disabilities. Many VA Guardians care for up to 25% of our caseload *pro bono* where their VA benefits are less than the maximum allowed for 100% disability.

An attempt to resolve this issue with the Regional Counsel of the DVA in St. Petersburg has not reached an agreement that would negate the need for the legislative change. Currently, in each case where the DVA disapproves an accounting only for taking payment of guardian fees on Social Security benefits, the VA Guardian is forced to litigate before the court the issue of payment of commissions on Social Security benefits pursuant to §744.641 under one of two theories:

a) The receipt and management of Social Security funds under §744.641 should be read *in pari materia* with §744.622 which empowers the guardian to receive and manage Social Security funds, and is therefore commissionable for guardian fees; or

b) Receipt and management of Social Security funds constitutes *extraordinary guardian services* under §744.641 for which guardian fees may be claimed by petition to the court (with or without approval by the DVA). Such petition requires attorney services and court appearances, for which attorney fees are properly levied. This alternative is substantially more costly to the guardianship and the ward.

To date the courts at the time of a hearing are authorizing the guardian to claim that portion of Social Security income to be commissionable and payable under the 5% clause of §744.641.

The current policy at the DVA Regional Office requires its Legal Instrument Examiners (LIE's) who audit the annual accountings to specially audit Guardian Fee commissions, separately calculate the amount of Social Security funds received, and require that commissions on Social Security funds be pled as extraordinary guardian services for which the VA approved amount will be equivalent to the 5% commission. This process adds substantial unnecessary time and labor to the process of auditing an annual accounting, to the detriment of efficient workflow for the DVA and cost to the taxpayer. Additionally, if the guardian has paid himself/herself commissions on Social Security funds, some LIE's require the guardian to refund such Social Security commissions to the veteran's account and obtain a separate court order authorizing payment of that same commission. This requires several hours of attorney services preparing the pleadings and the time of a court hearing and other legal process, wasting limited court resources. The DVA generally does not object to the payment of such commissions, and in fact executes Waivers and Consents for payment of such commissions.

III. PROPOSED STATUTORY CHANGES

This problem may be easily fixed by amendment to §744.604(4) and (7) to coordinate with the powers granted by §744.622 related to moneys due from the United States Government, "*payable through its agencies or entities. . .*"

The effect of these statutory changes allows VA Guardians to be paid commissions on all benefits and income under §744.641, eliminates the need for separately calculating income that is otherwise commissionable, and reduces the amount of guardian, accountant, guardian's attorney and DVA staff time and resources in preparing and auditing annual accountings. It also eliminates the utilization of court time and a resource in adjudicating a matter that has which is generally decided in favor of the guardian.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this statutory change has the potential of savings of court time and resources by eliminating the requirement of separate pleadings and hearings on payment of guardian fees that is otherwise already defined and decided by statute under §744.641.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This statutory change has no direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

None

VII. OTHER INTERESTED PARTIES

Department of Veterans Affairs Regional Office
Guardianship Unit, 272-B
Charles Cates, Coach
PO Box 1437
St. Petersburg, FL 33731
727-319-7891
e-mail charles.cates@va.gov

DVARO Office of Legal Counsel
Christine Senseman, Regional Counsel
PO Box 1437
St. Petersburg FL 33731
727-398-9390

Florida State Guardianship Association
Lennie Burke, Executive Director
PO Box 667579
Orlando FL 32867-7579
800-718-0207; 407-699-1068
e-mail Lennie@FloridaGuardians.com

Elder Law Section of The Florida Bar
Ms. Babette B. Bach, Chair
Bach Elder Law
240 S. Pineapple Ave., Ste. 700
Sarasota, FL 34236-6725
(941)906-1231
Email: babette@sarasotaelderlaw.com

765.2025. Designation of a health care surrogate for a minor

(1) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document which shall be signed by the designator in the presence of two subscribing adult witnesses. If a designator is unable to sign the instrument, such designator may, in the presence of witnesses, direct that another person sign the designator's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The designator's failure to designate an alternate surrogate shall not invalidate the designation.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the designator and in accordance with the designator's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(5) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a separate surrogate consent to mental health treatment for a minor. However, unless the

document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions for a minor under this chapter is also the designator's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the designator. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the designator's designation of the surrogate.

Section 617.2103, Fla. Stat.

(1) PREAMBLE

(a) The legislature finds that:

(i) institutions organized and operated exclusively for a charitable purpose perform essential and needed services in the state;

(ii) uncertainty exists regarding the prudence standards for the management and investment of charitable funds and for endowment spending by institutions described by subparagraph (i); and

(iii) the institutions, their officers, directors, and trustees, and the citizens of this state will benefit from removal of the uncertainty regarding applicable prudence standards and by permitting endowment funds to be invested for the long-term goals of achieving growth and maintaining purchasing power without adversely affecting the availability of funds for current expenditure.

(b) Subject to the intent of a donor expressed in a gift instrument, the purpose of this section is to provide guidance and authority through modern articulations of prudence standards for the management and investment of charitable funds and for endowment spending by institutions organized and operated exclusively for a charitable purpose in order to provide uniformity and remove uncertainty regarding those standards.

(2) SHORT TITLE. This Section may be cited as the Florida Uniform Prudent Management of Institutional Funds Act.

(3) DEFINITIONS. In this Section:

(a) "Charitable purpose" includes, but is not limited to, the relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.

(b) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(c) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(d) "Institution" means:

(i) a person, other than an individual or a trust, organized and operated exclusively for charitable purposes; and

(ii) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

(e) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(i) program-related assets;

(ii) a fund held for an institution by a trustee; or

(iii) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(f) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(g) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this section, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(i) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(ii) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(i) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(ii) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(iii) Except as otherwise provided by law other than this section, an institution may invest in any kind of property or type of investment consistent with this section.

(iv) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(v) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this section.

(vi) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

(5) APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(i) the duration and preservation of the endowment fund;

(ii) the purposes of the institution and the endowment fund;

(iii) general economic conditions;

(iv) the possible effect of inflation or deflation;

(v) the expected total return from income and the appreciation of investments;

(vi) other resources of the institution; and

(vii) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under paragraph (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(i) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(ii) do not otherwise limit the authority to appropriate for expenditure or accumulate under paragraph (a).

(6) DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this section, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(i) selecting an agent;

(ii) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(iii) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with paragraph (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this section.

(7) RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(i) the institutional fund subject to the restriction has a total value of less than $100,000;

(ii) more than 20 years have elapsed since the fund was established; and

(iii) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

(8) REVIEWING COMPLIANCE. Compliance with this section is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

(9) APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This section applies to institutional funds existing on or established after [the effective date of this section]. As applied to institutional funds existing on [the effective date of this section] this [section] governs only decisions made or actions taken on or after that date.

(10) EFFECTIVE DATE. This section takes effect [July 1, 2010].

(11) REPEAL. Section 1010.10, of the Florida Statutes is hereby repealed.

1010.10. Florida Uniform Management of Institutional Funds Act

~~(1) Short title.--This section may be cited as the "Florida Uniform Management of Institutional Funds Act."~~

~~(2) Definitions.--As used in this section, the term:~~

~~(a) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.~~

~~(b) "Governing board" means the body responsible for the management of an institution or of an institutional fund.~~

~~(c) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for the advancement of educational purposes, or a governmental entity to the extent that it holds funds exclusively for educational purposes.~~

~~(d) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes. The term excludes a fund held for an institution by a trustee that is not an institution. The term also excludes a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.~~

~~(e) "Instrument" means a will; deed; grant; conveyance; agreement; memorandum; electronic record; writing; or other governing document, including the terms of any institutional solicitations from which an institutional fund resulted, under which property is transferred to or held by an institution as an institutional fund.~~

~~(3) Expenditure of endowment funds.--~~

~~(a) A governing board may expend so much of an endowment fund as the governing board determines to be prudent for the uses and purposes for which the endowment fund is established, consistent with the goal of conserving the purchasing power of the endowment fund. In making its determination the governing board shall use reasonable care, skill, and caution in considering the following:~~

~~1. The purposes of the institution;~~

~~2. The intent of the donors of the endowment fund;~~

~~3. The terms of the applicable instrument;~~

~~4. The long-term and short-term needs of the institution in carrying out its purposes;~~

~~5. The general economic conditions;~~
~~6. The possible effect of inflation or deflation;~~

~~7. The other resources of the institution; and~~

~~8. Perpetuation of the endowment.~~

~~Expenditures made under this paragraph will be considered prudent if the amount expended is consistent with the goal of preserving the purchasing power of the endowment fund.~~

~~(b) A restriction upon the expenditure of an endowment fund may not be implied from a designation of a gift as an endowment or from a direction or authorization in the instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or words of similar import.~~

~~(c) The provisions of paragraph (a) shall not apply to instruments if the instrument so indicates by stating, "I direct that the expenditure provision of paragraph (a) of subsection (3) of the Florida Uniform Management of Institutional Funds Act not apply to this gift" or words of similar import.~~

~~(d) This subsection does not limit the authority of a governing board to expend funds as permitted under other law, the terms of the instrument, or the charter of the institution.~~

~~(e) Except as otherwise provided, this subsection applies to instruments executed or in effect before or after the effective date of this section.~~

~~(4) Standard of conduct.--~~

~~(a) Members of a governing board shall invest and manage an institutional fund as a prudent investor would, by considering the purposes, distribution requirements, and other circumstances of the fund. In satisfying this standard, the governing board shall exercise reasonable care, skill, and caution.~~

~~(b) A governing board's investment and management decisions about individual assets shall be made not in isolation but in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy that provides risk and return objectives reasonably suited to the fund and to the institution.~~

~~(c) Among circumstances that a governing board shall consider are:~~

~~1. Long-term and short-term needs of the institution in carrying out its purposes;~~

~~2. Its present and anticipated financial resources;~~

~~3. General economic conditions;~~

~~4. The possible effect of inflation or deflation;~~

5. The expected tax consequences, if any, of investment decisions or strategies;

6. The role that each investment or course of action plays within the overall investment portfolio of the institutional fund;

7. The expected total return from income and the appreciation of its investments;

8. Other resources of the institution;

9. The needs of the institution and the institutional fund for liquidity, regularity of income, and preservation or appreciation of capital; and

10. An asset's special relationship or special value, if any, to the purposes of the applicable gift instrument or to the institution.

(d) A governing board shall make a reasonable effort to verify the facts relevant to the investment and management of institutional fund assets.

(e) A governing board shall diversify the investments of an institutional fund unless the board reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversifying.

(f) A governing board shall invest and manage the assets of an institutional fund solely in the interest of the institution.

(5) Investment authority. In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations in the applicable gift instrument or in the applicable law, other than law relating to investments by a fiduciary:

(a) Within a reasonable time after receiving property, shall review the property and make and implement decisions concerning the retention and disposition of the assets, in order to bring the portfolio of the institutional fund into compliance with the purposes, terms, distribution requirements, and other circumstances of the institution, and with the requirements of this section;

(b) May invest in any kind of property or type of investment consistent with the standards of this section;

(c) May include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(d) May invest all or any part of the institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by

~~persons other than the governing board.~~

~~(6) Delegation of investment management.--~~

~~(a) Except as otherwise provided by applicable law relating to governmental institutions or funds, a governing board may delegate investment and management functions that a prudent governing body could properly delegate under the circumstances. A governing board shall exercise reasonable care, skill, and caution in:~~

~~1. Selecting an agent;~~

~~2. Establishing the scope and terms of the delegation, consistent with the purposes of the institutional fund; and~~

~~3. Periodically reviewing the agent's actions to monitor the agent's performance and the agent's compliance with the terms of the delegation.~~

~~(b) In performing a delegated function, an agent owes a duty to the governing board to exercise reasonable care to comply with the terms of the delegation.~~

~~(c) The members of a governing board who comply with the requirements of paragraph (a) are not liable for the decisions or actions of the agent to whom the function was delegated.~~

~~(d) By accepting the delegation of an investment or management function from a governing board of an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all actions arising from the delegation.~~

~~(7) Investment costs.--In investing and managing trust assets, a governing board may only incur costs that are appropriate and reasonable in relation to the assets and the purposes of the institution.~~

~~(8) Release of restrictions on use or investment.--~~

~~(a) With the written consent of the donor, a governing board may release, in whole or in part, a restriction imposed by the applicable instrument on the use or investment of an institutional fund.~~

~~(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, a governing board may release, in whole or in part, a restriction imposed by the applicable instrument on the use or investment of an institutional fund if the fund has a total value of less than $100,000 and if the governing board, in its fiduciary judgment, concludes that the value of the fund is insufficient to justify the cost of administration as a separate institutional fund.~~

~~(c) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, a governing board may apply in the~~

~~name of the institution to the circuit court of the county in which the institution is located for release of a restriction imposed by the applicable instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is unlawful, impracticable, impossible to achieve, or wasteful, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.~~

~~(d) A release under this subsection may not allow a fund to be used for purposes other than the educational purposes of the institution affected.~~

~~(e) This subsection does not limit the application of the doctrine of cy pres.~~

~~(9) Uniformity of application and construction.--This act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this act among those states which enact it.~~

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Charitable Organizations Committee, RPPTL Section, The Florida Bar
(List name of the section, division, committee, bar group or individual)

Address C/o Thomas Lee, Gunster Yoakley & Stewart, P.A., 3055 Cardinal Dr Ste 301, Vero Beach, Florida 32963
(List street address and phone number)

Position Type Real Property Probate and Trust Law Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance **Thomas Lee,** 3055 Cardinal Dr Ste 301, Vero Beach, Florida 32963 (772) 234-1040
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Delete Section 1010.10, of the Florida Statutes (Florida's version of the Uniform Management of Institutional Funds Act of 1972) ("FUMIFA"), and add a new Section to the Florida Statutes ("FUPMIFA") to address how donor funds for the benefit of a charitable organization that are not held in the name of a trust are to be invested and administered. See attached for the wording of the new Section of the Florida Statutes, which is based upon the Uniform Prudent Management of Institutional Funds Act drafted by the Uniform Law Commission (formerly known as National Conference of Commissioners on Uniform State Laws). Note that all funds held in the name of a trust will still be governed under the provisions of the Florida Trust Code and not this new proposed Section.

Reasons For Proposed Advocacy:

The existing Florida law regarding the management of donor funds for the benefit of a charitable organization, contained at § 1010.10, Fla. Stat. (FUMIFA) only applies to educational institutions. Further, there is no guidance under current Florida law as to how non-educational institutions are to manage donor funds, which can ultimately harm donors who create endowment funds for charities that are not educational institutions, as there is no legal guidance as to how their funds are to be invested. Expanding FUMIFA to cover all charitable organizations is not appropriate because FUMIFA continues to place too much of an emphasis on the retention of "purchasing power" in making expenditures from an endowment fund, without ever explaining

what the term “purchasing power” means. Because of this lack of guidance, charitable institutions are limited in their options as to how to invest and expend assets held in endowment funds and donor intent may be sacrificed as a result. Although the term "purchasing power" is not included in the FUPMIFA statutory guidance with regard to expenditures, it is assumed charities will act to maintain purchasing power of contributions over the long term. FUPMIFA provides charities more flexibility when deciding on the appropriate level of expenditures than did FUMIFA. Further, merely expanding FUMIFA to cover all charities would make Florida out-of-step with the remaining states in the country that are adopting some version of the new Uniform Prudent Management of Institutional Funds Act (UPMIFA).

Modification of Restrictions on Charitable Funds. Florida’s version of UPMIFA (FUPMIFA) provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, including Florida (with modifications), served as a model for many of the revisions. UPIA updates rules on investment decision-making for trusts, including charitable trusts, and imposes additional duties on trustees for the protection of beneficiaries. FUPMIFA applies these rules and duties to charities organized as nonprofit corporations. FUPMIFA will not apply to trusts because the Florida Trust Code provides management and investment standards for trusts.

FUPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and FUPMIFA imposes duties on those who manage and invest charitable funds, which are similar to the duties that exist currently under FUMIFA. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely. FUPMIFA modernizes the rules governing expenditures from endowment funds by clarifying the retention of purchasing power standard, so as to give institutions the guidance they need to more easily cope with fluctuations in the value of the endowment. Finally, the FUPMIFA approach expands the rules on releasing or modifying restrictions on endowment funds that are found in Section 1010.10(8), of the Florida Statutes, providing greater flexibility to institutions that are managing funds that have become uneconomical or unsustainable. By allowing greater opportunity to institutions to modify fund terms rather than completely terminating them, it provides a mechanism for greater protection of donor intent.

The UPMIFA approach has been adopted by or is being considered in at least 40 other states. UPMIFA focuses on the entirety of a donor-restricted endowment fund – both the original gift amount and any net appreciation. The Financial Accounting Standards Board has issued Staff Position 117-1 (“FSP 117-1”), which requires additional disclosures pursuant to UPMIFA. Therefore, adopting UPMIFA would create uniformity for reporting and accounting purposes for CPAs and the SEC. FSP 117-1.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER
PROPOSED REPEAL OF § 1010.10, FLA. STAT. AND
THE ADOPTION OF SECTION 617.2103, FLA. STAT.

I. SUMMARY

The proposed changes are submitted to address problems that result from the current statutory framework relating to the investment and management of endowment funds for charities. The statute currently in place to address the management of endowment funds, § 1010.10, Fla. Stat. – Florida Uniform Management of Institutional Funds Act (FUMIFA), only applies to educational institutions. Further it uses the term "purchasing power," without defining the term "purchasing power." Moreover, FUMIFA fails to take into account some recent changes in accounting rules that make the provisions under FUMIFA no longer logically related to the disclosures required under accountings. The proposed addition of § 617.2103, Fla. Stat. is intended to address all of these concerns.

Current Situation

The existing Florida law regarding the management of donor funds for the benefit of a charitable organization, contained at § 1010.10, Fla. Stat. (FUMIFA) only applies to educational institutions. Further, there is no guidance under current Florida law as to how non-educational institutions are to manage donor funds, which can ultimately harm donors who create endowment funds for charities that are not educational institutions, as there is no legal guidance as to how their funds are to be invested. Expanding FUMIFA to cover all charitable organizations is not appropriate because FUMIFA continues to place too much of an emphasis on the retention of "purchasing power" in making expenditures from an endowment fund, without ever explaining what the term "purchasing power" means. Because of this lack of guidance, charitable institutions are limited in their options as to how to invest and expend assets held in endowment funds and donor intent may be sacrificed as a result. Although the term "purchasing power" is not included in the FUPMIFA statutory guidance with regard to expenditures, it is assumed charities will act to maintain purchasing power of contributions over the long term. FUPMIFA provides charities more flexibility when deciding on the appropriate level of expenditures than did FUMIFA. Further, merely expanding FUMIFA to cover all charities would make Florida out-of-step with the remaining states in the country that are adopting some version of the new Uniform Prudent Management of Institutional Funds Act (UPMIFA).

Effect of Proposed Change

Florida's version of UPMIFA (FUPMIFA) provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, including Florida (with modifications), served as a model for many of the revisions. UPIA updates rules on investment decision-making for trusts, including charitable

trusts, and imposes additional duties on trustees for the protection of beneficiaries. FUPMIFA applies these rules and duties to charities organized as nonprofit corporations. FUPMIFA will not apply to trusts because the Florida Trust Code provides management and investment standards for trusts.

FUPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and FUPMIFA imposes duties on those who manage and invest charitable funds, which are similar to the duties that exist currently under FUMIFA. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely. FUPMIFA modernizes the rules governing expenditures from endowment funds by clarifying the retention of purchasing power standard, so as to give institutions the guidance they need to more easily cope with fluctuations in the value of the endowment. Finally, the FUPMIFA approach expands the rules on releasing or modifying restrictions on endowment funds that are found in Section 1010.10(8), of the Florida Statutes, providing greater flexibility to institutions that are managing funds that have become uneconomical or unsustainable. By allowing greater opportunity to institutions to modify fund terms rather than completely terminating them, it provides a mechanism for greater protection of donor intent.

The UPMIFA approach has been adopted by or is being considered in at least 40 other states. UPMIFA focuses on the entirety of a donor-restricted endowment fund – both the original gift amount and any net appreciation. The Financial Accounting Standards Board has issued Staff Position 117-1 ("FSP 117-1"), which requires additional disclosures pursuant to UPMIFA. Therefore, adopting UPMIFA would create uniformity for reporting and accounting purposes for CPAs and the SEC. FSP 117-1.

II. LANGUAGE OF PROPOSED STATUTE - SECTION 617.2103

(1) PREAMBLE

(a) The legislature finds that:

(i) institutions organized and operated exclusively for a charitable purpose perform essential and needed services in the state;

(ii) uncertainty exists regarding the prudence standards for the management and investment of charitable funds and for endowment spending by institutions described by subparagraph (i); and

(iii) the institutions, their officers, directors, and trustees, and the citizens of this state will benefit from removal of the uncertainty regarding applicable prudence standards and by permitting endowment funds to be invested for the long-term goals of achieving growth and maintaining purchasing power without adversely affecting the availability of funds for current expenditure.

(b) Subject to the intent of a donor expressed in a gift instrument, the purpose of this section is to provide guidance and authority through modern articulations of prudence standards for the management and investment of charitable funds and for endowment spending by institutions organized and operated exclusively for a charitable purpose in order to provide uniformity and remove uncertainty regarding those standards.

(2) SHORT TITLE. This Section may be cited as the Florida Uniform Prudent Management of Institutional Funds Act.

(3) DEFINITIONS. In this Section:

(a) "Charitable purpose" includes, but is not limited to, the relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.

(b) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(c) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(d) "Institution" means:

(i) a person, other than an individual or a trust, organized and operated exclusively for charitable purposes; and

(ii) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

(e) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(i) program-related assets;

(ii) a fund held for an institution by a trustee; or

(iii) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(f) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(g) "Program-related asset" means an asset held by an institution primarily to

accomplish a charitable purpose of the institution and not primarily for investment.

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this section, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(i) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(ii) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(i) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(ii) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(iii) Except as otherwise provided by law other than this section, an institution may invest in any kind of property or type of investment consistent with this section.

(iv) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(v) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this section.

(vi) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

(5) APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(i) the duration and preservation of the endowment fund;

(ii) the purposes of the institution and the endowment fund;

(iii) general economic conditions;

(iv) the possible effect of inflation or deflation;

(v) the expected total return from income and the appreciation of investments;

(vi) other resources of the institution; and

(vii) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under paragraph (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(i) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(ii) do not otherwise limit the authority to appropriate for expenditure or accumulate under paragraph (a).

(6) DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this section, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(i) selecting an agent;

(ii) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(iii) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with paragraph (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the

courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this section.

(7) RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(i) the institutional fund subject to the restriction has a total value of less than $100,000;

(ii) more than 20 years have elapsed since the fund was established; and

(iii) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

(8) REVIEWING COMPLIANCE. Compliance with this section is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

(9) APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This section applies to institutional funds existing on or established after [the effective date of this section]. As applied to institutional funds existing on [the effective date of this section] this [section] governs only decisions made or actions taken on or after that date.

(10) EFFECTIVE DATE. This section takes effect [July 1, 2010].

(11) REPEAL. Section 1010.10, of the Florida Statutes is hereby repealed.

III. SECTION-BY-SECTION ANALYSIS

Subsection (1) – Preamble. Subsection (1) briefly explains the need for a new statutory provision to remove uncertainty regarding the prudence standards for the management and investment of charitable funds and for endowment spending by institutions organized and operated exclusively for a charitable purpose.

Subsection (2) – Short Title. Subsection (2) states that the Section may be cited to as the Florida Uniform Prudent Management of Institutional Funds Act.

Subsection (3) – Definitions. Subsection (3) provides definitions for the terms charitable purpose, endowment fund, gift instrument, institution, institutional fund, person, program-related asset, and record.

Charitable Purpose. The definition of charitable purpose follows that of the Florida Trust Code § 736.405. However, Subsection (3) does not include charitable trusts in any of its definitions, as it is thought that FUPMIFA should not apply to charitable trusts because charitable trusts are already regulated under the Florida Trust Code.

Endowment Fund. This definition is largely in keeping with the current definition in FUMIFA. An endowment fund is an institutional fund or a part of an institutional fund that is not wholly expendable by the institution on a current basis. A restriction that makes a fund an endowment fund arises from the terms of a gift instrument. If an institution has more than one endowment fund, under Subsection (4) the institution can manage and invest some or all endowment funds together. Subsections (5) and (7) must be applied to individual funds and cannot be applied to a group of funds that may be managed collectively for investment purposes.

Board-designated funds are institutional funds but not endowment funds. The rules on expenditures and modification of restrictions in this Section do not apply to restrictions that an institution places on an otherwise unrestricted fund that the institution holds for its own benefit. The institution may be able to change these restrictions itself, subject to internal rules and to the

fiduciary duties that apply to those that manage the institution. This is a clarification from what is contained in FUMIFA.

If an institution transfers assets to another institution, subject to the restriction that the other institution hold the assets as an endowment, then the second institution will hold the assets as an endowment fund.

Gift Instrument. The term "instrument" used in FUMIFA is broken down into two (2) separate terms under FUPMIFA – "gift instrument" and "record." The term gift instrument refers to the records that establish the terms of a gift and may consist of more than one document. The definition clarifies that the only legally binding restrictions on a gift are the terms set forth in writing.

As used in this definition, "record" is an expansive concept and means a writing in any form, including electronic. The term includes a will, deed, grant, conveyance, agreement, or memorandum, and also includes writings that do not have a donative purpose. For example, under some circumstances the bylaws of the institution, minutes of the board of directors, or canceled checks could be a gift instrument or be one of several records constituting a gift instrument. Although the term can include any of these records, a record will only become a gift instrument if both the donor and the institution were or should have been aware of its terms when the donor made the gift. For example, if a donor sends a contribution to an institution for its general purposes, then the articles of incorporation may be used to clarify those purposes. If, in contrast, the donor sends a letter explaining that the institution should use the contribution for its "educational projects concerning teenage depression," then any funds received in response must be used for that purpose and not for broader purposes otherwise permissible under the articles of incorporation.

Solicitation materials may constitute a gift instrument. For example, a solicitation that suggests in writing that any gifts received pursuant to the solicitation will be held as an endowment may be integrated with other writings and may be considered part of the gift instrument. Whether the terms of the solicitation become part of the gift instrument will depend upon the circumstances, including whether a subsequent writing superseded the terms of the solicitation. Each gift received in response to a solicitation will be subject to any restrictions indicated in the gift instrument pertaining to that gift. For example, if an initial gift establishes an endowment fund, and the charity then solicits additional gifts "to be held as part of the Charity X Endowment Fund," those additional gifts will each be subject to the restriction that the gifts be held as part of that endowment fund.

The term gift instrument includes matching funds provided by an employer or some other person. Whether matching funds transferred from the institution's own unrestricted funds or from a third party are treated as part of an endowment fund or otherwise will depend upon the terms of the solicitation describing the matching gift.

The term gift instrument also includes an appropriation by a legislature or other public or governmental body for the benefit of an institution.

Institution. FUPMIFA's definition of "institution" is more expansive than FUMIFA's, as FUPMIFA's definition applies generally to institutions organized and operated exclusively for charitable purposes – not just educational institutions. The term includes any charitable organizations created as nonprofit corporations, unincorporated associations, governmental subdivisions or agencies to the extent that the entity hold funds exclusively for a charitable purpose, or any form of entity, however organized, that is organized and operated exclusively for charitable purposes; provided, however. The term specifically excludes an individual. It also excludes a trust because charitable and other trusts are already sufficiently regulated by the Florida Trust Code.

Although FUPMIFA does not apply to charitable trusts, many of FUPMIFA's provisions derive from trust law. Prudent investor standards apply to trustees of charitable trusts in states like Florida that have adopted UPIA. Trustees of charitable trusts can use the doctrines of cy pres and deviation to modify trust provisions, and the Florida Trust Code (and the Uniform Trust Code) includes a number of modification provisions. The Florida Principal and Income Act permits allocation between principal and income to facilitate total-return investing.

The definition of "institution" includes a government, governmental subdivision or agency that holds funds exclusively for a charitable purpose.

Institutional Fund. The term "institutional fund" includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee, which is a substantive departure from UPMIFA because it is believed trusts are already sufficiently regulated under the Florida Trust Code.

Some institutions combine assets from multiple funds for investment purposes, and some institutions invest funds from different institutions in a common fund. Typically each fund is assigned units representing the share value of the individual fund. The assets are invested collectively, permitting more efficient investment and improved diversification of the overall portfolio. The collective fund makes annual distributions to the individual funds based on the units held by each fund. For purposes of Subsections (4) and (6), the collective fund is considered one institutional fund. Subsections (5) and (7) apply to each fund individually and not to the collective fund.

Assets held by an institution primarily for program-related purposes rather than exclusively for investment are not subject to FUPMIFA. For example, a university may purchase land adjacent to its campus for future development. The purchase might not meet prudent investor standards for commercial real estate, but the purchase may be appropriate because the university needs to build a new dormitory. The classroom buildings, administration buildings, and dormitories held by the university all have value as property, but the university

does not hold those buildings as financial assets for investment purposes. FUPMIFA excludes from the prudent investor norms those assets that a charity uses to conduct its charitable activities, but does not exclude assets that have a tangential tie to the charitable purpose of the institution but are held primarily for investment purposes.

A fund held by an institution is not an institutional fund if any beneficiary of the fund is not an institution. If a governing instrument provides that a fund will revert to the donor if, and only if, the institution ceases to exist or the purposes of the fund fail, then the fund will be considered an institutional fund until such contingency occurs.

Person. FUPMIFA uses the definition of "person" approved by the National Conference of Commissioners on Uniform State Laws. The definition of institution uses the term person, but to be an institution a person must be organized and operated exclusively for charitable purposes. A person with a commercial purpose cannot be an institution. Thus, although the definition of person includes "business trust" and "any other legal or commercial entity," FUPMIFA does not apply to an entity organized for business purposes and not exclusively for charitable purposes. Further, the definition of person includes trusts, but trusts cannot be an institution, as FUPMIFA does not apply to trusts.

Program-Related Asset. Although FUPMIFA does not apply to program-related assets, if program-related assets serve, in part, as investments for an institution, then the institution should identify categories for reporting those investments and should establish investment criteria for the investments that are reasonably related to achieving the institution's charitable purposes. For example, a program providing below-market loans to inner-city businesses may be "primarily to accomplish a charitable purpose of the institution" but also can be considered, in part, an investment. The institution should create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid.

Record. This definition was added to clarify that the definition of instrument includes electronic records as defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

Subsection (4) – Standard of Conduct in Managing and Investing Institutional Funds. Subsection (4) adopts the "prudent investor" standard for investment decision making. The Subsection directs directors or others responsible for managing and investing the funds of an institution to act as a prudent investor would, using a portfolio approach in making investments and considering the risk and return objectives of the fund. The Subsection lists the factors that commonly bear on decisions in fiduciary investing and incorporates the duty to diversify investments absent a conclusion that special circumstances make a decision not to diversify reasonable. Thus, the Subsection follows modern portfolio theory for investment decision making. This Subsection applies to all funds held by an institution, regardless of whether the institution obtained the funds by gift or otherwise and regardless of whether the funds are restricted. Much of this Subsection is consistent with FUMIFA.

The language of the prudence standard adopted in FUPMIFA is based upon the language in UPMIFA that is derived from the Revised Model Nonprofit Corporation Act (RMNCA) and from the prudent investor rule of UPIA. The standard is consistent with the business judgment standard under corporate law, as applied to charitable institutions. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule. The standard for prudent investment set forth in Subsection (4) first states the duty of care as articulated in the RMNCA, but provides more specific guidance for those managing and investing institutional funds by incorporating language from UPIA. The criteria derived from UPIA are consistent with good practice under current law applicable to nonprofit corporations.

The Drafting Committee of UPMIFA decided that by adopting language from both the RMNCA and UPIA, UPMIFA could clarify that common standards of prudent investing apply to all charitable institutions.

Subsection (4) has incorporated the provisions of UPIA with only a few exceptions. Because this Section applies to charitable organizations, it makes the duty of care, the duty to minimize costs, and the duty to investigate mandatory. Other than these duties, the provisions of Subsection (4) are default rules. A gift instrument or the governing instruments of an institution can modify these duties, but the charitable purpose doctrine limits the extent to which an institution or a donor can restrict these duties. In addition, Paragraph (a) of Subsection (4) reminds the decision maker that the intent of a donor expressed in a gift instrument will control decision making. Further, the decision maker must consider the charitable purposes of the institution and the purposes of the institutional fund for which decisions are being made. These factors are specific to charitable organizations.

FUPMIFA does not include the duty of impartiality, stated in UPIA § 6, because nonprofit corporations do not confront the multiple beneficiaries problem to which the duty is addressed. A nonprofit corporation typically creates one charity. The institution may serve multiple beneficiaries, but those beneficiaries do not have enforceable rights in the institution in the same way that beneficiaries of a private trust do.

In other respects, the Drafting Committee of UPMIFA made changes to language from UPIA only where necessary to adapt the language for charitable institutions. No material differences are intended. Subsection (4)(e)(i)(D) does not include a clause that appears at the end of UPIA § 2(c)(4) ("which may include financial assets, interest in closely held enterprises, tangible and intangible personal property, and real property."). The Drafting Committee deemed this clause unnecessary for charitable institutions. The language of Paragraph (e)(i)(G) reflects a modification of the language of UPIA § (2)(c)(7). Other minor modifications to the UPIA provisions make the language more appropriate for charitable institutions.

The duties imposed by this Subsection apply to those who govern an institution, including directors, and to those to whom the directors or managers delegate responsibility for investment and management of institutional funds. The standard applies to officers and

employees of an institution and to agents who invest and manage institutional funds. Volunteers who work with an institution will be subject to the duties imposed here, but state and federal statutes may provide reduced liability for persons who act without compensation. FUPMIFA does not affect the application of those shield statutes.

Paragraph (a). Donor Intent and Charitable Purposes. Paragraph (a) states the overarching duty to comply with donor intent as expressed in the terms of the gift instrument. The emphasis in FUPMIFA on giving effect to donor intent does not mean that the donor can or should control the management of the institution. The other fundamental duty is the duty to consider the charitable purposes of the institution and of the institutional fund in making management and investment decisions.

Paragraph (b). Duty of Loyalty. Paragraph (b) reminds those managing and investing institutional funds that the duty of loyalty will apply to their actions, but Subsection (4) does not state the loyalty standard that applies. Thus, the duty of loyalty under nonprofit corporation law will apply to charities organized as nonprofit corporations, and the duty of loyalty under trust law will apply to charitable trusts.

Paragraph (b). Duty of Care. Paragraph (b) also applies the duty of care to performance of investment duties. The language derives from § 8.30 of the RMNCA. This Paragraph states the duty to act in good faith, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Although the language in the RMNCA and in FUPMIFA is similar to that of § 8.30 of the Model Business Corporation Act (3d ed. 2002), the standard as applied to persons making decisions for charities is altered by the fact that the institution is a charity and not a business corporation. Thus, in FUPMIFA the references to "like position" and "similar circumstances" mean that the charitable nature of the institution affects the decision making of a prudent person acting under the standard set forth in Paragraph (b). The duty of care involves considering the factors set forth in Paragraph (e)(i).

Paragraph (c)(i). Duty to Minimize Costs. Paragraph (c)(i) tracks the language of UPIA § 7 and requires an institution to minimize costs. An institution may prudently incur costs by hiring an investment advisor, but the costs incurred should be appropriate under the circumstances. See UPIA § 7 cmt. The duty is consistent with the duty to act prudently under § 8.30 of the RMNCA.

Paragraph (c)(ii). Duty to Investigate. This Paragraph incorporates the traditional fiduciary duty to investigate, using language from UPIA § 2(d). The Paragraph requires persons who make investment and management decisions to investigate the accuracy of the information used in making decisions.

Paragraph (d). Pooling Funds. An institution holding more than one institutional fund may find that pooling its funds for investment and management purposes will be economically beneficial. This Paragraph permits pooling for these purposes. The prohibition against commingling no longer prevents pooling funds for investment and management purposes. See

UPIA § 3, cmt. (duty to diversify aided by pooling); UPIA § 7, cmt. (pooling to minimize costs); Restatement (Third) of Trusts: Duty to Segregate and Identify Trust Property § 84 (T.D. No. 4 2005). Funds will be considered individually for other purposes of FUPMIFA, including for the spending rule for endowment funds of Subsection (5) and the modification rules of Subsection (7).

Paragraph (e)(i). Prudent Decision Making. Paragraph (e)(i) takes much of its language from UPIA § 2(c), and is generally consistent with FUMIFA. In making decisions about whether to acquire or retain an asset, the institution should consider the institution's mission, its current programs, and the desire to cultivate additional donations from a donor, in addition to factors related more directly to the asset's potential as an investment.

Paragraph (e)(i)(C) reflects the fact that some organizations will invest in taxable investments that may generate unrelated business taxable income for income tax purposes.

Assets held primarily for program-related purposes are not subject to FUPMIFA. The management of those assets will continue to be governed by other laws applicable to the institution. Other assets may not be held primarily for program-related purposes but may have both investment purposes and program-related purposes. Paragraphs (a) and (e)(i)(H) indicate that a prudent decision maker can take into consideration the relationship between an investment and the purposes of the institution and of the institutional fund in making an investment that may have a program-related purpose but not be primarily program-related. The degree to which an institution uses an asset to accomplish a charitable purpose will affect the weight given that factor in a decision to acquire or retain the asset.

Paragraph (e)(ii). Portfolio Approach. Paragraph (e)(ii) reflects the use of portfolio theory in modern investment practice. The language comes from UPIA § 2(b), which follows the articulation of the prudent investor standard in Restatement (Third) of Trusts: Prudent Investor Rule § 227(a) (1992).

Paragraph (e)(iii). Broad Investment Authority. Consistent with the portfolio theory of investment, Paragraph (e)(iii) permits a broad range of investments. The language derives from UPIA § 2(e).

Paragraph (e)(iii) also provides that other law may limit the authority under this Subsection. In addition, all of Paragraph (e) is subject to contrary provisions in a gift instrument, and a gift instrument may restrict the ability to invest in particular assets. For example, the gift instrument for a particular institutional fund might preclude the institution from investing the assets of the fund in companies that produce tobacco products.

In her book, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 434 (Harv. Univ. Press 2004), Marion R. Fremont-Smith reports that some large charities pledge their endowment funds as security for loans. Paragraph (e)(iii) permits this sort of debt financing, subject to the guidelines of Paragraph (e)(i).

Paragraph (e)(iv). Duty to Diversify. Paragraph (e)(iv) assumes that prudence requires diversification but permits an institution to determine that nondiversification is appropriate under exceptional circumstances. A decision not to diversify must be based on the needs of the charity and not solely for the benefit of a donor. A decision to retain property in the hope of obtaining additional contributions from the same donor may be considered made for the benefit of the charity, but the appropriateness of that decision will depend on the circumstances. This Paragraph derives its language from UPIA § 3. See UPIA § 3 cmt. (discussing the rationale for diversification) and is consistent with FUMIFA.

Paragraph (e)(v). Disposing of Unsuitable Assets. This Paragraph imposes a duty on an institution to review the suitability of retaining property contributed to the institution within a reasonable period of time after the institution receives the property. Paragraph (e)(v) requires the institution to make a decision but does not require a particular outcome. The institution may consider a variety of factors in making its decision, and a decision to retain the property either for a period of time or indefinitely may be a prudent decision.

The language of Paragraph (e)(v) comes from UPIA § 4, which restates Restatement (Third) of Trusts: Prudent Investor Rule § 229 (1992), which adopted language from Restatement (Second) of Trusts § 231 (1959). See UPIA § 4 cmt.

Paragraph (e)(vi). Special Skills or Expertise. Paragraph (e)(vi) states the rule provided in UPIA § 2(f) requiring a trustee to use the trustee's own skills and expertise in carrying out the trustee's fiduciary duties. Section 8.30(a)(2) of the RMNCA provides that in discharging duties a director must act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances…." The comment explains that "[t]he concept of 'under similar circumstances' relates not only to the circumstances of the corporation but to the special background, qualifications, and management experience of the individual director and the role the director plays in the corporation." After describing directors chosen for their ability to raise money, the comment notes that "[n]o special skill or expertise should be expected from such directors unless their background or knowledge evidences some special ability."

The intent of Paragraph (e)(vi) is that a person managing or investing institutional funds must use the person's own judgment and experience, including any particular skills or expertise, in carrying out the management or investment duties. For example, if a charity names a person as a director in part because the person is a lawyer, the lawyer's background may allow the lawyer to recognize legal issues in connection with funds held by the charity. The lawyer should identify the issues for the board, but the lawyer is not expected to provide legal advice. A lawyer is not expected to be able to recognize every legal issue, particularly issues outside the lawyer's area of expertise, simply because the board member is lawyer.

Section 1010.10, of the Florida Statutes contains two provisions that authorize investments in pooled or common investment funds. See § 1010.10(5)(c) & (5)(d), Fla. Stat.

The Drafting Committee for UPMIFA concluded that Subsection (3)(e)(iii) of UPMIFA authorizes these investments. The decision not to include the two provisions in UPMIFA implies no disapproval of such investments. Therefore, this provision was carried over into FUPMIFA.

Purpose and Scope of Revisions in Subsection (5). Subsection (5) revises the provision in FUMIFA requiring that all fund expenditures have the effect of conserving purchasing power and relies more heavily on modern portfolio theory. The expenditure rule of Subsection (5) applies only to the extent that a donor and an institution have not reached some other agreement about spending from an endowment. If a gift instrument sets forth specific requirements for spending, then the charity must comply with those requirements. However, if the gift instrument uses more general language, for example directing the charity to "hold the fund as an endowment" or "retain principal and spend income," then Subsection (5) provides a rule of construction to guide the charity.

FUPMIFA also applies a rule of construction to terms like "income" or "endowment." The assumption in FUPMIFA is that a donor who uses one of these terms intends to create a fund that will generate sufficient gains over time to be able to make regular ongoing distributions from the fund while at the same time preserving the purchasing power of the fund over the long-term. FUPMIFA directs the institution to determine spending based on the total assets of the endowment fund. Under Subsection (5)(a), institutions are permitted to make current distributions from funds that have not maintained their purchasing power on a year over year basis, provided the funds are being managed with the prospective long-term goals of achieving growth and maintaining purchasing power.

FUPMIFA requires the persons making spending decisions for an endowment fund to focus on the purposes of the endowment fund as opposed to the purposes of the institution more generally. When the institution considers the purposes and duration of the fund, the institution will give priority to the donor's general intent that the fund be maintained permanently. This means that the institution must adopt a spending policy for its endowment that does not fluctuate from year to year and that is subject to change only when there are changes in underlying fundamental factors, such as inflation or asset allocation. By making arbitrary changes to the institution's spending rate, a charity would compromise the donor's general intent that the fund was established to be maintained permanently. Although FUPMIFA does not require that a specific amount be set aside as "principal," it assumes that the charity will adopt a spending policy intended to preserve "principal" (i.e., to maintain the purchasing power of the amounts contributed to the fund over the long-term) while spending "income" (i.e. making a distribution each year that represents a reasonable spending rate, given anticipated future long-term investment performance and general economic conditions).

For example, if (i) an institution received an endowment gift of $10,000,000 on January 1st, (ii) the endowment fund was invested in a well diversified portfolio of assets appropriate to the fund's anticipated duration, (iii) the institution's spending policy was based upon distributing only so much from the fund as was reasonably anticipated to maintain the fund's purchasing power over the long-term given the expected total return of the fund over one or more market

cycles, net of distributions and expenses (estimated by the institution in this example to be four percent (4%) annually of the fund's value as of the first day of each year), and (iv) the endowment gift's value dropped to $5,000,000 within the first year prior to any distributions, the institution would, consistent with FUPMIFA and maintenance of purchasing power, likely be permitted to distribute $400,000 from the fund in year one. Alternatively, had the same fund increased to $15,000,000 rather than dropped to $5,000,000 in year one, the fund would, consistent with FUPMIFA and maintenance of purchasing power, likely be permitted to distribute $400,000 in year one. The expenditure is permitted in both cases, even though year over year purchasing power is not maintained, because returns are expected to revert to the norm over the market cycle and the endowment gift is managed with the long term goal of achieving growth and maintaining purchasing power.

Paragraph (a). Expenditure of Endowment Funds. Paragraph (a) uses the RMNCA articulation of the standard of care for decision making under Section 4. The change in language does not reflect a substantive change.

Subsection (5) permits expenditures from an endowment fund to the extent the institution determines that the expenditures are prudent after considering the factors listed in Paragraph (a). These factors emphasize the importance of the intent of the donor, as expressed in a gift instrument. Subsection (5) looks to written documents as evidence of donor's intent and does not require an institution to rely on oral expressions of intent. By requiring written evidence of intent, the Section protects reliance by the donor and the institution on the written terms of a donative agreement. Informal conversations may be misremembered and may be subject to multiple interpretations. Of course, oral expressions of intent may guide an institution in further carrying out a donor's wishes and in understanding a donor's intent.

The factors in paragraph (a) require attention to the purposes of the institution and the endowment fund, economic conditions, and present and reasonably anticipated resources of the institution. As under FUMIFA, determinations under Subsection (5) do not depend on the characterization of assets as income or principal and are not limited to the amount of income and unrealized appreciation.

In addition to the guidance provided by Subsection (5), other safeguards exist. Donors can restrict gifts and can provide specific instructions to donee institutions regarding appropriate uses for assets contributed. Within institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must operate both with the best interests of the institution in mind and in keeping with the intent of donors. If an institution diverts an institutional fund from the charitable purposes set forth in the gift instrument or provided under FUPMIFA, the state attorney general can enforce the charitable interests of the public. In addition, if the gift instrument provides legal standing to the donor or another party, the donor or other party may enforce the gift instrument. By relying on these safeguards while providing institutions with adequate discretion to make appropriate expenditures, FUPMIFA creates a standard that takes into consideration the diversity of the charitable sector.

Distinguishing Legal and Accounting Standards. An endowment fund may restricted because of the donor's intent reflected in the gift instrument that the fund be restricted by the prudent spending rule, that the fund not be spent in the current year, and that the fund continue to maintain its value for a long time. Regardless of the treatment of an endowment fund from an accounting standpoint, legally an endowment fund should not be considered unrestricted. Paragraph (a) states that endowment funds will be legally restricted until the institution appropriates funds for expenditure.

The term "endowment fund" includes funds that may last in perpetuity but also funds that are created to last for a fixed term of years or until the institution achieves a specified objective. Subsection (5) requires the institution to consider the intended duration of the fund in making determinations about spending. For example, if a donor directs that a fund be spent over 20 years, Subsection (5) will guide the institution in making distribution decisions. The institution would amortize the fund over 20 years rather than try to maintain the fund in perpetuity. For an endowment fund of limited duration, spending at a rate higher than rates typically used for endowment spending will be both necessary and prudent.

Paragraph (c). Rule of Construction. Donor's intent must be respected in the process of making decisions to expend endowment funds. Subsection (5) does not allow an institution to convert an endowment fund into a non-endowment fund nor does the section allow the institution to ignore a donor's intent that a fund be maintained as an endowment. Rather, Paragraph (c) provides rules of construction to assist institutions in interpreting donor's intent. Paragraph (c) assumes that if a donor wants an institution to spend "only the income" from a fund, the donor intends that the fund both support current expenditures and be preserved permanently. The donor is unlikely to be concerned about designation of particular returns as "income" or "principal" under accounting principles. Rather the donor is more likely to assume that the institution will use modern total-return investing techniques to generate enough funds to distribute while maintaining the long-term viability of the fund. Paragraph (c) is an intent effectuating provision that provides default rules to construe donor's intent.

As Paragraph (b) explains, a donor who wants to specify particular spending guidelines can do so. For example, a donor might require that a charity spend between three and five percent of an endowed gift each year, regardless of investment performance or other factors. Because the charity agrees to the restriction in accepting the gift, the restriction will govern spending decisions by the charity. An instruction to "pay only the income" will not be specific enough, but an instruction to "pay only interest and dividend income earned by the fund and not to make other distributions of the kind authorized by Subsection (5) of Florida Statutes section 617.2103" should be sufficient. If a donor indicates that the rules on investing or expenditures under Subsection (5) do not apply to a particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a decision by a donor to require fund specific expenditure rules will likely also have consequences in the way the institution invests the fund.

Retroactive Application of the Rule of Construction. A constructional rule resolves an ambiguity, in this case, because donors use words like endowment or income without specific

directions regarding the intended meaning. Changing a statutory constructional rule does not change the underlying intent, and instead changes the way an ambiguity is resolved, in an attempt to increase the likelihood of giving effect to the intent of most donors.

If a donor has stated in a gift instrument specific directions as to spending, then the institution must respect those wishes, but many donors do not give precise instructions about how to spend endowment funds. Subsection (5) provides guidance for giving effect to a donor's intent when the donor has not been specific. Like Section 1010.10(3), of the Florida Statutes, Subsection (5) of this Section is a rule of construction, so it does not violate either donor intent or the Constitution.

The issue of whether to apply a rule of construction retroactively was considered in connection with UMIFA. When the New Hampshire legislature considered UMIFA, the Senate asked the New Hampshire Supreme Court for an opinion regarding whether UMIFA, if adopted, would violate a provision of the state constitution prohibiting retrospective laws, and also whether the statute would encroach on the functions of the judicial branch. The opinion answered no to both questions. Opinion of the Justices, Request of the Senate No. 6667, 113 N.H. 287, 306 A.2d 55 (1973).

More recently the Colorado Supreme Court considered the retroactive application of another constructional statute, one that deems the designation of a spouse as the beneficiary of a life insurance policy to be revoked in a case in which the marriage was dissolved after the naming of the spouse as beneficiary. *In re Estate of DeWitt*, 54 P. 3d 849 (Colo. 2002). In holding that retroactive application of the statute did not violate the Contracts Clause, the court cited approvingly from a statement prepared by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB). JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to PreExisting Documents, 17 Am. Coll. Tr. & Est. Couns. Notes 184 app. II (1991).

The JEB Statement explains that the purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law. By definition, however, rules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction. See also *In re Gardner's Trust*, 266 Minn. 127, 132, 123 N.W. 2d 69, 73 (1963) ("[I]t is doubtful whether the testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends go where the law required them to go at the time they were received by the trustee.") (Uniform Principal and Income Act).

Non-retroactivity would produce serious practical problems: If FUPMIFA were not retroactive, a charity would need to keep two sets of books for each endowment fund created before the enactment of this Section, if new funds were added after the enactment. The burden that such a rule would impose is out of proportion to the benefit sought.

Subsection (6) – Delegation of Management and Investment Functions. The prudent investor standard in Subsection (5) presupposes the power to delegate. For some types of

investment, prudence requires diversification, and diversification may best be accomplished through the use of pooled investment vehicles that entail delegation.

Subsection (6) incorporates the delegation rule found in UPIA § 9, updating the delegation rules in Section 1010.10(6), of the Florida Statutes. Subsection (6) permits the decision makers in an institution to delegate management and investment functions to external agents if the decision makers exercise reasonable skill, care, and caution in selecting the agent, defining the scope of the delegation and reviewing the performance of the agent. In some circumstances, the scope of the delegation may include redelegation. For example, an institution may select an investment manager to assist with investment decisions. The delegation may include the authority to redelegate to investment managers with expertise in particular investment areas. All decisions to delegate require the exercise of reasonable care, skill, and caution in selecting, instructing, and monitoring agents. Further, decision makers cannot delegate the authority to make decisions concerning expenditures and can only delegate management and investment functions. Paragraph (c) protects decision makers who comply with the requirement for proper delegation from liability for actions or decisions of the agents. In making decisions concerning delegation, the institution must be mindful of Subsection (3)(c)(i) of this new Section, the provision that directs the institution to incur only reasonable costs in managing and investing an institutional fund.

Subsection (6) does not address issues of internal delegation and potential liability for internal delegation, and Paragraph (c) does not affect laws that govern personal liability of directors or trustees for matters outside the scope of Subsection (6). Directors will look to nonprofit corporation laws for these rules.

The language of Paragraph (c) is similar to that of UPIA § 9(c) and RMNCA § 8.30(d). The decision not to include the terms “beneficiaries” or “members” in Paragraph (c) does not indicate a decision that this Subsection (6) does not create immunity from claims brought by beneficiaries or members. Instead, a decision maker who complies with Subsection (6) will be protected from any liability resulting from actions or decisions made by an external agent.

Paragraph (d) creates personal jurisdiction over the agent. This Paragraph is not a choice of law rule.

Paragraph (e) notes that law other than this Section governs internal delegation. UMIFA included internal delegation as well as external delegation, due to a concern at that time that trust law concepts might govern internal delegation in nonprofit corporations. With the adoption of nonprofit corporation statutes, that concern no longer exists. The decision not to address internal delegation in this new Section does not suggest that a governing board of a nonprofit corporation cannot delegate to committees, officers, or employees. Rather, a nonprofit corporation must look to other law, typically a nonprofit corporation statute, for the rules governing internal delegation.

Subsection (7) – Release or Modification of Restrictions on Management, Investment or Purpose. Subsection (7) expands the rules on releasing or modifying restrictions

that are found in Section 1010.10(8), of the Florida Statutes. Paragraph (a) restates the rule from the existing statute allowing the release of a restriction with donor consent. Paragraphs (b) and (c) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under appropriate circumstances. Paragraph (d), a new provision, permits an institution to apply cy pres on its own for small funds that have existed for a substantial period of time, after giving notice to the state attorney general.

Although Section 1010.10(8)(e) states that it did not "limit the application of the doctrine of cy pres, what that statement meant was unclear. Section 1010.10, Fla. Stat. itself appeared to permit only a release of a restriction and not a modification. That all-or-nothing approach did not adequately protect donor intent. By expressly including deviation and cy pres, this new Section requires an institution to seek modifications that are "in accordance with the donor's probable intention" for deviation and "in a manner consistent with the charitable purposes expressed in the gift instrument" for cy pres.

Individual Funds. The rules on modification require that the institution, or a court applying a court-ordered doctrine, review each institutional fund separately. Although an institution may manage institutional funds collectively, for purposes of this Subsection each fund must be considered individually.

Paragraph (a). Donor Release. Paragraph (a) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a restriction, this Paragraph does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect the property to another use by the charity. The donor has no retained interest in the fund.

Paragraph (b). Equitable Deviation. Paragraph (b) applies the rule of equitable deviation, adapting the language of Florida Trust Code sections 736.04113 & 736.0412. See also Restatement (Third) of Trusts § 66 (2003). Under the deviation doctrine, a court may modify restrictions on the way an institution manages or administers a fund in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor commonly has a predominating purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. Deviation does not alter the purpose but rather modifies the means in order to carry out the purpose.

Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations the restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner. A court applying deviation should attempt to follow the donor's probable intention in deciding how to modify the restriction. Consistent with the doctrine of equitable deviation in trust law, Paragraph (b) does not require an institution to notify donors of the proposed modification. Good practice dictates notifying any donors who are

alive and can be located with a reasonable expenditure of time and money. Consistent with the doctrine of deviation under trust law, the institution must notify the attorney general who may choose to participate in the court proceeding. The attorney general protects donor intent as well as the public's interest in charitable assets.

Paragraph (c). Cy Pres. Paragraph (c) applies the rule of cy pres from trust law, authorizing the court to modify the purpose of an institutional fund. The term "modify" encompasses the release of a restriction as well as an alteration of a restriction and also permits a court to order that the fund be paid to another institution. A court can apply the doctrine of cy pres only if the restriction in question has become unlawful, impracticable, impossible to achieve, or wasteful. Any change must be made in a manner consistent with the charitable purposes expressed in the gift instrument. Consistent with the doctrine of cy pres, Paragraph (c) does not require an institution seeking cy pres to notify donors. Good practice will be to notify donors whenever possible. As with deviation, the institution must notify the attorney general who must have the opportunity to be heard in the proceeding.

Paragraph (d). Modification of Small, Old Funds. Paragraph (d) permits an institution to release or modify a restriction according to cy pres principles but without court approval if the amount of the institutional fund involved is small and if the institutional fund has been in existence for more than 20 years. The rationale is that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. Paragraph (d) was drafted to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent. It was concluded that an institutional fund with a value of $100,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion to its protective purpose. The Committee included a requirement that the institutional fund be in existence at least 20 years, as a further safeguard for fidelity to donor intent. The 20-year period begins to run from the date of inception of the fund and not from the date of each gift to the fund.

As under judicial cy pres, an institution acting under Paragraph (d) must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term "wasteful" would allow the institution to combine the fund with another fund with similar purposes. If a fund has been created for nursing scholarships and the institution closes its nursing school, the institution might appropriately decide to use the fund for other scholarships at the institution. In using the authority granted under Paragraph (d), the institution must determine which alternative use for the fund reasonably approximates the original intent of the donor. The institution cannot divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

An institution seeking to modify a provision under Paragraph (d) must notify the attorney general of the planned modification. The institution must wait 60 days before proceeding; the attorney general may take action if the proposed modification appears inappropriate.

Notice to Donors. The Drafting Committee decided not to require notification of donors under Paragraphs (b), (c), and (d). The trust law rules of equitable deviation and cy pres do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public's interest in charitable assets.

With regard to Paragraph (d), the Drafting Committee concluded that an institution should not be required to give notice to donors. Paragraph (d) can only be used for an old and small fund. Locating a donor who contributed to the fund more than 20 years earlier may be difficult and expensive. If multiple donors each gave a small amount to create a fund 20 years earlier, the task of locating all of those donors would be harder still. The Drafting Committee concluded that an institution's concern for donor relations would serve as a sufficient incentive for notifying donors when donors can be located.

Subsection (8) – Reviewing Compliance. Subsection (8) merely clarifies that compliance with this Section is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

Subsection (9) – Application to Existing Institutional Funds. Subsection (9) specifies that this Section applies to institutional funds existing on or established after the effective date of this Section. As applied to institutional funds existing on the effective date of this Section, this Section governs only decisions made or actions taken on or after that date.

Subsection (10) – Effective Date. Subsection (10) makes the effective date of this Section July 1, 2010.

Subsection (11) – Repeal. Subsection (11) repeals Section 1010.10 of the Florida Statutes, as this FUPMIFA would replace it.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed changes are expected to have no impact on the collection of any taxes and, therefore, no impact on state and local governments.

A bill to be entitled

An act relating to probate, amending s. 731.110, s. 731.201, s. 731.301, s. 733.2123, s. 733.608, s. 735.203, clarify that formal notice is a form of notice and method of service, clarifying service in the manner provided for formal notice, and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 731.110, Florida Statutes is amended to read:

731.110 Caveat proceedings.—

(3) When a caveat has been filed by an interested person other than a creditor, the court shall not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent ~~by formal notice~~ and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

Section 2. Subsections (18) and Subsection (22) of section 731.201, Florida Statutes, are amended to read:

731.201 General definitions.—Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:--

(18) "Formal notice" means a form of notice described in, and which is served by a method of service ~~formal notice under~~ provided in rule 5.040(a) of the Florida Probate Rules. --

(22) "Informal notice" or "notice" means a method of serving pleadings and papers as provided in rule 5.041(b) of ~~informal notice under~~ the Florida Probate Rules.

Section 2. Subsection (1), Subsection (2) and Subsection (3) of section 731.301, Florida Statutes are amended to read:

731.301 Notice**.**—

(1) When notice to an interested person of a petition or other proceeding is required, the notice shall be given to the interested person or that person's attorney as provided in this code or in the Florida Probate Rules.

(2) In a probate proceeding, ~~F~~formal notice shall be sufficient to acquire jurisdiction over the person receiving ~~formal~~ that notice to the extent of the person's interest in the estate~~.~~ or in the decedent's homestead property.

(3) Persons given proper notice of any proceeding shall be bound by all orders entered in that proceeding.

Section 3. Section 733.2123, Florida Statutes is amended to read:

733.2123 Adjudication before issuance of letters.—A petitioner may serve formal notice of the petition for administration on interested persons. ~~A copy of the will offered for probate shall be attached to notice.~~ No person who is served with formal notice of the petition for administration prior to the issuance of letters or who has waived notice may challenge the

validity of the will, testacy of the decedent, qualifications of the personal representative, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

Section 4. Subsection (4) of section 733.608, Florida Statutes is amended to read:

733.608 General power of the personal representative.—

(4) The personal representative's lien shall attach to the property and take priority as of the date and time a notice of that lien is recorded in the official records of the county where that property is located, and the lien may secure expenditures and obligations incurred, including, but not limited to, fees and costs made before or after recording the notice. The notice of lien may be recorded prior to the adjudication of the amount of the debt. The notice of lien also shall be filed in the probate proceeding, but failure to do so shall not affect the validity of the lien. A copy of the notice of lien shall be served ~~by~~ in the manner provided for service of formal notice upon each person appearing to have an interest in the property. The notice of lien shall state:

Section 5. Subsection () of section 735.203, Florida Statutes is amended to read:

735.203 Petition for summary administration.—

(3) The joinder in, or consent to, a petition for summary administration is not required of a beneficiary who will receive full distributive share under the proposed distribution. The Petition shall be served by formal notice upon a~~A~~ny beneficiary not joining or consenting ~~shall receive formal notice of~~ in the petition.

Section 6. This act shall take effect on July 1, 2010.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Tae Kelley Bronner, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section of the Florida Bar (August 2, 2009)

Address 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33647
Telephone: (813) 907-6643

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33647, Telephone (813) 907-6643.
Rohan Kelley, The Kelley Law Firm, 3365 Galt Ocean Drive, Ft. Lauderdale, FL 33308, Telephone (954) 563-1400.
Michael J. Gelfand, Gelfand & Arpe, 1555 Palm Beach Lakes Blvd., Ste. 1220, West Palm Beach, Florida 33401 Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support the amendment of F.S. § 731.110, F.S. §731.201, F.S. 731.301, F.S. §733.2123, F.S. §733.608, F.S. §735.203. The purpose of the amendments is to clarify that formal notice is actually a particular form of notice not just a document or just a method of service.

Reasons For Proposed Advocacy:

Confusion arises when lawyers "serve formal notice" or "serve by formal notice." Many practitioners mistakenly believe simply utilizing the service methods listed in the Florida Probate Rules without the inclusion of the required notice or sending the FLSSI form entitled "Formal Notice" by regular mail satisfies the requirement of service by formal notice. Broad confusion also exists where a pleading is required to be served in the manner of formal notice. The amendments clarify that formal notice is a neither just a document or just a method of service. The amendments also clarify the distinction between formal notice, service in the manner provided for formal notice and when each is appropriate. Please see attached White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

Proposed Revisions to §731.110, Florida Statutes, §731.201, Florida Statutes, §731.301, Florida Statutes, §733.2123, Florida Statutes, §733.608, Florida Statutes, and §735.203, Florida Statutes

I. Summary.

The purpose of the amendments is largely a housekeeping amendment to clarify that formal notice is actually a particular form of notice not just a document or just a method of service.

II. Current Situation.

Confusion arises when lawyers "serve formal notice" or "serve by formal notice". Many practitioners believe that simply sending a document by certified mail, return receipt requested, is serving formal notice (or by formal notice). Others take the FLSSI form entitled "Formal Notice," enclose it in an envelope (sometimes with and sometimes without a copy of the pleading or paper being served), send it by regular mail, and consider they have served formal notice. Neither of these methods is sufficient. There is also broad confusion where notice is served "in the manner of formal notice." Finally, there is currently some confusion regarding of what affect formal notice has on the jurisdiction of the court. The amendment clarifies that in a probate proceeding formal notice shall be sufficient to acquire jurisdiction. Finally, there are procedural requirements, which are also in the rules, and need to be removed from the statutes. The committee believes the amendments to the statutes to more clearly describe formal notice as a method of service will eliminate this confusion.

III. Effect of Proposed Change Generally.

The proposed changes will eliminate the present confusion between those forms of service and better define formal notice to clarify that formal notice means a particular form of notice served by a particular method of service defined in rule 5.040(a) of the Florida Probate Rules.

IV. Analysis.

Formal notice is actually a particular form of notice (*eg.* requiring a response within 20 days, etc.) which is served by a particular method of service (*eg.* certified mail, return receipt requested or other authorized methods) as defined in Fla. Prob. R. 5.040(a). It is neither ***just*** a document or ***just*** a method of service. This is often confused with service in the manner of formal notice. The requirement that something be served in the manner provided for formal notice simply means that the document be

served by one of the methods listed in Fla. Prob. R. 5.040(a)(3) (*eg.* certified mail, return receipt requested or other authorized methods) but does not require the inclusion of the accompanying notice under Fla. Prob. R. 5.040(a)(1) and does not impose limitation on the time in which the recipient must respond. As with formal notice, however, service as provided in manner of formal notice is complete upon receipt, not upon mailing as with informal notice. *Fla. Prob. Rule 5.041(b).*

To avoid the present confusion, the amendments begin by revising the definition of formal notice in §731.201, Florida Statutes, to clarify that formal notice means a particular form of notice served by a particular method of service as defined in Fla. Prob. R. 5.040(a). The definition of informal notice is also amended to clarify that informal notice is also a method of service but as provided in Fla. Prob. R. 5.041(b). Additional statutory "clean up" was also needed throughout the Probate Code where the code indicated that something should be served by formal notice or in the manner of formal notice. The amendment rephrases those references to formal notice to include requirements that formal notice of a particular document is served rather than "service by formal notice". These housekeeping amendments include amendments to §731.110, Florida Statutes, §733.2123, Florida Statutes, §733.608, Florida Statutes, and §735.203, Florida Statutes.

Finally, §731.301(2) is amended to clarify that formal notice in a probate proceeding is sufficient to acquire jurisdiction over the person receiving that notice to the extent of that person's interest in the estate or in the decedent's homestead property.

I. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS – None.

II. DIRECT IMPACT ON PRIVATE SECTOR – None.

III. CONSTITUTIONAL ISSUES – None apparent.

IV. OTHER INTERESTED PARTIES – Clerks of Court

A bill to be entitled

An act relating to probate and trust law; amending s. 732.608, Florida Statutes, and s. 736.1102, Florid Statutes, clarifying that the laws for determining paternity and relationships for purposes of intestate succession will apply in determining whether class gifts or terms of relationship set forth in wills and trusts include adopted persons or persons born out of wedlock, and providing effective date.

Be It Enacted by the Legislature of the State of Florida.

Section 1. Section 732.608, Florida Statutes, is amended to read:

732.608 Construction of generic terms.- ~~Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules~~ The laws for determining paternity and relationships for purposes of intestate succession shall apply to determine whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock.

Section 2. Section 736.1102, Florida Statutes is amended to read:

736.1102 Construction of generic terms.- ~~Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules~~ The laws for determining paternity and relationships for purposes of intestate succession shall apply to determine whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock.

Section 3. This act shall take effect on July 1, 2010.

RM:6724080:1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647, (813) 907-6643
Anne Buzby, Rogers and Towers, P.A., 1301 Riverplace Blvd Ste 1500, Jacksonville, FL 32207, (904) 398-3911
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Amends Section 732.608 and 736.1102 to clarify that the laws for determining paternity and relationships for purposes of intestate succession will apply in determining whether class gifts or terms of relationship set forth in wills and trusts include adopted persons or persons born out of wedlock.

Reasons For Proposed Advocacy Sections 732.608 and 736.1102, Florida Statutes provide that adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship set forth in wills and trusts in accordance with rules for determining relationships for purposes of intestate succession. The proposed changes to the statute clarify that it is the laws for determining paternity and relationships for purposes of intestate succession which apply to determine whether class gift terminology and terms of relationship set forth in a will or trust include adopted persons and persons born out of wedlock.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. (Name of Group or Organization) (Support, Oppose or No Position)

2. (Name of Group or Organization) (Support, Oppose or No Position)

3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED REVISIONS TO §732.608 and 736.1102 FLA.STAT.

I. SUMMARY

The purpose of the proposed change is to clarify that the laws for determining paternity and relationships for purposes intestate succession apply to determine whether class gift terminology and terms of relationship in wills and trusts include adopted persons and persons born out of wedlock.

II. CURRENT SITUATION

The current statutes refer to the term “rules” for determining paternity and relationships for purposes of intestate succession.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change amends Sections 732.608 and 736.1102, Florida Statutes to refer to the term “laws” rather than the term “rules” and rewords the Sections to be active rather than passive.

IV. ANALYSIS

Sections 732.608 and 736.1102, Florida Statutes provide that adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship set forth in wills and trusts in accordance with rules for determining relationships for purposes of intestate succession. The proposed changes to the statute clarify that it is the laws for determining paternity and relationships for purposes of intestate succession which apply to determine whether class gift terminology and terms of relationship set forth in a will or trust include adopted persons and persons born out of wedlock.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS-None

VI. DIRECT IMPACT ON PRIVATE SECTOR-None

VII. CONSTITUTIONAL ISSUES-NONE

VIII. OTHER INTERESTED PARTIES-NONE

A bill to be entitled

An act relating to administration of estates; amending s. 733.607, F.S.; revising provisions to permit trust exclusions and adding a cross-reference; amending s. 736.05053, F.S.; revising provisions on abatement and adding a cross-reference; amending s. 733.707, F.S.; adding a cross-reference; providing an effective date.

Be it enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 733.607, Florida Statutes, is amended to read:

733.607 Possession of estate.—

(2) If, after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent's estate are insufficient to pay the expenses of the administration and obligations of the decedent's estate, the personal representative is entitled to payment from the trustee of a trust described in s. 733.707(3), in the amount the personal representative certifies in writing to be required to satisfy the insufficiency~~.~~, subject to the exclusions and preferences of s. 736.05053. The provisions of s. 733.805 shall apply in determining the amount of any payment required by the foregoing provisions of this section.

Section 2. Subsection (3) of section 733.707, Florida Statutes, is amended to read:

733.707 Order of payment of expenses and obligations.--

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2)~~.~~ and s. 736.05053.

Section 3. Section 736.05053, Florida Statutes, is amended by adding a new subsection (5) as follows:

736.05053. Trustee's duty to pay expenses and obligations of settlor's estate.--

(5) Nonresiduary trust dispositions shall abate prorata with nonresiduary devises pursuant to the priorities of this section and s. 733.805, determined as if the beneficiaries of the will and trust, other than the estate or trust itself, were taking under a common instrument.

Section 4. This act shall take effect July 1, 2010.

RM:6747986:1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Barry F. Spivey, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section

Address 1515 Ringling Blvd., Ste. 700, Sarasota, FL 34236
Telephone: (941) 316-7610

Position Type Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance **Barry F. Spivey**, Ruden, McClosky, Smith, Schuster & Russell, P.A.,1515 Ringling Blvd., Sarasota, FL 34236, Telephone (941) 316-7600.
Michael Gelfand, Gelfand & Arpe, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone (561) 655-6224.
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

To amend §733.607, §733.707, and §736.05053 of the Florida Statutes to clarify the requirement that a decedent's will and revocable trust must be read together in determining the source of payment of administration expenses and obligations of the decedent's estate, and to further clarify that the order in which gifts under a will and trust are appropriated to pay administration expenses and other obligations is as specified in §733.805.

Reasons For Proposed Advocacy:

The Florida Probate Code and the Florida Trust Code have provisions to insure that the expenses of administration and other obligations of a decedent's estate are paid from the decedent's revocable trust, if

one exists, and if the probate assets are insufficient. The statutes require that the will and trust be read together as though they were one document in order to make sure that specific, nonresiduary gifts under both documents are paid before gifts of the probate estate residue and trust residue are paid. The proposed amendments do not change the law, but clarify that the order in which gifts under the will and trust are appropriated to pay expenses and obligations is governed by §733.805 of the Probate Code.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position RPPTL Section supported adoption of the Florida Trust Code in 2007

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

PROBATE LAW & PROCEDURE COMMITTEE	APPROVED
(Name of Group or Organization)	(Support, Oppose or No Position)
(Name of Group or Organization)	(Support, Oppose or No Position)
(Name of Group or Organization)	(Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED REVISIONS TO 733.607, 733.707 AND 736.05053

I. SUMMARY

Current provisions in the Florida Probate Code and the Florida Trust Code provide that if a decedent's probate estate assets are insufficient to pay expenses of administering the estate and other obligations, the estate can request that the insufficiency be paid from the decedent's revocable trust, if one exists. The statutory scheme further provides that the will and trust must be read together as one plan, so that, for example, gifts of specific items or cash bequests in a will are not appropriated to pay expenses and obligations when there are assets of the trust that are not specific gifts (i.e., "residue" of the trust) available to pay those expenses and obligations. The proposed changes do not purport to change the current law, but are intended to clarify that specific gifts under both the will and trust (i.e., nonresiduary gifts) are to be appropriated proportionately to pay expenses and obligations if the residue of the will or trust is insufficient to pay them. This is accomplished by specific references to §733.805, the statute governing the order of appropriation of gifts (i.e., "abatement").

II. CURRENT SITUATION

While the statutory scheme described above is currently set forth in the Probate Code and the Trust Code, sections 733.607 and 736.05053 do not direct lawyers or the courts to §733.805, which is necessary in order to fully implement the intent of reading the decedent's will and revocable trust as one coherent plan. The proposed amendments would correct that deficiency.

III. EFFECT OF PROPOSED CHANGES

The proposed changes will insure the coordination of will and revocable trust provisions to make certain that specific gifts under either document will not be appropriated to pay expenses of administration and obligations of the decedent' probate estate when there are residuary assets of the estate or trust available to pay them. Section 733.805(4) already provides for such coordination, but the proposed changes clarify that the order of appropriation of gifts in both a will and a revocable trust is governed by that section.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal does not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

None are known at this time.

736.0206. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust

(1) ~~After notice to all interested persons,~~ ~~t~~The court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.

(2) If the settlor's estate is being probated, and the settlor's trust or the trustee of the settlor's trust is a beneficiary under the settlor's will, the trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) The burden of proof of the propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.

(4) Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. The costs, including attorney's fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.

(5) The court may determine reasonable compensation for a trustee or any person employed by a trustee without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee ~~shall~~ may be awarded by the court and paid from the assets of the trust unless the court finds that the expert testimony did not assist the court. The court shall direct from which part of the trust assets the fee shall be paid.

~~(6) Persons given notice as provided in this section shall be bound by all orders entered on the complaint.~~

~~(7)~~ (6) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

736.1007. Trustee's attorney's fees

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney's fees and costs.

(2) Unless otherwise agreed, compensation based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise a trustee concerning the trustee's duties in initial trust administration.

(3) An attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).

(4) Ordinary services of the attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to:

(a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.

(b) Implementation of substitution of the successor trustee.

(c) Persons who must or should be served with required notices and the method and timing of such service.

(d) The obligation of a successor to require a former trustee to provide an accounting.

(e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.

(f) The trustee's duty regarding investments imposed by the prudent investor rule.

(g) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of such obligations, the liability of the trust and trustee to the settlor's creditors, and the advisability or necessity for probate proceedings to bar creditors.

(h) Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate.

(i) Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.

(j) Filing a nontaxable affidavit, if not filed by a personal representative.

(k) Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions.

(l) Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.

(m) Preparation of any legal documents required to effect distribution.

(n) Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.

(o) If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.

(p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.

(5) In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:

(a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.

(b) Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes.

(c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation,

handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.

(d) Review of an estate tax return and preparation or review of other tax returns required to be filed by the trustee.

(e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of $10 million and one-fourth of 1 percent on the value in excess of $10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.

(f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.

(g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.

(h) Legal advice regarding claims for damage to the environment or related procedures.

(i) Legal advice regarding homestead status of trust real property or proceedings involving the status.

(j) Involvement in fiduciary, employee, or attorney compensation disputes.

(k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.

(6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as the court may determine to be appropriate:

(a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.

(b) The responsibilities assumed by, and potential liabilities of, the attorney.

(c) The nature and value of the assets that are affected by the decedent's death.

(d) The benefits or detriments resulting to the trust or the trust's beneficiaries from the attorney's services.

(e) The complexity or simplicity of the administration and the novelty of issues presented.

(f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.

(g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.

(h) Any delay in payment of the compensation after the services were furnished.

(i) Any other relevant factors.

~~(7) The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court shall direct from what part of the trust the fee is to be paid.~~

~~(8)~~ (7) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement of employment and, if employed, shall promptly file and serve a copy on all interested persons. A separate agreement or a provision in the trust suggesting or directing the trustee to retain a specific attorney does not obligate the trustee to employ the attorney or obligate the attorney to accept the representation but, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid shall not exceed the compensation provided in the agreement.

~~(9) Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from what part of the trust the fees are to be paid.~~

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Barry F. Spivey, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section

Address 1515 Ringling Blvd., Ste. 700, Sarasota, FL 34236
Telephone: (941) 316-7610

Position Type Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Barry F. Spivey, Ruden, McClosky, Smith, Schuster & Russell, P.A.,1515 Ringling Blvd., Sarasota, FL 34236, Telephone (941) 316-7600.
Michael Gelfand, Gelfand & Arpe, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone (561) 655-6224.
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators (SAME)

(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

RM:6747988:1

To amend the Florida Trust Code by deleting §736.1007(7) and (9) as duplicative of §736.0206, and modifying §736.0206 to delete redundant and unnecessary notice provisions and to also provide that, in judicial proceedings to determine reasonable compensation for a trustee or person employed by a trustee, the court has discretion to award a reasonable expert witness fee from the assets of the trust unless it finds that the expert testimony did not assist the court.

Reasons For Proposed Advocacy:

It is proposed that §§736.1007(7) and (9) be deleted as duplicative because they are nearly identical to §§736.0206(4) and (5).

It is also proposed that the notice provisions of §§736.0206(1) and (6) be eliminated as redundant and unnecessary because notice requirements in trust proceedings are governed by the Florida Rules of Civil Procedure, which are applicable to trust proceedings, as provided in §736.0201(1).

Lastly, it is proposed that §736.206(5) be amended to provide that, in judicial proceedings to determine reasonable compensation for a trustee or person employed by a trustee, the court has discretion to award a reasonable expert witness fee from the assets of the trust to an expert witness who testifies on the issue of reasonable compensation unless it finds that the expert testimony did not assist the court. Subsection 736.0206(5) currently requires the court to award an expert witness fee to any expert witness who testifies (i.e., "expert witness fee shall be awarded"), and the subsection contains no exception for cases in which the expert testimony did not assist the court, including those in which the expert testimony is offered in support of a substantially unreasonable compensation request. The Committee believes that the best policy is to permit the court to award expert witness fees in it sound discretion in such proceedings unless it affirmatively finds that the expert testimony did not assist the court in its determination of reasonable compensation.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position RPPTL Section supported adoption of the Florida Trust Code in 2007

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

None

RM:6747988:1

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

RM:6747988:1

WHITE PAPER

RE: PROPOSAL TO AMEND FLORIDA TRUST CODE §§736.0206 & 736.1007 WITH RESPECT TO PROCEEDINGS TO DETERMINE REASONABLE COMPENSATION

I. SUMMARY

This proposal is to amend the Florida Trust Code by deleting certain duplicative and unnecessary provisions concerning proceedings to determine reasonable compensation for the attorney for the trustee and notice in proceedings to determine reasonable compensation of trustees and persons employed by trustees, and providing that the court in such proceedings has the discretion to award a reasonable expert witness fee from the assets of the trust unless it finds that the expert testimony did not assist the court. This proposal does not have a fiscal impact on state funds

II. SECTION-BY-SECTION ANALYSIS

A. Section 736.1007

Current Situation: Subsection 736.1007(7) currently provides that in proceedings to determine reasonable compensation for the attorney for the trustee:

> The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court shall direct from what part of the trust the fee is to be paid. Subsection 736.0206(5) contains essentially the same provision with respect to proceedings to determine reasonable compensation of the trustee and persons employed by the trustee.

Subsection 736.0206(5) contains essentially the same provision with respect to proceedings to determine reasonable compensation of the trustee and persons employed by the trustee.

Subsection 736.1007(9) currently provides that:

> Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from what part of the trust the fees are to be paid.

Subsection 736.0206(4) contains essentially the same provision with respect to proceedings to determine reasonable compensation of the trustee and persons employed by the trustee.

Effect of Proposed Changes: This proposal would delete §§736.1007(7) and (9) as duplicative and unnecessary because they are nearly identical to §§736.0206(4) and (5). Subsection 736.1007(8) would be renumbered because of the deletion of §736.1007(7).

B. Section 736.0206

Current Situation: Subsections 736.0206(1) and (6) contain provisions concerning notice in proceedings to determine reasonable compensation of the trustee and persons employed by the trustee. Notice requirements in trust proceedings are already governed by the Florida Rules of Civil Procedure, as provided in §736.0201(1).

In addition, §736.0206(5) currently requires the court to award an expert witness fee to any expert witness who testifies in a proceeding to determine the reasonable compensation of the trustee or a person employed by the trustee (i.e., "expert witness fee shall be awarded"), and the subsection contains no exception for cases in which the expert testimony did not assist the court, including those in which the expert testimony is offered in support of a substantially unreasonable compensation request. The proposing Committee believes that the better policy is to permit the court to award expert witness fees in it sound discretion in such proceedings unless it affirmatively finds that the expert testimony did not assist the court in its determination of reasonable compensation.

Effect of Proposed Changes: This proposal would eliminate the notice provisions of §§736.0206(1) and (6) as redundant and unnecessary because notice requirements in trust proceedings are already governed by the Florida Rules of Civil Procedure, as provided in §736.0201(1).

In addition, this proposal would amend §736.206(5) to provide that, in judicial proceedings to determine reasonable compensation for a trustee or person employed by a trustee, the court has discretion to award a reasonable expert witness fee from the assets of the trust to an expert witness who testifies on the issue of reasonable compensation unless it finds that the expert testimony did not assist the court.

This proposal would renumber §736.0206(7) because of the deletion of §736.0206(6).

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal does not have a fiscal impact on state or local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal would reduce economic costs and otherwise benefit members of the private sector (i.e., trustees, persons employed by trustees and trust beneficiaries) by streamlining and adding greater certainty to the rules applicable to proceedings to determine reasonable compensation of trustees and persons employed by trustees, particularly with regard to the costs associated with the use of expert witness testimony in such proceedings.

V. CONSTITUTIONAL ISSUES

It is not anticipated that any constitutional issues will arise as a result of this proposal.

VI. OTHER INTERESTED PARTIES

No other groups or individuals assisted in the development of this proposal, were contacted regarding this proposal, or are believed to be interested in this proposal.

736.0505. Creditors' claims against settlor

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the

settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or

2. Section 2503(b), and if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in section 2503(b)

of the Internal Revenue Code of 1986, as amended.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Barry F. Spivey, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section

Address 1515 Ringling Blvd., Ste. 700, Sarasota, FL 34236
Telephone: (941) 316-7610

Position Type Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance **Barry F. Spivey**, Ruden, McClosky, Smith, Schuster & Russell, P.A.,1515 Ringling Blvd., Sarasota, FL 34236, Telephone (941) 316-7600.
Michael Gelfand, Gelfand & Arpe, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone (561) 655-6224.
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Amends §736.0505 of the Florida Statutes to clarify that two annual gift tax exclusion amounts are exempt from the claims of creditors of a trust beneficiary having a power to withdraw trust assets when contributions to the trust are made by a married person whose spouse makes a "split gift election" under the Internal Revenue Code.

Reasons For Proposed Advocacy:

Subsection 736.0505(2)(b) of the Florida Trust Code provides that, when a trust beneficiary's right to withdraw contributions to an irrevocable trust lapses, or is released or waived, a creditor of the beneficiary may reach the assets subject to the power but only to the extent that the value of the property affected *exceeds* the annual gift tax exclusion (currently $13,000). Frequently, estate planners draft powers of

withdrawal to include two annual exclusion amounts when contributions to a trust are made by a married contributor whose spouse can make a "split gift election." The proposed amendment makes clear that the amount exempt from creditor claims is the amount of two annual exclusion amounts for such contributions.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position RPPTL Section supported adoption of the Florida Trust Code in 2007

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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Referrals

None

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

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WHITE PAPER

PROPOSED REVISION TO §736.0505, FLA. STAT.

I. SUMMARY

The purpose of the proposed change to subsection (2)(b) of this statute is to clarify a possible ambiguity. The intent is to make it clear that when spouses contributing to an irrevocable trust make a "split gift election," *two* annual exclusion amounts for gift tax purposes are exempt from claims by creditors of a beneficiary who has the right to withdraw the contributions to the trust when the power to withdraw lapses (or is released or waived).

II. CURRENT SITUATION

The statute provides that the creditors of a beneficiary holding a power to withdraw assets from a trust can reach the assets subject to the power of withdrawal to satisfy creditor claims against the beneficiary as long as the withdrawal power is exercisable. However, when the power of withdrawal lapses, or is released or waived, a creditor can reach the assets formerly subject to the power to withdraw only to the extent that the assets subject to the power exceeded the amount of the gift tax annual exclusion. Frequently, trusts are drafted so that a contribution by a married person can be equal to two annual exclusion amounts if the contributor's spouse makes a "split gift election," and the power to withdraw extends to both annual exclusion amounts. The statute as it exists does not appear on its face to apply to more than one gift tax annual exclusion.

III. EFFECT OF PROPOSED CHANGE

This proposed amendment would make it clear that both annual exclusion amounts (currently totaling $26,000) are exempt from claims of the beneficiary's creditors when a married donor's spouse has consented to a split gift election, and the power of withdrawal has lapsed, or has been released or waived.

IV. ANALYSIS

The proposed amendment would tie the amount exempt from creditor claims against a beneficiary having a power of withdrawal to each donor of an amount subject to a beneficiary's power of withdrawal, and make it clear that "donor" includes spouses included as donors because of a split gift election under section 2513 of the Internal Revenue Code.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VII. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

A bill to be entitled

An act relating to community associations; amending s. 718.110, F.S.; providing for the application of certain amendments to a declaration of condominium to certain unit owners; amending s. 718.111, F.S.; clarifying the official records of the association; providing that providing penalties for any person who knowingly or intentionally defaces or destroys certain records of an association with the intent to harm the association or any of its members; providing that a unit owner request for official records must be submitted by specified delivery methods; providing that an association is not responsible for the use or misuse of certain information obtained pursuant to state law requiring the maintenance of certain records of an association; providing an exception; providing that, notwithstanding the other requirements, certain records are not accessible to unit owners; requiring that any rules adopted for the purpose of setting forth accounting principles or addressing financial reporting requirements include certain provisions and standards; amending s. 718.112, F.S.; revising requirements for the reappointment of certain board members; revising board eligibility requirements; revising notice requirements for board candidates; establishing requirements for newly elected board members; providing that a director or officer delinquent in the payment of a monetary obligation due to the association by more than a specified number of days is deemed to have abandoned the office; creating certain exemptions fore application of election procedures for associations governing a timeshare condominium; requiring that a director charged by information or indictment of certain offenses involving an association’s funds or property be removed from office; amending s. 718.115, F.S.;

CODING: Words ~~stricken~~ are deletions; words underlined are additions

requiring that certain services obtained pursuant to a bulk contract as provided in the declaration be deemed a common expense; requiring that such contracts contain certain provisions; authorizing the cancellation of certain contracts; amending s. 718.116, F.S.; limiting the amount of certain costs to the unit owner; providing an exception; providing a maximum fee for expenses associated with efforts to collect assessments; providing a maximum fee for issuance of an estoppel letter; authorizing an association to demand tenants to make payments to the association to offset monetary obligations related to the condominium unit under specified conditions; requiring that a tenant continue to deliver rental payments to the association until the occurrence of specified events and to get credit for rental prepayments; requiring the delivery of notice of such demand; limiting the liability of a tenant; amending s. 718.301; providing that transfer of control occurs when a receiver is appointed for the developer, unless an interested party petitions the court within 30 days that transfer of control would be detrimental; amending s. 718.303, F.S.; authorizing an association to suspend, until paid, the right of a unit owner or the unit's occupant, licensee, or invitee to use certain common elements under certain circumstances; excluding certain common elements from such authorization; prohibiting a fine from being levied or a suspension from being imposed unless the association meets certain notice requirements; providing circumstances under which such notice requirements do not apply; providing procedures and notice requirements for levying a fine or imposing a suspension; authorizing an association to suspend voting rights due to nonpayment of any monetary obligation due to the association which is delinquent by a specified

number of days under certain circumstances; amending s. 719.104, F.S.; providing that a unit owner request for official records must be submitted by specified delivery methods; providing that, notwithstanding the other requirements, certain records are not accessible to unit owners; amending s. 719.108, F.S.; authorizing an association to recover charges incurred in connection with collecting a delinquent assessment up to a specified maximum amount; providing a maximum fee for expenses associated with efforts to collect assessments; providing a maximum fee for issuance of an estoppel letter; providing a prioritized list for disbursement of payments received by an association; providing for a lien by an association on a condominium unit for certain fees and costs; providing procedures and notice requirements for the filing of a lien by an association; authorizing an association to demand future regular assessments related to a unit under specified conditions; authorizing an association to demand tenants to make payments to the association to offset monetary obligations related to the cooperative share under specified conditions; requiring that a tenant continue to deliver rental payments to the association until the occurrence of specified events and to get credit for rental prepayments; requiring the delivery of notice of such demand; limiting the liability of a tenant; amending s. 720.303, F.S.; revising provisions relating to homeowners' association board meetings, inspection and copying of records, and reserve accounts of budgets; prohibiting certain association personnel from receiving a salary or compensation; providing exceptions; providing that a unit owner request for official records must be submitted by specified delivery methods; amending s. 720.304, F.S.; providing that a flagpole and any flagpole display are subject to certain codes and

regulations; amending s. 720.305, F.S.; authorizing the association to suspend certain rights under certain circumstances; providing that certain provisions regarding the suspension-of-use rights of an association do not apply to certain portions of common areas; providing procedures and notice requirements for levying a fine or imposing a suspension; amending s. 720.306, F.S.; providing requirements for secret ballots; providing for additional election procedures; amending s. 720.3085, F.S.; authorizing an association to demand tenants to make payments to the association to offset monetary obligations related to the parcel under specified conditions; requiring that a tenant continue to deliver rental payments to the association until the occurrence of specified events and to get credit for rental prepayments; requiring the delivery of notice of such demand; limiting the liability of a tenant; amending s. 720.30851, F.S.; providing a maximum fee for issuance of an estoppel certificate; amending s. 720.31, F.S.; authorizing an association to enter into certain agreements; requiring that certain items be stated and fully described in the declaration; limiting an association's power to enter into such agreements after a specified period following the recording of a declaration; requiring that certain agreements be approved by a specified percentage of voting interests of an association when the declaration is silent as to the authority of an association to enter into such agreement; authorizing an association to join with other associations or a master association under certain circumstances and for specified purposes; amending s. 718.103, F.S.; expanding the definition of "developer" to include a bulk assignee or bulk buyer; amending s. 718.301, F.S.; revising conditions under which unit owners other than the developer may elect not less than a majority of the

members of the board of administration of an association; creating part VII of ch. 718, F.S.; providing a short title; providing legislative findings and intent; defining the terms “bulk assignee” and “bulk buyer”; providing for the assignment of developer rights by a bulk assignee; specifying liabilities of bulk assignees and bulk buyers; providing exceptions; providing additional responsibilities of bulk assignees and bulk buyers; authorizing certain entities to assign developer rights to a bulk assignee; limiting the number of bulk assignees at any given time; providing for the transfer of control of a board of administration; providing effects of such transfer on parcels acquired by a bulk assignee; providing obligations of a bulk assignee upon the transfer of control of a board of administration; requiring that a bulk assignee certify certain information in writing; providing for the resolution of a conflict between specified provisions of state law; providing that the failure of a bulk assignee or bulk buyer to comply with specified provisions of state law results in the loss of certain protections and exemptions; requiring that a bulk assignee or bulk buyer file certain information with the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation before offering any units for sale or lease in excess of a specified term; requiring that a copy of such information be provided to a prospective purchaser; requiring that certain contracts and disclosure statements contain specified statements; requiring that a bulk assignee or bulk buyer comply with certain disclosure requirements; prohibiting a bulk assignee from taking certain actions on behalf of an association while the bulk assignee is in control of the board of administration of the association and requiring that such bulk assignee comply with certain requirements;

requiring that a bulk assignee or bulk buyer comply with certain requirements regarding certain contracts; providing unit owners with specified protections regarding certain contracts; requiring that a bulk buyer comply with certain requirements regarding the transfer of a unit; prohibiting a person from being classified as a bulk assignee or bulk buyer unless condominium parcels were acquired before a specified date; providing for the determination of the date of acquisition of a parcel; providing that the assignment of developer rights to a bulk assignee does not release a developer from certain liabilities; preserving certain liabilities for certain parties.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (13) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court. -

(13) Any amendment prohibiting ~~restricting~~ unit owners from renting their units or altering the duration of the rental term or the number of times unit owners are entitled to rent their units during a specified period ~~owners' rights relating to the rental of units~~ applies only to unit owners who consent to the amendment ~~and~~ or unit owners who acquire title to ~~purchase~~ their units after the effective date of that amendment.

Section 2. Subsections (12) and (13) of section 718.111, Florida Statutes, are amended to read:

718.111 The association. -

(12) OFFICIAL RECORDS. -

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

1. A copy of the plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4).

2. A photocopy of the recorded declaration of condominium of each condominium operated by the association and of each amendment to each declaration.

3. A photocopy of the recorded bylaws of the association and of each amendment to the bylaws.

4. A certified copy of the articles of incorporation of the association, or other documents creating the association, and of each amendment thereto.

5. A copy of the current rules of the association.

6. A book or books which contain the minutes of all meetings of the association, of the board of administration, and of unit owners, which minutes shall be retained for a period of not less than 7 years.

7. A current roster of all unit owners and their mailing addresses, unit identifications and, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and the numbers designated by unit owners for receiving notice sent by electronic transmission of those unit owners consenting to receive notice by electronic transmission. The electronic

mailing addresses ~~and numbers~~ provided by unit owners to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. However, the association is not liable for an erroneous disclosure of the electronic mailing address or the number for receiving electronic transmission of notices. Notwithstanding any provision in this section to the contrary, the association shall not disclose or release any contact information requested in writing by a unit owner to remain private and confidential.

8. All current insurance policies of the association and condominiums operated by the association.

9. A current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility.

10. Bills of sale or transfer for all property owned by the association.

11. Accounting records for the association and separate accounting records for each condominium which the association operates. All accounting records shall be maintained for a period of not less than 7 years. Any person who knowingly or intentionally defaces or destroys accounting records required to be maintained by this chapter during the period for which such records are required to be maintained pursuant to this chapter, or who knowingly or intentionally fails to create or maintain accounting records required to be maintained by this chapter, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The accounting records shall include, but are not limited to:

a. Accurate, itemized, and detailed records of all receipts and expenditures.

b. A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due.

c. All audits, reviews, accounting statements, and financial reports of the association or condominium.

d. All contracts for work to be performed. Bids for work to be performed shall also be considered official records and shall be maintained by the association.

12. Ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners, which shall be maintained for a period of 1 year from the date of the election, vote, or meeting to which the document relates, notwithstanding paragraph (b).

13. All rental records, when the association is acting as agent for the rental of condominium units.

14. A copy of the current question and answer sheet as described by s. 718.504.

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

16. A copy of the inspection report as provided for in s. 718.301(4)(p).

(b) The official records of the association shall be maintained within the state for at least 7 years. The records of the association shall be made available to a unit owner within 45 miles of the condominium property or within the county in which the

condominium property is located within 5 working days after receipt of written request by the board or its designee. However, such distance requirement does not apply to an association governing a timeshare condominium. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property, or the association may offer the option of making the records of the association available to a unit owner either electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. The association is not responsible for the use or misuse of the information provided to an association member or the authorized representative of the member pursuant to the compliance requirements of this chapter unless the association has an affirmative duty not to disclose such information pursuant to this chapter.

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request submitted by certified mail, return receipt requested, or receipted commercial delivery to the association's mailing address shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual

damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request. The failure to permit inspection of the association records as provided herein entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records for inspection. Any person who knowingly or intentionally defaces or destroys accounting records that are required by this chapter to be maintained during the period for which such records are required to be maintained pursuant to this chapter, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained by this chapter, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet provided for in s. 718.504 and year-end financial information required in this section, on the condominium property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the documents ~~same~~. Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction;

which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health and insurance records.

4.~~3.~~ Medical records of unit owners.

5.~~4.~~ Social security numbers, driver's license numbers, credit card numbers, electronic mailing addresses, telephone numbers, emergency contact information, any addresses for a unit owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, and property address.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allows manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(13) FINANCIAL REPORTING.–Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner. The division shall adopt rules setting forth uniform accounting principles and standards to be used by all associations and shall adopt rules addressing financial reporting requirements for multicondominium associations. The rules shall include, but not be limited to, standards for presenting a summary of association reserves, including, but not limited to, a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. This disclosure is not applicable to reserves funded via the pooling method ~~uniform accounting principles and standards for stating the disclosure of at least a summary of the reserves, including information as to whether such reserves are being funded at a level sufficient to prevent the need for a special assessment and, if not, the amount of assessments necessary to bring the reserves up to the level necessary to avoid a special assessment. The person preparing the financial reports shall be entitled~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions

~~to rely on an inspection report prepared for or provided to the association to meet the fiscal and fiduciary standards of this chapter.~~ In adopting such rules, the division shall consider the number of members and annual revenues of an association. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b) 1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association <u>that</u> ~~which~~ operates <u>fewer</u> ~~less~~ than 50 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a).

3. A report of cash receipts and disbursements must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as

applicable: costs for security, professional and management fees and expenses, taxes, costs for recreation facilities, expenses for refuse collection and utility services, expenses for lawn care, costs for building maintenance and repair, insurance costs, administration and salary expenses, and reserves accumulated and expended for capital expenditures, deferred maintenance, and any other category for which the association maintains reserves.

(c) An association may prepare or cause to be prepared, without a meeting of or approval by the unit owners:

1. Compiled, reviewed, or audited financial statements, if the association is required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is required to prepare compiled financial statements; or

3. Audited financial statements if the association is required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Such meeting and approval must occur before ~~prior to~~ the end of the fiscal year and is effective only for the fiscal year in which the vote is taken, except that the approval also may be effective for the following fiscal year. With respect to an association to which the developer has not turned over control of the association, all unit owners, including the developer, may vote on issues related to the preparation of financial reports for the first 2 fiscal years of the association's operation, beginning with the fiscal year in which the declaration is recorded. Thereafter, all unit owners except the developer may vote on such issues until control is turned over to the association by the developer. Any audit or review prepared under this section shall be paid for by the developer if done prior to turnover of control of the association. An association may not waive the financial reporting requirements of this section for more than 3 consecutive years.

Section 3. Paragraphs (d), (n), and (o) of subsection (2) of subsection of section 718.112, Florida Statutes, are amended to read:

718.112 Bylaws.-

(2) REQUIRED PROVISIONS.-The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(d) Unit owner meetings.

1. There shall be an annual meeting of the unit owners held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property. However, such distance requirement does not apply to an association governing a timeshare condominium.

2. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the election shall be by secret ballot; however, if the number of vacancies equals or exceeds the number of candidates, no election is required. The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms. If the number ~~no person is interested in or demonstrates an intention to run for the position~~ of ~~a~~ board members ~~member~~ whose terms have ~~term has~~ expired according to the provisions of this subparagraph exceeds the number of eligible candidates, each ~~such~~ board member whose term has expired ~~shall~~ may be reappointed to the board of administration and need not stand for reelection. The provisions of this subparagraph do not apply to an association governing a timeshare condominium.

3. In a condominium association of more than 10 units, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit or there are not enough eligible candidates to fill the vacancies on the board at the time of the election or vacancy. The provisions of this subparagraph do not apply to an association governing a timeshare condominium.

4. Any unit owner desiring to be a candidate for board membership shall comply with sub-subparagraph ~~subparagraph 3~~.7.a. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of

any monetary obligations due to the association ~~fee or assessment~~ as provided in paragraph (n), is not eligible for board membership. A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction that would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for a period of no less than 5 years as of the date on which such person seeks election to the board. The provisions of this subparagraph do not apply to an association governing a timeshare condominium.

5. The validity of an action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

~~2.~~6. The bylaws shall provide the method of calling meetings of unit owners, including annual meetings. Written notice, which notice must include an agenda, shall be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days prior to the annual meeting and shall be posted in a conspicuous place on the condominium property at least 14 continuous days preceding the annual meeting. Upon notice to the unit owners, the board shall by duly adopted rule designate a specific location on the condominium property or association property upon which all notices of unit owner meetings shall be posted; however, if there is no condominium property or association property upon which notices can be posted, this requirement does not apply. In lieu of or in addition to the physical posting of notice of any meeting of the unit owners on the condominium property, the association may, by reasonable rule, adopt a

procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice posted physically on the condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. When broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Unless a unit owner waives in writing the right to receive notice of the annual meeting, such notice shall be hand delivered, mailed, or electronically transmitted to each unit owner. Notice for meetings and notice for all other purposes shall be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association shall provide notice, for meetings and all other purposes, to that one address which the developer initially identifies for that purpose and thereafter as one or more of the owners of the unit shall so advise the association in writing, or if no address is given or the owners of the unit do not agree, to the address provided on the deed of record. An officer of the association, or the manager or other person providing notice of the association meeting, shall provide an affidavit or United States Postal Service certificate of mailing, to be included in the official records of the association affirming that the notice was mailed or hand delivered, in accordance with this provision.

~~3.~~7. a. The members of the board shall be elected by written ballot or voting machine. Proxies shall in no event be used in electing the board, either in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter. Not less than 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, whether by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election ~~along with a certification form provided by the division attesting that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of this chapter and any applicable rules.~~ Any unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association not less than 40 days before a scheduled election, and prior to such date such person shall be required to have satisfied all eligibility requirements contained in the bylaws and have paid all outstanding monetary obligations due to the association. Any person not meeting the requirements of the previous sentence shall not be included on the ballot as a candidate for election. ~~Together with the written notice and agenda as set forth in subparagraph 2., the~~ The association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote therein, together with a ballot which shall list all candidates and the written notice and agenda as set forth in subparagraph 2. Upon request of a candidate, ~~the association shall include~~ an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished

by the candidate not less than 35 days before the election, shall ~~along with the signed certification form provided for in this subparagraph, to~~ be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. The division shall by rule establish voting procedures consistent with the provisions contained herein, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots. Elections shall be decided by a plurality of those ballots cast. There shall be no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election of members of the board. No unit owner shall permit any other person to vote his or her ballot, and any such ballots improperly cast shall be deemed invalid, provided any unit owner who violates this provision may be fined by the association in accordance with s. 718.303. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain assistance in casting the ballot. The regular election shall occur on the date of the annual meeting. The provisions of this sub-subparagraph ~~subparagraph~~ shall not apply to timeshare condominium associations. Notwithstanding the provisions of this sub-subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board vacancies exist.

b. Within 90 days after being elected or appointed to the board, each newly elected or appointed director shall certify in writing to the secretary of the association that he or she has read the declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider. A director who fails to timely file the written certification or educational certificate is deemed to have abandoned the office and is suspended from service on the board until he or she complies with the provisions of this subparagraph. During the period of a suspension, the vacancy may be filled by the board pursuant to sub-subparagraph 12. The secretary shall cause the association to retain a director's written certification or educational certificate for inspection by the members for 5 years after a director's election. Failure to have such written certification or educational certificate on file does not affect the validity of any action.

~~4.~~8. Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), shall be made at a duly noticed meeting of unit owners and shall be subject to all requirements of this chapter or the applicable condominium documents relating to unit owner decisionmaking, except that unit owners may take action by written agreement, without meetings, on matters for which action by written agreement without

meetings is expressly allowed by the applicable bylaws or declaration or any statute that provides for such action.

~~5.~~9. Unit owners may waive notice of specific meetings if allowed by the applicable bylaws or declaration or any statute. If authorized by the bylaws, notice of meetings of the board of administration, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission.

~~6.~~ 10. Unit owners shall have the right to participate in meetings of unit owners with reference to all designated agenda items. However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

~~7.~~11. Any unit owner may tape record or videotape a meeting of the unit owners subject to reasonable rules adopted by the division.

~~8.~~12. Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to the requirements of sub-subparagraph ~~subparagraph 3~~.7.a. unless the association governs 10 units or fewer ~~less~~ and has opted out of the statutory election process, in which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member

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appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. Filling vacancies created by recall is governed by paragraph (j) and rules adopted by the division.

Notwithstanding subparagraph ~~subparagraphs~~ (b)2. and sub-subparagraph (d)3.a., an association of 10 or fewer units may, by the affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which vote may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

(n) ***Director or officer delinquencies***.–A director or officer more than 90 days delinquent in the payment of any monetary obligation due to the association ~~regular assessments~~ shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.

(o) ***Director or officer offenses***.–A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property shall be suspended from office, creating a vacancy in the office to be filled for the period of the suspension or until the end of the director's term of office, whichever occurs first ~~according to law~~. While such director or officer has such criminal charge pending, he or she may not be appointed or elected to a position as a director or officer. However, should the charges be resolved without a finding of guilt, the director or officer shall be reinstated for the remainder of his or her term of office, if any.

Section 4. Paragraph (d) of subsection (1) of section 718.115, Florida Statutes, is amended to read:

718.115 Common expenses and common surplus.

(1)

(d) If the association is authorized pursuant to ~~so provided in~~ the declaration ~~the cost~~ to enter into a bulk contract for communications services as defined in chapter 202, information services, or Internet services, ~~a master antenna television system or duly franchised cable television service obtained pursuant to a~~ the costs charged for such services shall be ~~deemed~~ a common expense. If the declaration does not ~~provide~~ authorize the association to enter into a bulk contract for ~~the cost of~~ communications services as defined in chapter 202, information services, or Internet services ~~a master antenna television system or duly franchised cable television service obtained under a bulk contract as a common expense~~, the board may enter into such a contract for such services, and the cost of the service will be a common expense. ~~but~~ The costs for services under a bulk rate contract may be allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of common expenses, and any contract entered into before July 1, 1998, in which the cost of the service is not equally divided among all unit owners, may be changed by vote of a majority of the voting interests present at a regular or special meeting of the association, to allocate the cost equally among all units. The contract shall be for a term of not less than 2 years.

1. Any contract made by the board after the effective date hereof for communications services as defined in chapter 202, information services, or Internet services ~~a community antenna system or duly franchised cable television service~~ may be canceled by a majority of the voting interests present at the next regular or special meeting of the association. Any member may make a motion to cancel the ~~said~~ contract, but if no motion is made or if such motion fails to obtain the required majority at the next regular or special meeting, whichever occurs ~~is~~ sooner, following the making of the contract, ~~then~~ such contract shall be deemed ratified for the term therein expressed.

2. Any such contract shall provide, and shall be deemed to provide if not expressly set forth, that any hearing-impaired or legally blind unit owner who does not occupy the unit with a non-hearing-impaired or sighted person, or any unit owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the internet, cable or video service without incurring disconnect fees, penalties, or subsequent service charges, and, as to such units, the owners shall not be required to pay any common expenses charge related to such service. If fewer ~~less~~ than all members of an association share the expenses of internet, cable or video service ~~television~~, the expense shall be shared equally by all participating unit owners. The association may use the provisions of s. 718.116 to enforce payment of the shares of such costs by the unit owners receiving internet, cable or video service ~~television~~.

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Section 5. Paragraph (b) of subsection (5) of section 718.116, Florida Statutes, is amended, and subsection (11) is added to that section, to read:

718.116 Assessments; liability; lien and priority; interest; collection.

(5)

(b) To be valid, a claim of lien must state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates. It must be executed and acknowledged by an officer or authorized agent of the association. No such lien shall be effective longer than 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period shall automatically be extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien shall secure all unpaid assessments which are due and which may accrue subsequent to the recording of the claim of lien and through ~~prior to~~ the entry of a final judgment ~~certificate of title~~, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Costs to the unit owner secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75. In addition, if the management company or licensed property manager prepares an estoppel certificate required by this section, an additional

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fee not to exceed $75 per estoppel certificate may be charged. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien.

After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(11) If the unit is leased and the unit owner is delinquent in the payment of any monetary obligation due to the association, the association may make written demand to the tenant that the tenant pay to the association the future monetary obligations related to the condominium unit, and the tenant shall be obligated to make such payment. The tenant shall continue to pay the monetary obligations due to the association for the unit until the association releases the tenant or the tenant discontinues tenancy in the unit. The tenant also is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association shall mail written notice to the unit owner of the association's demand that the tenant

make payments to the association pursuant to this section. The tenant is not liable for increases in the amount of the monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment is due. In no event shall the liability of the tenant exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of monies paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

Section 6. Subsection (1) of section 718.301, Florida Statutes, is amended to read:

718.301 Transfer of association control; claims of defect by association.

(1) When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the

members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

(a) Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(b) Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(c) When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;

(d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;

(e) When the developer files a petition seeking protection in bankruptcy;

(f) When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless any interested party, including the holder of a mortgage on a unit in the condominium, petitions the court within such 30 day period that transfer of control would be detrimental to the association or its members; or

(g) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the

case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase, whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

Section 7. Section 718.303, Florida Statutes, is amended to read:

718.303 Obligations of owners and occupants; waiver; levy of fines, suspension of use or voting rights, and other nonexclusive remedies in law or equity ~~fine against unit~~ by an association.-

(1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:

(a) The association.

(b) A unit owner.

(c) Directors designated by the developer, for actions taken by them prior to the time control of the association is assumed by unit owners other than the developer.

(d) Any director who willfully and knowingly fails to comply with these provisions.

(e) Any tenant leasing a unit, and any other invitee occupying a unit.

The prevailing party in any such action or in any action in which the purchaser claims a right of voidability based upon contractual provisions as required in s. 718.503(1)(a) is entitled to recover reasonable attorney's fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. Actions arising under this subsection shall not be deemed to be actions for specific performance.

(2) A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision, except that unit owners or members of a board of administration may waive notice of specific meetings in writing if provided by the bylaws. Any instruction given in writing by a unit owner or purchaser to an escrow agent may be relied upon by an escrow agent, whether or not such instruction and the payment of funds thereunder might constitute a waiver of any provision of this chapter.

(3) If a unit owner is delinquent for more than 90 days in the payment of a monetary obligation due to the association ~~or if the declaration or bylaws so provide~~, the association may suspend, until paid, the right of a unit owner or a unit's occupant, tenant, licensee, or invitee to use common elements, common facilities, or any other association property. This subsection does not apply to limited common elements intended to be used only by that unit, common elements that must be used to access the unit, electricity, water, gas and sanitary sewer services provided to the unit, parking spaces, or elevators. The association may also levy reasonable fines ~~against a unit~~ for the failure of the owner of the unit, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. However, no fine shall be levied for the failure of a unit owner to pay assessments or other charges when due. No fine will become a lien against a unit. A ~~No~~ fine may not exceed $100 per violation. However, a fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, provided that no such fine shall in the aggregate exceed $1,000. A ~~No~~ fine may not be levied and a suspension may not be imposed unless the association provides not less than 14 days' written ~~gives except after giving reasonable~~ notice and an opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee. The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household. If the committee does not agree with the fine or suspension, the fine or suspension may not be levied or imposed. ~~The provisions of this subsection do not apply to unoccupied units.~~

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(4) The notice and hearing requirements of subsection (3) do not apply to the imposition of suspensions against a unit owner or a unit's occupant, licensee, or invitee because of the failure to pay any amounts due the association. A suspension must be imposed at a properly noticed board meeting, and after the imposition of such suspension, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

(5) An association may suspend the voting rights of a member due to nonpayment of any monetary obligation due to the association which are delinquent in excess of 90 days.

Section 8. Paragraph (c) of Subsection (2) of Section 719.104, Florida Statutes, is amended to read:

(c) The official records of the association shall be open to inspection by any association member or the authorized representative of such member at all reasonable times. Failure to permit inspection of the association records as provided herein entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denies access to the records for inspection. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request submitted by certified mail, return receipt requested, or receipted commercial delivery to the

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association's mailing address creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th day after receipt of the written request. The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet provided for in s. 719.504, on the cooperative property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the same. Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:

1. A record that was prepared by an association attorney or prepared at the attorney's express direction; that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association; or that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, until the conclusion of the litigation or adversarial administrative proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health and insurance records.

4. Medical records of unit owners or community residents.

5. Social security numbers, driver's license numbers, credit card numbers, electronic mailing addresses, telephone numbers, emergency contact information, any addresses for a unit owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, and property address.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allows manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Section 9. Subsections (3) and (4) of Section 719.108, Florida Statutes, are amended, and subsection (10) is added to that section, to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

(3) Rents and assessments, and installments on them, not paid when due bear interest at the rate provided in the cooperative documents from the date due until paid. This rate may not exceed the rate allowed by law, and, if no rate is provided in the cooperative documents, then interest shall accrue at 18 percent per annum. Also, if the cooperative documents or bylaws so provide, the association may charge an

790 administrative late fee in addition to such interest, in an amount not to exceed the
791 greater of $25 or 5 percent of each installment of the assessment for each delinquent
792 installment that the payment is late. Costs to the unit owner secured by the
793 association's claim of lien with regard to collection letters or any other collection efforts
794 by management companies or licensed managers as to any delinquent installment of an
795 assessment may not exceed $75; provided, that if the management company prepares
796 any letter or estoppel certificate required by this chapter, an additional fee not to exceed
797 $75 may be charged. Any payment received by an association shall be applied first to
798 any interest accrued by the association, then to any administrative late fee, then to any
799 costs and reasonable attorney's fees incurred in collection, then to an amount not to
800 exceed $75 for collection services for which the association has contracted, and then to
801 the delinquent assessment. The foregoing shall be applicable notwithstanding any
802 restrictive endorsement, designation, or instruction placed on or accompanying a
803 payment. A late fee is not subject to chapter 687 or s. 719.303(3).
804 (4) The association shall have a lien on each cooperative parcel for any
805 unpaid rents and assessments, plus interest, any authorized administrative late fees,
806 and any reasonable costs for collection services for which the association has
807 contracted against the unit owner of the cooperative parcel. If authorized by the
808 cooperative documents, said lien shall also secure reasonable attorney's fees incurred
809 by the association incident to the collection of the rents and assessments or
810 enforcement of such lien. The lien is effective from and after the recording of a claim of
811 lien in the public records in the county in which the cooperative parcel is located which

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states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. The lien shall expire if a claim of lien is not filed within 1 year after the date the assessment was due, and no such lien shall continue for a longer period than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien is commenced in a court of competent jurisdiction. Except as otherwise provided in this chapter, a lien may not be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien has been delivered to the owner by registered or certified mail, return receipt requested, and by first-class United States mail to the owner at his or her last address in the records of the association, if the address is within the United States, and delivered to the owner at the address of the unit if the owner's address as reflected in the records of the association is not the unit address. If the address in the records is outside the United States, notice shall be sent to that address and to the unit address by first-class United States mail. Delivery of the notice shall be deemed given upon mailing as required by this subsection. ~~No lien may be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien has been served on the unit owner of the cooperative parcel by certified mail or by personal service in the manner authorized by chapter 48 and the Florida Rules of Civil Procedure.~~

(10) If the unit is occupied by a tenant and the unit owner is delinquent in the any monetary obligation due to the association, the association may make written demand to the tenant that the tenant pay to the association the future monetary

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obligations related to the cooperative share, and the tenant shall be obligated to make such payment. The tenant shall continue to pay the monetary obligations due to the association for the unit until the association releases the tenant or the tenant discontinues tenancy in the unit. The tenant also is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association shall mail written notice to the unit owner of the association's demand that the tenant make payments to the association pursuant to this section. The tenant is not liable for increases in the amount of the monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment is due. In no event shall the liability of the tenant exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of monies paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the

association. A court may supersede the effect of this subsection by appointing a receiver.

Section 10. Paragraph (b) of subsection (2), paragraphs (a) and (c) of subsection (5), and paragraphs (b), (c), (d), (f), and (g) of subsection (6) of section 720.303, Florida Statutes, are amended, and subsection (12) is added to that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.

(2) BOARD MEETINGS.

(b) Members have the right to attend all meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The association may adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak. ~~Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the members is inapplicable to meetings~~ Meetings between the board or a committee and the association's attorney to discuss proposed or pending litigation, or ~~with respect to~~ meetings of the board held for the purpose of discussing personnel matters, shall not be open to the members other than the directors.

(5) INSPECTION AND COPYING OF RECORDS.–The official records shall be maintained within the state and must be open to inspection and available for

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photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(a) The failure of an association to provide access to the records within 10 business days after receipt of a written request submitted by certified mail, return receipt requested, or receipted commercial delivery to the association's mailing address creates a rebuttable presumption that the association willfully failed to comply with this subsection.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require ~~impose a requirement that~~ a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including, without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside vendor or association management company

personnel and may charge the actual cost of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or the association. The board shall be required to promulgate a rule identifying all such costs, personnel fees and charges that may be paid by parcel owners pursuant to this subsection. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding the provisions of this paragraph, the following records are ~~shall~~ not ~~be~~ accessible to members or parcel owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including, but not limited to, any record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or ~~adversarial~~ administrative proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a parcel.

3. ~~Disciplinary, health, insurance and personnel records~~ Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health and insurance records.

4. Medical records of parcel owners or community residents.

5. Social security numbers, driver's license numbers, credit card numbers, electronic mailing addresses, telephone numbers, emergency contact information, any addresses for a parcel owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, parcel designation, mailing address, and property address.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allows manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(6) BUDGETS.

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible. If reserve accounts are not established pursuant to paragraph (d), funding of such reserves shall be limited to the extent that the governing documents ~~do not~~ limit increases in assessments, including reserves. If the budget of the association includes reserve accounts established pursuant to paragraph (d), such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an

association provides for reserve accounts pursuant to paragraph (d) ~~in the budget~~, the association shall thereafter determine, maintain, and waive reserves in compliance with this subsection. The provisions of this section do not preclude the termination of a reserve account established pursuant to this paragraph upon approval of a majority of the total voting interests of the association. Upon such approval, the terminated reserve account shall be removed from the budget.

(c)1. If the budget of the association does not provide for reserve accounts pursuant to paragraph (d) ~~governed by this subsection~~ and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON OBTAINING THE APPROVAL OF ~~NOT LESS THAN~~ A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION BY VOTE OF THE MEMBERS AT A MEETING OR BY WRITTEN CONSENT.

2. If the budget of the association does provide for funding accounts for deferred expenditures, including, but not limited to, funds for capital expenditures and deferred maintenance, but such accounts are not created or established pursuant to

paragraph (d), each financial report for the preceding fiscal year required under subsection (7) must also contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION ~~DOES~~ PROVIDES FOR LIMITED VOLUNTARY DEFERRED EXPENDITURE ACCOUNTS, INCLUDING CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE, SUBJECT TO LIMITS ON FUNDING CONTAINED IN OUR GOVERNING DOCUMENTS. BECAUSE THE OWNERS HAVE NOT ELECTED TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, THESE FUNDS ARE NOT SUBJECT TO THE RESTRICTIONS ON USE OF SUCH FUNDS SET FORTH IN THAT STATUTE, NOR ARE RESERVES CALCULATED IN ACCORDANCE WITH THAT STATUTE.

(d) An association shall be deemed to have provided for reserve accounts if ~~when~~ reserve accounts have been initially established by the developer or ~~when~~ the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of ~~not less than~~ a majority of the total voting interests of the association. Such approval may be obtained ~~attained~~ by vote of the members at a duly called meeting of the membership or by the ~~upon a~~ written consent ~~of executed by not less than~~ a majority of the total voting interests of the association ~~in the community~~. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and shall designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall include ~~provide for~~ the required reserve

accounts ~~for inclusion~~ in the budget in the next fiscal year following the approval and for each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(f) After one or more ~~Once a reserve account or~~ reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves is ~~shall be~~ applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account is ~~shall be~~ the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget may ~~shall~~ not be less than that required to ensure that the balance on hand at the beginning of the period ~~for which~~ the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all ~~of~~ the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal and accounts receivable minus the allowance for doubtful accounts. The reserve funding formula may ~~shall~~ not include any type of balloon payments.

(12) COMPENSATION PROHIBITED.–A director, officer, or committee member of the association may not receive any salary or compensation from the

association for the performance of duties as a director, officer, or committee member and may not in any other way benefit financially from service to the association. This subsection does not preclude:

(a) Participation by such person in a financial benefit accruing to all or a significant number of members as a result of actions lawfully taken by the board or a committee of which he or she is a member, including, but not limited to, routine maintenance, repair, or replacement of community assets.

(b) Reimbursement for out-of-pocket expenses incurred by such person on behalf of the association, subject to approval in accordance with procedures established by the association's governing documents or, in the absence of such procedures, in accordance with an approval process established by the board.

(c) Any recovery of insurance proceeds derived from a policy of insurance maintained by the association for the benefit of its members.

(d) Any fee or compensation authorized in the governing documents.

(e) Any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by proxy at a meeting of the members.

(f) A developer or its representative from serving as a director, officer, or committee member of the association and benefiting financially from service to the association.

Section 11. Paragraph (b) of subsection (2) of section 720.304, Florida Statutes, is amended to read:

720.304 Right of owners to peaceably assemble; display of flag; SLAPP suits prohibited.

(2)

(b) Any homeowner may erect a freestanding flagpole no more than 20 feet high on any portion of the homeowner's real property, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, if the flagpole does not obstruct sightlines at intersections and is not erected within or upon an easement. The homeowner may further display in a respectful manner from that flagpole, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, one official United States flag, not larger than 4 1/2 feet by 6 feet, and may additionally display one official flag of the State of Florida or the United States Army, Navy, Air Force, Marines, or Coast Guard, or a POW-MIA flag. Such additional flag must be equal in size to or smaller than the United States flag. The flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flag pole is erected, and all setback and locational criteria contained within the covenants, restrictions, bylaws, rules, or requirements of the association.

Section 12. Subsection (2) of Section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.-

(2) If a member is delinquent for more than 90 days in the payment of a monetary obligation due to the association ~~the governing documents so provide~~, an association may suspend, until paid ~~for a reasonable period of time~~, the rights of a member or a member's tenants, guests, or invitees, or both, to use common areas and facilities and may levy ~~reasonable~~ fines of up to~~, not to exceed~~ $100 per violation, against any member or any tenant, guest, or invitee. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, except that a ~~no such~~ fine may not ~~shall~~ exceed $1,000 in the aggregate unless otherwise provided in the governing documents. A fine of less than $1,000 may ~~shall~~ not become a lien against a parcel. In any action to recover a fine, the prevailing party is entitled to collect its reasonable attorney's fees and costs from the nonprevailing party as determined by the court. The provisions regarding the suspension-of-use rights do not apply to the portion of common areas intended to be used only by that parcel, common areas that must be used to access the parcel, electricity, water, gas and sanitary sewer services provided to the parcel, common area parking spaces, or elevators.

(a) A fine or suspension may not be imposed without notice of at least 14 days to the person sought to be fined or suspended and an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. If the committee, by majority vote, does not approve a proposed fine or suspension, it may not be imposed. If a fine or suspension

is imposed, the association must provide written notice, by mail or hand delivery, to the parcel owner and, if applicable, to the parcel's occupant, tenant, licensee or invitee.

~~(b) The requirements of this subsection do not apply to the imposition of suspensions or fines upon any member because of the failure of the member to pay assessments or other charges when due if such action is authorized by the governing documents.~~

(b) ~~(c)~~ Suspension of common-area-use rights shall not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park.

Section 13. Subsections (8) and (9) of section 720.306, Florida Statutes, are amended to read:

720.306 Meetings of members; voting and election procedures; amendments.

(8) PROXY VOTING.–The members have the right, unless otherwise provided in this subsection or in the governing documents, to vote in person or by proxy.

(a) To be valid, a proxy must be dated, must state the date, time, and place of the meeting for which it was given, and must be signed by the authorized person who executed the proxy. A proxy is effective only for the specific meeting for which it was originally given, as the meeting may lawfully be adjourned and reconvened from time to time, and automatically expires 90 days after the date of the meeting for which it was originally given. A proxy is revocable at any time at the pleasure of the person who

executes it. If the proxy form expressly so provides, any proxy holder may appoint, in writing, a substitute to act in his or her place.

(b) If the governing documents permit voting by secret ballot by members who are not in attendance at a meeting of the members for the election of directors, such ballots shall be placed in an inner envelope with no identifying markings and mailed or delivered to the association in an outer envelope bearing identifying information reflecting the name of the member for which the vote is being cast, and the signature of the lot or parcel owner casting that ballot. If a parcel owner owns multiple parcels, the parcel owner shall be required to provide identifying information on the exterior of the outer envelope. If the eligibility of the member to vote is confirmed and no other ballot has been submitted for that lot or parcel, the inner envelope shall be removed from the outer envelope bearing the identification information, placed with the ballots which were personally cast, and opened when the ballots are counted. If more than one ballot is submitted for a lot or parcel, the ballots for that lot or parcel shall be disqualified. Any vote by ballot received after the closing of the balloting may not be considered.

(9) ELECTIONS.–Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. All members of the association are ~~shall be~~ eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held or, if the election process allows voting by absentee ballot, in advance of the balloting by submission in writing delivered to the board not less than 21 days prior to the meeting or such other date as determined by the board

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from time to time. Except as otherwise provided in the governing documents, boards of directors must be elected by a plurality of the votes cast by eligible voters. Any election dispute between a member and an association must be submitted to mandatory binding arbitration with the division. Such proceedings shall be conducted in the manner provided by s. 718.1255 and the procedural rules adopted by the division.

Section 14. Subsection (8) is added to section 720.3085, Florida Statutes, to read:

720.3085 Payment for assessments; lien claims.

(8) If the parcel is leased and the parcel owner is delinquent in the payment of any monetary obligation due to the association, the association may make written demand to the tenant that the tenant pay to the association the future monetary obligations related to the parcel, and the tenant shall be obligated to make such payment. The tenant shall continue to pay the monetary obligations due to the association for the parcel until the association releases the tenant or the tenant discontinues tenancy in the parcel. The tenant also is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association shall mail written notice to the parcel owner of the association's demand that the tenant make payments to the association pursuant to this section. The tenant is not liable for increases in the amount of the monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment is due. In no event shall the liability of the tenant exceed the

amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the parcel owner in the amount of monies paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a parcel owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

Section 15. Section 720.30851, Florida Statutes, is amended to read:

720.30851 Estoppel certificates.--Within 15 days after the date on which a request for an estoppel certificate is received from a parcel owner or mortgagee, or his or her designee, the association shall provide a certificate signed by an officer or authorized agent of the association stating all assessments and other moneys owed to the association by the parcel owner or mortgagee with respect to the parcel. An association may charge a fee not to exceed $150 for the preparation of such certificate, and the amount of such fee must be stated on the certificate.

(1) Any person other than a parcel owner who relies upon a certificate receives the benefits and protection thereof.

(2) A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this section, and the prevailing party is entitled to recover reasonable attorney's fees.

(3) The authority to charge a fee for the certificate shall be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate. If the certificate is requested in conjunction with the sale or mortgage of a parcel but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the parcel owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the parcel owner, and the association may collect it from that owner in the same manner as an assessment as provided in this section.

Section 15. Subsection (6) is added to section 720.31, Florida Statutes, to read:

720.31 Recreational leaseholds; right to acquire; escalation clauses.

(6) An association may enter into agreements to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities, including, but not limited to, country clubs, golf courses, marinas, submerged lands, parking areas, conservation and mitigation easements and areas, and other recreational facilities. An association may enter into such agreements regardless of whether the lands or facilities are contiguous to the lands of the community or whether such lands or facilities are

intended to provide enjoyment, recreation, or other use or benefit to the owners. All leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration may be entered into only if authorized by the declaration for material alterations or substantial additions to the common areas or association property. If the declaration is silent, any such transaction requires the approval of 75 percent of the total voting interests of the association. The declaration may provide that the rental, membership fees, operations, replacements, or other expenses are common expenses; impose covenants and restrictions concerning their use; and contain other provisions not inconsistent with this subsection. An association exercising its rights under this subsection may join with other associations that are part of the same development or with a master association responsible for the enforcement of shared covenants, conditions, and restrictions in carrying out the intent of this subsection.

Section 16. Subsection (16) of section 718.103, Florida Statutes, is amended to read:

718.103 Definitions.–As used in this chapter, the term:

(16) "Developer" means a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include:

(a) An owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy;~~, nor does it include~~

(b) A cooperative association that ~~which~~ creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion;~~,~~

(c) A bulk assignee or bulk buyer as defined in s. 718.703; or

(d) A state, county, or municipal entity ~~is not a developer for any purposes under this act when it is~~ acting as a lessor and not otherwise named as a developer in the declaration of condominium ~~association~~.

Section 17. Part VII of chapter 718, Florida Statutes, consisting of sections 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, is created to read:

718.701 Short title.–This part may be cited as the "Distressed Condominium Relief Act."

718.702 Legislative intent.

(1) The Legislature acknowledges the massive downturn in the condominium market which has transpired throughout the state and the impact of such downturn on developers, lenders, unit owners, and condominium associations. Numerous condominium projects have either failed or are in the process of failing, whereby the condominium has a small percentage of third-party unit owners as compared to the

unsold inventory of units. As a result of the inability to find purchasers for this inventory of units, which results in part from the devaluing of real estate in this state, developers are unable to satisfy the requirements of their lenders, leading to defaults on mortgages. Consequently, lenders are faced with the task of finding a solution to the problem in order to be paid for their investments.

(2) The Legislature recognizes that all of the factors listed in this section lead to condominiums becoming distressed, resulting in detriment to the unit owners and the condominium association on account of the resulting shortage of assessment moneys available to support the financial requirements for proper maintenance of the condominium. Such shortage and the resulting lack of proper maintenance further erodes property values. The Legislature finds that individuals and entities within Florida and in other states have expressed interest in purchasing unsold inventory in one or more condominium projects, but are reticent to do so because of accompanying liabilities inherited from the original developer, which are by definition imputed to the successor purchaser, including a foreclosing mortgagee. This results in the potential purchaser having unknown and unquantifiable risks, and potential successor purchasers are unwilling to accept such risks. The result is that condominium projects stagnate, leaving all parties involved at an impasse without the ability to find a solution.

(3) The Legislature finds and declares that it is the public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums, and that there is a need for relief from certain provisions of the Florida Condominium Act geared toward enabling economic

opportunities within these condominiums for successor purchasers, including foreclosing mortgagees. Such relief would benefit existing unit owners and condominium associations. The Legislature further finds and declares that this situation cannot be open-ended without potentially prejudicing the rights of unit owners and condominium associations, and thereby declares that the provisions of this part shall be used by purchasers of condominium inventory for a specific and defined period.

718.703 Definitions.–As used in this part, the term:

(1) "Bulk assignee" means a person who:

(a) Acquires more than seven condominium parcels in a single condominium as set forth in s. 718.707; and

(b) Receives an assignment of all or substantially all of the rights of the developer as are set forth in the declaration of condominium or in this chapter by a written instrument recorded as an exhibit to the deed or as a separate instrument in the public records of the county in which the condominium is located.

(2) "Bulk buyer" means a person who acquires more than seven condominium parcels in a single condominium as set forth in s. 718.707 but who does not receive an assignment of any developer rights other than, at the bulk buyer's option, the right to conduct sales, leasing, and marketing activities within the condominium; the right to be exempt from the payment of working capital contributions to the condominium association arising out of or in connection with bulk buyer's acquisition of a bulk number of units; and the right to be exempt from any rights of first refusal which may be held by the condominium association and would otherwise be applicable to

subsequent transfers of title from the bulk buyer to any third party purchaser concerning one or more units.

718.704 Assignment and assumption of developer rights by bulk assignee; bulk buyer.

(1) A bulk assignee shall be deemed to have assumed and is liable for all duties and responsibilities of a developer under the declaration and this chapter, except:

(a) Warranties of a developer under s. 718.203(1) or s. 718.618, except for design, construction, development, or repair work performed by or on behalf of such bulk assignee;

(b) The obligation to:

1. Fund converter reserves under s. 718.618 for a unit that was not acquired by the bulk assignee; or

2. Provide converter warranties on any portion of the condominium property except as may be expressly provided by the bulk assignee in the contract for purchase and sale executed with a purchaser and pertaining to any design, construction, development, or repair work performed by or on behalf of the bulk assignee;

(c) The requirement to provide the association with a cumulative audit of the association's finances from the date of formation of the condominium association as required by s. 718.301. However, the bulk assignee shall provide an audit for the period for which the bulk assignee elects a majority of the members of the board of administration;

(d) Any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee elects a majority of the members of the board of administration; and

(e) Any liability for or arising out of the developer's failure to fund previous assessments or to resolve budgetary deficits in relation to a developer's right to guarantee assessments, except as otherwise provided in subsection (2).

Further, the bulk assignee is responsible for delivering documents and materials in accordance with s. 718.705(3). A bulk assignee may expressly assume some or all of the obligations of the developer described in paragraphs (a)-(e).

(2) A bulk assignee receiving the assignment of the rights of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 shall be deemed to have assumed and is liable for all obligations of the developer with respect to such guarantee, including any applicable funding of reserves to the extent required by law, for as long as the guarantee remains in effect. Neither a bulk assignee not receiving an assignment of the right of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 nor a bulk buyer shall be deemed to have assumed and shall not be liable for the obligations of the developer with respect to such guarantee, but shall be responsible for payment of assessments in the same manner as all other owners of condominium parcels.

(3) A bulk buyer is liable for the duties and responsibilities of the developer under the declaration and this chapter only to the extent provided in this part, together

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with any other duties or responsibilities of the developer expressly assumed in writing by the bulk buyer.

(4) An acquirer of condominium parcels is not considered a bulk assignee or a bulk buyer if the transfer to such acquirer was made prior to the effective date of this part, or was made with the intent to hinder, delay, or defraud any purchaser, unit owner, or the association, or if the acquirer is a person who would constitute an insider under s. 726.102(7).

(5) An assignment of developer rights to a bulk assignee may be made by the developer, a previous bulk assignee, or a court of competent jurisdiction acting on behalf of the developer or the previous bulk assignee. At any particular time, there may be no more than one bulk assignee within a condominium, but there may be more than one bulk buyer. If more than one acquirer of condominium parcels in the same condominium receives an assignment of developer rights from the same person, the bulk assignee is the acquirer whose instrument of assignment is recorded first in applicable public records.

718.705 Board of administration; transfer of control.

(1) For purposes of determining the timing for transfer of control of the board of administration of the association to unit owners other than the developer under s. 718.301(1)(a) and (b), if a bulk assignee is entitled to elect a majority of the members of the board, any condominium parcel acquired by the bulk assignee shall not be deemed to be conveyed to a purchaser, or to be owned by an owner other than the

developer, until such condominium parcel is conveyed to an owner who is not a bulk assignee.

(2) Unless control of the board of administration of the association has already been relinquished pursuant to s. 718.301(1), the bulk assignee is obligated to relinquish control of the association in accordance with s. 718.301(1)-(2) and this part as if the bulk assignee were the developer.

(3) When a bulk assignee relinquishes control of the board of administration, the bulk assignee shall deliver all of those items required by s. 718.301(4). However, the bulk assignee is not required to deliver items and documents not in the possession of the bulk assignee during the period during which the bulk assignee was entitled to elect not less than a majority of the members of the board of administration. In conjunction with acquisition of condominium parcels, a bulk assignee shall undertake a good faith effort to obtain the documents and materials required to be provided to the association pursuant to s. 718.301(4). To the extent the bulk assignee is not able to obtain all of such documents and materials, the bulk assignee shall certify in writing to the association the names or descriptions of the documents and materials that were not obtainable by the bulk assignee. Delivery of the certificate relieves the bulk assignee of responsibility for the delivery of the documents and materials referenced in the certificate as otherwise required under ss. 718.112 and 718.301 and this part. The responsibility of the bulk assignee for the audit required by s. 718.301(4) shall commence as of the date on which the bulk assignee elected a majority of the members of the board of administration.

(4) If a conflict arises between the provisions or application of this section and s. 718.301, then this section shall prevail.

(5) Failure of a bulk assignee or bulk buyer to substantially comply with all the requirements contained in this part shall result in the loss of all protections or exemptions provided under this part.

718.706 Specific provisions pertaining to offering of units by a bulk assignee or bulk buyer.

(1) Before offering any units for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer shall file the following documents with the division and provide such documents to a prospective purchaser or tenant:

(a) An updated prospectus or offering circular, or a supplement to the prospectus or offering circular, filed by the creating developer prepared in accordance with s. 718.504, which shall include the form of contract for purchase and sale in compliance with s. 718.503(1)(a);

(b) An updated Frequently Asked Questions and Answers sheet;

(c) The executed escrow agreement if required under s. 718.202; and

(d) The financial information required by s. 718.111(13). However, if a financial information report does not exist for the fiscal year before acquisition of title by the bulk assignee or bulk buyer, or accounting records cannot be obtained in good faith by the bulk assignee or the bulk buyer which would permit preparation of the required financial information report, the bulk assignee or bulk buyer is excused from the

requirement of this paragraph. However, the bulk assignee or bulk buyer must include in the purchase contract the following statement in conspicuous type:

THE FINANCIAL INFORMATION REPORT REQUIRED UNDER S. 718.111(13) FOR THE IMMEDIATELY PRECEDING FISCAL YEAR OF THE ASSOCIATION IS NOT AVAILABLE OR CANNOT BE CREATED BY THE SELLER AS A RESULT OF INSUFFICIENT ACCOUNTING RECORDS OF THE ASSOCIATION.

(2) Before offering any units for sale or for lease for a term exceeding 5 years, a bulk assignee shall file with the division and provide to a prospective purchaser or tenant a disclosure statement that must include, but is not limited to:

(a) A description of any rights of the developer which have been assigned to the bulk assignee;

(b) The following statement in conspicuous type:

THE SELLER IS NOT OBLIGATED FOR ANY WARRANTIES OF THE DEVELOPER UNDER S. 718.203(1) OR S. 718.618, AS APPLICABLE, EXCEPT FOR DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF SELLER; and

(c) If the condominium is a conversion subject to part VI, the following statement in conspicuous type:

THE SELLER HAS NO OBLIGATION TO FUND CONVERTER RESERVES OR TO PROVIDE CONVERTER WARRANTIES UNDER S. 718.618 ON ANY PORTION OF THE CONDOMINIUM PROPERTY EXCEPT AS MAY BE

EXPRESSLY REQUIRED OF THE SELLER IN THE CONTRACT FOR PURCHASE AND SALE EXECUTED BY THE SELLER AND THE PREVIOUS DEVELOPER AND PERTAINING TO ANY DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER.

(3) In addition to the requirements set forth in subsection (1), a bulk assignee or bulk buyer must comply with the nondeveloper disclosure requirements set forth in s. 718.503(2) before offering any units for sale or for lease for a term exceeding 5 years.

(4) A bulk assignee, while it is in control of the board of administration of the association, may not authorize, on behalf of the association:

(a) The waiver of reserves or the reduction of funding of the reserves in accordance with s. 718.112(2)(f)2., unless approved by a majority of the voting interests not controlled by the developer, bulk assignee, and bulk buyer; or

(b) The use of reserve expenditures for other purposes in accordance with s. 718.112(2) (f)3., unless approved by a majority of the voting interests not controlled by the developer, bulk assignee, and bulk buyer.

(5) A bulk assignee or a bulk buyer shall comply with all the requirements of s. 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration. Unit owners shall be afforded all the protections contained in s. 718.302 regarding agreements entered into by the association before unit owners other than the

developer, bulk assignee, or bulk buyer elected a majority of the board of administration.

(7) A bulk buyer shall comply with the requirements contained in the declaration regarding any transfer of a unit, including sales, leases, and subleases. A bulk buyer is not entitled to any exemptions afforded a developer or successor developer under this chapter regarding any transfer of a unit, including sales, leases, or subleases.

718.707 Time limitation for classification as bulk assignee or bulk buyer.–A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired before July 1, 2012. The date of such acquisition shall be determined by the date of recording of a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuance of a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

718.708 Liability of developers and others. An assignment of developer rights to a bulk assignee or bulk buyer does not release the creating developer from any liabilities under the declaration or this chapter. This part does not limit the liability of the creating developer for claims brought by unit owners, bulk assignees, or bulk buyers for violations of this chapter by the creating developer, unless specifically excluded in this part. Nothing contained within this part waives, releases, compromises, or limits the liability of contractors, subcontractors, materialmen, manufacturers, architects, engineers, or any participant in the design or construction of a condominium for any

claim brought by an association, unit owners, bulk assignees, or bulk buyers arising from the design of the condominium, construction defects, misrepresentations associated with condominium property, or violations of this chapter, unless specifically excluded in this part.

Section 18. This act shall take effect October 1, 2010, except that Sections 16 and 17 shall take effect upon becoming law.

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Robert S. Freedman, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address c/o Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607
Telephone: (813) 223-7000

Position Type Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, Telephone (813) 223-7000
Michael J. Gelfand, Gelfand & Arpe, P.A. 1555 Palm Beach Lakes Blvd., Suite 1220, West Palm Beach, FL 33401-2323, Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has ***not*** been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support clarification to the Condominium, Cooperative and Homeowners' Association Acts, to clarify and amend duties of owners, directors and associations to each other, including definition of common expenses; protection of private information; bulk buyer rights; and, procedures for: restriction amendments, records access, financial reporting, assessment levy and collection, delinquent collection of assessments from tenants and resulting suspension of rights, payment of delinquent assessments, meeting notice, election procedures; and, disclosures to purchasers."

Reasons For Proposed Advocacy:

As community associations mature, influences and market conditions change, communities are lacking in funds necessary to provide services and to perform duties, demands on associations grow and the number of competent volunteers wan, the legislature has considered many changes to laws affecting associations. Anticipating reintroduction of bills that did not become law, the Section seeks to anticipate issues and address current problems that are anticipated to become long standing issues, including: fairness when amending restrictions, effective financial reporting, protecting members' privacy, defining what is a proper expense and funds are collected and tenants duty to pay rent amounts to associations to cover owners delinquencies, penalties for non-payment of assessments, receivership thresholds, purchase disclosures and bulk purchaser rights.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSAL OF THE CONDOMINIUM AND PLANNED DEVELOPMENT COMMITTEE FOR CHANGES TO CHAPTER 718, 719 AND 720

I. SUMMARY

The Condominium Act, the first community association chapter of Florida Statutes, was enacted in 1963, and has seen many changes since enactment. However, new challenges to community associations have outstripped outdated laws. These challenges include methods of election, new community designs, less volunteerism and concern over privacy rights. In addition, changing market forces have altered the economy and well-being of communities.

In response to the new issues facing communities, during the 2009 Legislative session many proposals were introduced, and many incorporated into Senate Bill 880, to amend the Condominium, Cooperative and Homeowners' Association Acts; however, that bill did not become law. Anticipating Legislators desire to address the issues that remain, the structure of Senate Bill 880 was utilized as a vehicle to incorporate lessons learned and suggestions from those who represent the various facets of community associations, property owners to developers to associations. A vast majority of the provisions contained in Senate Bill 880 remain intact and without modification. Certain modifications and deletions were made to various provisions to clarify language which was unclear, contradictory or believed to be unworkable.

II. CURRENT SITUATION

Chapters 718, 719 and 720 presently contain a variety of provisions which are ambiguous or unclear. Each year, the Florida legislature considers a variety of proposals to improve or correct numerous issues in the law, and this proposal is designed to clarify or improve upon the existing law. Further, the current economic distress of the residential real estate market has highlighted ambiguities in the Chapter 718 related to the purchasers or lenders acquiring unsold condominium units in a bulk purchase, and this proposal serves to create provisions of a limited duration to enable distressed condominium projects to be rehabilitated when units are conveyed to a bulk purchaser, with or without an assignment of developer rights.

II. SECTION-BY-SECTION ANALYSIS

The following is a listing of the specific changes to Chapters 718, 719 and 720 if the proposal is enacted:

A. Section 718.110(13)

Current Situation: The language concerning the ability to amend the declaration of condominium pertaining to rental rights does not provide

sufficient protection for existing unit owners.

Effect of Proposed Changes: Amendments to the declaration of condominium which would restrict the rights of a unit owner from renting their units or which would alter the duration of the rental term or the number of times a unit owner can rent a unit during a specific period will only apply to existing unit owners who consent to the amendment.

B. Section 718.111(12)

Current Situation:

(a) Clarification is needed to prevent liability for a person who knowingly or intentionally destroys or defaces accounting records after the time that the records are required to be maintained pursuant to Chapter 718 (i.e., there is no link with the time frame for maintaining the records).

(b) Clarification is needed as to when an association will have liability for the use or misuse of information obtained under the provisions of Chapter 718.

(c) Clarification is needed to prevent liability for a person who knowingly or intentionally destroys or defaces association official records after the time that the records are required to be maintained pursuant to Chapter 718 (i.e., there is no link with the time frame for maintaining the records) or with an intent to cause harm.

(d) Clarification is needed as to the description of records that are or are not accessible to unit owners.

(e) Clarification is needed as to the method of delivery to the association of a unit owner's request for official records.

Effect of Proposed Changes:

(a) There will now be liability when a person knowingly or intentionally destroys or defaces accounting records required to be created and maintained only for the period of time when such records are required to be maintained in accordance with other provisions of Chapter 718.

(b) The association shall not be responsible for the use or misuse of information obtained under Chapter 718 unless the association has an affirmative obligation not to disclose the information.

(c) There will now be liability when a person knowingly or intentionally destroys or defaces association official accounting records required to be created and maintained only for the period of time when such records are required to be maintained in accordance with other provisions of Chapter 718, or if the person knowingly fails to create or maintain accounting records with an intent to cause harm to the association or one or more of its members.

(d) Unit owners will not be given access to electronic mailing addresses; telephone numbers; emergency contact information; any addresses for a unit owner other than as provided by association notice requirements; personnel records of association's employees (including, but not limited to, disciplinary, payroll, health and insurance records); any electronic security

measure that is used by the association to safeguard data (including passwords); and the underlying software used by the association to generate data. Unit owners are to be given access to the name, unit designation, mailing address, and property address.
(e) A unit owner is required to submit a request for official records by certified mail, return receipt requested, or receipted commercial delivery to the association's mailing address.

C. Section 718.111(13)

Current Situation: Clarification is needed as to the standards for financial reporting by condominium associations and to require the Division to promulgate rules in such regard.
Effect of Proposed Changes: Specific provisions will be deleted as to requirements for reporting on reserves, and the Division will be required to promulgate rules containing standards for presenting a summary of association reserves, including, but not limited to, a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. Such reporting shall not be applicable to reserves funded via the pooling method.

D. Section 718.112(2)

Current Situation:
(a) Clarification is needed when there are insufficient candidates to serve on the board of administration.
(b) Clarification is needed where coowners of a unit are permitted to each serve on the board of administration.
(c) Clarification is needed as to the eligibility requirements of a candidate for election to the board of administration.
(d) Clarification is needed as to the requirements for unit owners that are elected to the board of administration to certify their understanding of the association documents or that they have received sufficient educational guidance from the Division.
(e) Clarification is needed that any director or officer who has failed to pay any monetary obligation due to the association (i.e., not just an assessment obligation) for 90 days is deemed to have abandoned their office.
(f) Clarification is needed as to the basis for determining director or officer offenses that will result in suspension from office.
(g) Clarification is needed that election and eligibility procedures and requirements should not be applicable to an association which governs a timeshare condominium (the current provisions are almost impossible to comply with because of the nature of the timeshare, the multitude of owners and the extreme cost associated with the election procedures).

Effect of Proposed Changes:
(a) Where there is an insufficient number of candidates to serve on the board of administration, directors whose terms are expiring can be reappointed to serve without an election.
(b) In a condominium association of more than 10 units, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit and are not co-occupants of a unit or unless there are not enough owners to fill the vacancies on the board.
(c) A candidate for election to the board of administration shall be required to have satisfied all eligibility requirements contained in the bylaws and have paid all outstanding monetary obligations due to the association (failure to do so shall result in the candidate not being listed on the ballot).
(d) Within 90 days after being elected, a newly-elected director must certify in writing to the association that he or she has read the declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, the newly elected director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider. Failure to timely file the written certification or educational certificate will serve to suspend the director until he or she complies with the requirements.
(e) A director or officer more than 90 days delinquent in the payment of any monetary obligation due to the association shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.
(f) A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property shall be suspended from office.
(g) An association which governs a timeshare condominium is not bound by the provisions pertaining to election of directors or eligibility requirements for service on the board.

E. Section 718.115

Current Situation: Clarification is needed as to certain costs that constitute common expenses. Current language only references cable television agreements, and this concept needs to be expanded to cover internet and video services as well.
Effect of Proposed Changes: Contracts for communications services, information services or internet or video services are now specifically included in the concept of common expenses.

F. Section 718.116

Current Situation:
(a) Clarification is needed as to the amount that is covered under the association's lien for nonpayment of assessments and the charges that an association can levy against a unit owner for collection services and issuance of estoppel certificates
(b) Rights need to be created for an association to collect monies from tenants of units if the unit owner fails to pay any monetary obligation due to the association.
Effect of Proposed Changes:
(a) The cost secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75. In addition, if the management company or licensed property manager prepares an estoppel certificate required by Chapter 718, it can charge an additional fee of up to $75 for the issuance of such certificate.
(b) The association is authorized to demand that a tenant pay to the association the future regular assessments related to the condominium unit so as to satisfy any outstanding monetary obligations due to the association in connection with the unit. The tenant will receive a credit from the landlord against rent for any amounts paid to the association. The tenant is required to continue payment until the association releases the tenant or the tenancy ends. The tenant is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association has certain notice requirements. The tenant is not liable for increases in the amount of any monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment was due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

G. Section 718.301

Current Situation: Clarification is needed that transfer of control is not triggered in a receivership circumstance when a court determines that turnover is not in the best interest of the association or its members.

Effect of Proposed Changes: Turnover will occur when a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless an interested party, including the holder of a mortgage on a unit in the condominium, petitions the court within such 30 day period that transfer of control would be detrimental to the association or its members.

H. Section 718.303

Current Situation: Clarification is needed that the association has the right to suspend an owner's right of enjoyment of the common elements (other than as may be necessary for legal ingress and egress to and from the unit, for necessary services or for the use of limited common elements) in the event of nonpayment of monetary obligations due to the association.
Effect of Proposed Changes: If a unit owner is delinquent for more than 90 days in the payment of any monetary obligation due to the association, the association may suspend, until paid, the right of a unit owner or a unit's occupant, tenant, licensee, or invitee to use common elements, common facilities, or any other association property. This does not apply to limited common elements intended to be used only by that unit, common elements that must be used to access the unit, electricity, water, gas and sanitary sewer services provided to the unit, parking spaces, or elevators.

I. Section 719.104

Current Situation:
(a) Clarification is needed as to the method of delivery to the association of a unit owner's request for official records.
(b) Clarification is needed as to the description of records that are or are not accessible to unit owners.
Effect of Proposed Changes:
(a) A unit owner is required to submit a request for official records by certified mail, return receipt requested, or receipted commercial delivery to the association's mailing address.
(b) Unit owners will not be given access to social security numbers; driver's license numbers; credit card numbers; electronic mailing addresses; telephone numbers; emergency contact information; any addresses for a unit owner other than as provided by association notice requirements; personnel records of association's employees (including, but not limited to, disciplinary, payroll, health and insurance records); any electronic security measure that is used by the association to safeguard data (including passwords); and the underlying software used by the association to generate data. Unit owners are to be given access to the name, unit designation, mailing address, and property address.

J. Section 719.108

Current Situation:
(a) Clarification is needed as to the amount that is covered under the association's lien for nonpayment of assessments and the charges that an association can levy against a cooperative parcel owner for collection services and issuance of estoppel certificates
(b) Rights need to be created for an association to collect monies from tenants of units if the unit owner fails to pay any monetary obligation due to the association.
Effect of Proposed Changes:
(a) The cost secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75. In addition, if the management company or licensed property manager prepares an estoppel certificate required by Chapter 718, it can charge an additional fee of up to $75 for the issuance of such certificate.
(b) The association is authorized to demand that a tenant pay to the association the future regular assessments related to the condominium unit so as to satisfy any outstanding monetary obligations due to the association in connection with the unit. The tenant will receive a credit from the landlord against rent for any amounts paid to the association. The tenant is required to continue payment until the association releases the tenant or the tenancy ends. The tenant is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association has certain notice requirements. The tenant is not liable for increases in the amount of any monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment was due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

K. Section 720.303

Current Situation:
(a) Clarification is needed that a board of administration meeting to

discuss proposed or pending litigation or for discussing personnel matters is not open to members.
(b) Clarification is needed as to charges for copies of association records as requested by a homeowner, so as to prevent homeowner abuse and waste of association personnel time.
(c) Clarification is needed as to the description of records that are or are not accessible to unit owners.
(d) Clarification is needed as to homeowners association budgeting and disclosure of reserve accounts.
(e) Disclosures are needed in the financial reports pertaining to reserves.
(f) Clarification is needed on the ability of a director to receive compensation.
(g) Clarification is needed as to the method of delivery to the association of a unit owner's request for official records.

Effect of Proposed Changes:

(a) Meetings between the board or a committee and the association's attorney to discuss proposed or pending litigation, or meetings of the board held for the purpose of discussing personnel matters shall not be open to the members other than the directors.
(b) The association is entitled to charge the actual cost of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or the association.
(c) Parcel owners will not be given access to social security numbers; driver's license numbers; credit card numbers; electronic mailing addresses; telephone numbers; emergency contact information; any addresses for a parcel owner other than as provided by association notice requirements; personnel records of association's employees (including, but not limited to, disciplinary, payroll, health and insurance records); any electronic security measure that is used by the association to safeguard data (including passwords); and the underlying software used by the association to generate data. Parcel owners are to be given access to the name, unit designation, mailing address, and property address.
(d) The association budget must disclose any reserves that have been collected, and the funding requirement for reserves is limited to the extent that there is a limitation on the increase in assessments in the governing documents. There is no preclusion from terminating a reserve account, which requires approval of a majority of the voting interests of the association.
(e) Specific disclosures are now provided for inclusion in the association financial reports concerning the funding and existence of reserves.
(f) A director, officer, or committee member of the association may not receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member and may not in any other way benefit financially from service to the association. However, this does not preclude: (1) participation by such

person in a financial benefit accruing to all or a significant number of members as a result of actions lawfully taken by the board or a committee of which he or she is a member, including, but not limited to, routine maintenance, repair, or replacement of community assets; (2) reimbursement for out-of-pocket expenses incurred by such person on behalf of the association, subject to approval in accordance with procedures established by the association's governing documents or, in the absence of such procedures, in accordance with an approval process established by the board; (3) any recovery of insurance proceeds derived from a policy of insurance maintained by the association for the benefit of its members; (4) any fee or compensation authorized in the governing documents; (5) any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by proxy at a meeting of the members; or (6) a developer or its representative from serving as a director, officer, or committee member of the association and benefiting financially from service to the association.

(g) A parcel owner is required to submit a request for official records by certified mail, return receipt requested, or receipted commercial delivery to the association's mailing address.

L. Section 720.304

Current Situation: Clarification is needed as to the requirements imposed for the installation of a flagpole on a lot.

Effect of Proposed Changes: A flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flag pole is erected, and all setback and locational criteria contained within the covenants, restrictions, bylaws, rules, or requirements of the association.

M. Section 720.305

Current Situation:

(a) Clarification is needed that the association has the right to suspend an owner's right of enjoyment of the common property (other than as may be necessary for legal ingress and egress to and from the unit or for the use of limited common elements) in the event of nonpayment of monetary obligations due to the association.

(b) Clarification is needed to permit certain fines to become liens.

Effect of Proposed Changes:

(a) If a parcel owner is delinquent for more than 90 days in the payment of any monetary obligation due to the association, the association may suspend, until paid, the right of the parcel owner or the parcel's occupant, tenant, licensee, or invitee to use common areas, common facilities, or any other association property. This does not apply to those portions of

the common areas intended to be used only by that parcel, common areas that must be used to access the parcel, electricity, water, gas and sanitary sewer services provided to the parcel, common area parking spaces, or elevators.
(b) A fine of less than $1,000 shall not become a lien against the parcel, and the imposition of a fine or suspension requires the association to provide written notice, by mail or hand delivery, to the parcel owner, and, if applicable, to the parcel's occupant, tenant, licensee or invitee.

N. Section 720.306

Current Situation: Clarification is needed as to the ability to vote by secret ballot and proxies.
Effect of Proposed Changes: Voting can occur via secret ballot employing an election process similar to that of Section 718.112 pertaining to condominiums.

O. Section 720.3085

Current Situation: Rights need to be created for an association to collect monies from a tenant of a parcel if the parcel owner fails to pay any monetary obligation due to the association.
Effect of Proposed Changes: The association is authorized to demand that a tenant pay to the association the future regular assessments related to the condominium parcel so as to satisfy any outstanding monetary obligations due to the association in connection with the parcel. The tenant will receive a credit from the landlord against rent for any amounts paid to the association. The tenant is required to continue payment until the association releases the tenant or the tenancy ends. The tenant is not required to pay monetary obligations if the tenant provides written evidence to the association of prepaid rent payments made to the landlord, up to the amount of the prepaid rent. The association has certain notice requirements. The tenant is not liable for increases in the amount of any monetary obligations due to the association unless the tenant was notified in writing of the increase not less than ten days prior to the date on which the rent payment was due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a parcel owner to vote in any election or to examine the books and records of the association. A court may supersede

the effect of this subsection by appointing a receiver.

P. Section 720.30851

Current Situation: Clarification is needed as to the amount an association may charge for the issuance of an estoppel certificate.
Effect of Proposed Changes: An association may charge a fee up to $150 for the issuance of an estoppel certificate.

Q. Section 720.31

Current Situation: Clarification is needed as to the ability of a homeowners association to acquire leaseholds, membership and other possessory use interests in lands or facilities such as country clubs, golf courses, marinas, submerged lands, parking areas, conservation and mitigation easements and areas, and other recreational facilities
Effect of Proposed Changes: The association is now empowered to enter into such agreements. There are requirements for description of these interests in the declaration if occurring prior to recording. Subsequent to recording, there must be authorizing language in the declaration to such effect, or else a 75% approval of the voting interests is required.

R. A new Part VII of Chapter 718, entitled the "Distressed Condominium Relief Act," is to be created:

Section 718.701: This section creates the title for Part VII.

Section 718.702: This section provides legislative findings and legislative intent. The statement of legislative intent indicates it is public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums.

Section 718.703: This section creates definitions of "bulk assignee" and "bulk buyer."

Section 718.704: This section creates provisions pertaining to the assignment and assumption of developer rights and provides different exceptions for a bulk assignee and a bulk buyer.

Section 718.705: This section creates provisions related to the transfer of control of the condominium association's board of administration, the ability of bulk assignees and bulk buyers to elect directors, and the delivery of transfer materials by a bulk assignee.

Section 718.706: This section provides specific provisions to be contained in offering materials utilized by bulk assignees or bulk buyers to offer units for sale or lease for a term of more than 5 years.

Section 718.707: This section provides a time limitation for classification as a bulk assignee or bulk buyer.

Section 718.708: This section provides that an assignment of developer rights does not release the developer from any liabilities under the condominium declaration or Chapter 718. The developer's liability is not limited for claims brought by unit owners, bulk assignees, or bulk buyers for violations of Chapter 718.

S. As a result of the creation of Part VII, Section 718.103(16) has been modified to exclude a bulk assignee or a bulk buyer from the scope of the defined term "developer."

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of these proposals will enable the improve operation of condominium, cooperative and homeowners associations, thereby saving money for the residents in these communities.

VI. CONSTITUTIONAL ISSUES

There are no known constitutional issues resulting from this proposal.

V. OTHER INTERESTED PARTIES

There are no other parties that are known to have an interest in this proposal.

Florida Department of State
Division of Elections

REFERENDA REQUIRED FOR ADOPTION AND AMENDMENT OF LOCAL GOVERNMENT COMPREHENSIVE LAND USE PLANS.

05-18

Reference:

Article II, Section 7

Summary: View Full Text (pdf)

Establishes that before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, the proposed plan or amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body and notice. Provides definitions.

Sponsor:

Florida Hometown Democracy, Inc., PAC
Post Office Box 636
New Smyrna Beach, FL 32170-0000
(386) 424-0860

Contact: Lesley G. Blackner, Chairperson

Signatures: ****Verified Totals are UNOFFICIAL until the Initiative receives certification and a ballot number.**

Required for review by Attorney General:	67,683
Required to have initiative on the ballot:	676,811
** Number currently valid:	711,842
(View By District by County)	

Status: ***Active***

Approval Date:	06/21/2005
Undue Burden:	
Made Review:	01/23/2006
Attorney General:	01/26/2006
Sent to Supreme Court:	02/01/2006
Supreme Court Ruling:	Constitutional : Complies with the single-subject requirement of article XI, Sec 3 of the FL Const, and the ballot title & summary comply with sec. 101.161(1).
SC Ruling Date:	09/14/2006
Made Ballot:	06/22/2009

Ballot Number:	4
Election Year:	2010

CONSTITUTIONAL AMENDMENT PETITION FORM

104.185 – A person who knowingly signs a petition or petitions for a candidate, minor political party, or an issue more than one time commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the next general election.

I AM REGISTERED TO VOTE IN _____ COUNTY.

NAME_____ STREET ADDRESS_____
Please **PRINT** Name as it appears on Voter I.D. Card — **PRINT** Current Physical Address (NO PO BOXES)

CITY_____ , FL ZIP_____ , USA COUNTY_____
(County of residence)

IS THIS A CHANGE OF ADDRESS FOR VOTER REGISTRATION IN SAME COUNTY? Yes___ No___

VOTER REGISTRATION NUMBER_____ ***-or-*** DATE OF BIRTH ____/____/_____
Month Day Year

X_____ DATE_____
SIGNATURE AS IT APPEARS ON VOTER I.D. CARD — **DATE SIGNED**

BALLOT TITLE: REFERENDA REQUIRED FOR ADOPTION AND AMENDMENT OF LOCAL GOVERNMENT COMPREHENSIVE LAND USE PLANS.

BALLOT SUMMARY: Establishes that before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, the proposed plan or amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body and notice. Provides definitions.

FULL TEXT OF PROPOSED AMENDMENT:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

Article II, Section 7. Natural resources and scenic beauty of the Florida Constitution is amended to add the following subsection:

Public participation in local government comprehensive land use planning benefits the conservation and protection of Florida's natural resources and scenic beauty, and the long-term quality of life of Floridians. Therefore, before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, such proposed plan or plan amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body as provided by general law, and notice thereof in a local newspaper of general circulation. Notice and referendum will be as provided by general law. This amendment shall become effective immediately upon approval by the electors of Florida.

For purposes of this subsection:

1. "Local government" means a county or municipality.
2. "Local government comprehensive land use plan" means a plan to guide and control future land development in an area under the jurisdiction of a local government.
3. "Local planning agency" means the agency of a local government that is responsible for the preparation of a comprehensive land use plan and plan amendments after public notice and hearings and for making recommendations to the governing body of the local government regarding the adoption or amendment of a comprehensive land use plan.
4. "Governing body" means the board of county commissioners of a county, the commission or council of a municipality, or the chief elected governing body of a county or municipality, however designated.

Serial Number 05-18 — Date Approved June 21, 2005

Return to:
Florida Hometown Democracy, Inc.,
P.O. Box 636
New Smyrna Beach, FL 32170-0636

www.FloridaHometownDemocracy.com
phone: (866) 779-5513
email: info@floridahometowndemocracy.com

PLEASE DONATE! Contributions should be made payable to "Florida Hometown Democracy, Inc."

pd.pol.adv., Florida Hometown Democracy, Inc.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION
OF THE FLORIDA BAR
RECOMMENDATIONS TO THE
TITLE INSURANCE STUDY ADVISORY COUNCIL

The Florida Bar's Real Property, Probate and Trust Law Section hereby presents the following recommendations to the Title Insurance Study Advisory Council in an effort to assist the Council in recommending legislation to benefit and protect consumers in the State of Florida:

1. Data Collection. Data collection is necessary to protect the public in establishing title insurance rates. Unlike casualty insurance, title insurance premiums include compensation for a number of activities in addition to funding a reserve to pay claims. Those activities, which are referenced as primary title services, are described in Section 627.7711(1)(b) Fla. Stat. Primary title services are routinely performed by thousands of title insurance agents across Florida. Information regarding the costs of performing primary title services is necessary in connection with any evaluation of the rates to be charged for title insurance.

A systematic collection of providers' defined costs incurred in providing primary title services is critical to permit a regulator to evaluate data provided by title agents and insurers supporting requested rates. The data collection must be effective and efficient to avoid undue increases in the operating costs borne by the thousands of small businesses providing primary title services, especially in areas of the state where smaller agencies or law firms are the only providers of real estate settlement services. Several guidelines may be identified to assure the quality of the information collected from title insurance agents and to assure that such information is collected in a cost efficient manner.

Therefore, we recommend that:

a. Data reporting should be an annual requirement of all insurers and licensed title insurance agencies.

b. There should be an expeditious and workable system developed by the regulator to gather data necessary for setting rates. With regard to data for years prior to the adoption of rules and one year thereafter, the cost of retroactively compiling data can be prohibitive and data should be limited to information readily available from records already maintained by agents for business management and tax reporting purposes.

c. Data for years beginning one or more years after the adoption of rules may be more inclusive and more detailed but should be designed to be reasonably trackable by modified closing software.

d. The statute should include an express prohibition on the use of data call information for enforcement actions.

e. Because of the difficulty of separating the costs and revenues attributable to legal services from those attributable to title services within a law office, the attorney-client privilege, and uncertainty about separation of powers issues as

concerns the Florida Supreme Court's exclusive authority to regulate attorneys, the data call statute should expressly exclude attorney-agents.

f. The statute should clarify that rates may properly be based on data submitted only by title agencies and insurers and less than complete response rates.

g. The responsible regulatory agency should be delegated rule making authority with respect to data calls and enforcing compliance.

2. <u>Establishing Rates</u>. The current promulgated rate mechanism continues to be the most suitable for a state like Florida, in which real estate activities in their various forms constitute a significant portion of the economy. The primary purpose of an insurance regulator is to assure consumers that insurance companies will be able to pay claims on the policies of the insureds. Most of the underwriting and risk management functions of title insurers in Florida are provided by a network of thousands of independent agents. It is incumbent upon a regulator of title insurance to assure consumers that, in addition to assuring that title insurers have adequate reserves to pay claims, the network of title agents is appropriately compensated to permit the primary title services to be properly discharged, avoiding the time and lost productivity involved with any insurance claim.

The promulgated rate permits a regulator to independently set rates that will be both adequate and fair to consumers. Promulgated rates permit the regulator to responsibly set rates across all markets and avoid subsidizing one market at the expense of another. The promulgated rate model acknowledges that the thousands of title insurance agents performing primary title services are often agents for more than one underwriter. Competitive concerns will prevent title agents from providing the costs of underwriting and risk management activities to title insurers on a consistent basis, thus denying title insurers the ability to adequately identify the true costs of title insurance necessary to employ other title insurance rating models. The promulgated rate model empowers a regulator with the ability to obtain data in a systematic and consistent manner from title agents so it may independently determine the costs associated with the provision of title insurance and establish a rate which is appropriate for title insurers, title agents and consumers. Florida, with its reliance on the thousands of title agents for critical underwriting and risk management functions, requires the promulgated rate model to protect consumers from the risks associated with rates established without adequate information or direction from the regulator.

A promulgated rate mechanism avoids the destructive rate competition evident in other states and provides a regulatory mechanism for maintaining the balance between the public policy in favor of reasonable rates for consumers and the public policy of protecting the solvency of the insurer and the agencies providing necessary services. In non-promulgated rate states (and recently in New Mexico), we have seen an upward pressure on rates over the last year. A single industry wide promulgated rate requires less regulatory resources than would individual rate filings by each underwriter and each agent. The regulator does not currently have, and is unlikely in the future to add, the additional resources necessary to evaluate individual rate filings by each underwriter and each agent.

Therefore, we recommend that:

a. The concept of establishing rates adequate to assure the maintenance of an efficient title agent network and delivery system, as currently embodied in §627.782 (2)(b), should be continued.

b. The established rates should provide for a reasonable margin for underwriting profit and contingencies, including contingent liabilities under s. 627.7865, sufficient to allow title insurers, agents, and agencies to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business and maintain an efficient title insurance delivery system.

c. The promulgated rates in Florida are in need of review currently and should be reviewed on a regular basis in the future.

3. <u>Rebating of Premiums</u>. Rebates result in disparate premiums which make it impossible for consumers to comparison shop. It is misleading to have a rate system which establishes promulgated rates, which are stated as mandatory rates, and yet to permit rebates. Consumers will benefit from a structure that treats consumers equally.

Therefore, we recommend that: No rebates of title premium should be permitted. Since the rationale underlying a regulated rate system is to preserve an appropriate balance between the solvency of the industry and consumer pricing, any deviation from a properly established rate is antithetical to that goal.

4. <u>Role of Title Agents</u>. The Council has explored in great detail the various functions performed by title insurance agents in the delivery of a title insurance policy and the closing of a real estate transaction and how those functions differ dramatically from the functions of an agent issuing property and casualty insurance or life insurance. The functions regarding the determination of insurability and the clearing of title objections directly impact the ultimate liability under the issued policies and the underwriter's ultimate claims loss experiences. The agent's compliance with written closing instructions and other matters addressed in a closing protection letter also directly impact an underwriter's claims experience. The simple reality is that all of those functions are covered by the premium paid for the policy and, unless agents are appropriately compensated for the work involved in performing those functions, quality will suffer and claims will increase.

Therefore, we recommend that: The critical role played and services provided by title agents in the process of closing a real estate transaction, incurring liability under an insured closing protection letter and issuing a title insurance commitment and policy should be recognized as substantively different than the role of agents involved with other types of insurance. Agents should continue to be compensated for these critical roles and liability both with a portion of the premium and payment for their closing services.

5. Conclusion of Closing Services. Consumers have a right to expect policies to be delivered on a timely basis and the prompt disbursement of closing funds. Although it is understandable and conceivable that it is not possible to issue a policy within 24 hours of the closing, it is unacceptable to have policies that still haven't been issued and delivered several months after the closing. Failure to promptly disburse funds may result in extra fees being charged and may delay subsequent closings. Lastly, without enforcement of these violations, those practices will not change. Currently, it appears that many agents (especially in light of the many recent defalcations) view the department as "all bark and no bite".

Therefore, we recommend: Legislation that sets statutory time limits for delivery of the final policy, the payment of premiums to the underwriter, and the disbursement of funds (with an exception for longer term escrows subject to a written escrow agreement) and authorize regulatory enforcement of violations.

6. Single Regulator. Title insurance agents play a very substantive role in the underwriting and elimination of risk in the issuance of title insurance. The agent role overlaps significantly with the roles and duties of the title insurance underwriter such that common regulation and uniform positions and interpretations of law and policy are extremely important. It makes little practical and economic sense to maintain two regulatory infrastructures to supervise the same core functions, especially when the duplication results in inconsistent regulation, confusion among the regulated parties and business inefficiencies.

A secondary problem in the currently regulatory environment is the lack of substantive title insurance knowledge and experience within the regulatory body. A deeper understanding of the industry and business practices is required. One regulatory body will be more capable of understanding not just the operational intricacies of title insurance but how a failure of those intricacies will impact the solvency and stability of title insurance agents and title insurance companies

Therefore, we recommend that: Florida should have a single regulator with rule-making authority governing both agents and underwriters, supervised by a person who specifically has knowledge of and experience within title insurance.

7. Authorizing of Title Insurance Forms. Title insurance protects the real property ownership interests of Florida consumers and permits Florida consumers to gain access to lenders across the country by providing those lenders with certainty and protection. Access to a wide pool of lenders reduces the cost of borrowing to consumers. Title insurance reduces total transaction costs to the consumer by adding certainty and protection that allows lenders to reduce interest rates by assuming certain risks that title insurers are in a position to manage. The nature and scope of the risks may change as lending markets change. Consumers in Florida will benefit from a timely and effective system to promptly review proposed title insurance coverages for both consumers and lenders.

The American Land Title Association (ALTA) is a national trade organization comprised of title insurers and title insurance agents. ALTA also develops nationally standardized forms and works closely with consumer groups, lenders and title insurance regulators across the

country to identify necessary coverages that can be responsibly provided. National standardization of title insurance policy forms not only permits acceptance of residential mortgages in secondary markets, such as the Federal National Mortgage Association (Fannie Mae), but it also lowers the cost to consumers. A procedure to timely consider new or additional title insurance coverages, particularly coverages available in a majority of other states, will benefit Florida consumers.

Therefore, we recommend that:

a. There should be a limited time period for the approval or rejection of proposed title insurance forms, after which such forms are automatically deemed approved.

b. Recognizing that real estate practices have become national in scope, ALTA approved forms should come with a presumption in favor of approval and a reduced period for approval or rejection.

c. The availability of prior approved forms after the approval of new versions of the same form is confusing to the public and the industry. When a new version of a form is approved, the old version should be automatically disapproved six months later.

d. Where a new form is replacing a substantively similar existing form which has a promulgated rate, the promulgated rate for the similar form should be applied to the new form until the next rate review.

8. <u>Florida Statutes</u>. The Florida Insurance Code has grown and evolved incrementally over the years as part of the legislative process. Statutes regarding all types of insurance are intermingled within the Insurance Code and spread across various chapters. In an unsuccessful attempt to eliminate this confusion, §627.776 purports to list the provisions of the Insurance Code applicable to title insurance, and creates a separate list of those provisions which are not applicable. Unfortunately, significant portions of the Insurance Code are not referenced in either category. Rather than clarifying a confused statutory framework, §627.776 compounds the confusion, leading to uncertainty within the industry and among regulators as to the intent of the Legislature.

Therefore, we recommend that: All statutes related to the provision of title insurance in Florida should be consolidated into a single stand-alone chapter within Florida Statutes. The current legislative structure, in which title insurance is mixed within the overall Insurance Code is confusing, with some provisions expressly applicable, some expressly inapplicable, and a great many where the applicability is uncertain. Care should be exercised in the consolidation process to remove all references to title insurance from other provisions of the Insurance Code.

9. <u>Continuing Education and Licensure</u>.

W***e recommend that***:

a. Recognizing that the interests of sellers, purchasers and lenders can best be served by title agents with knowledge of Florida real estate law and its unique aspects, such as Constitutional homestead, it is a necessary precondition to title insurance functions that:

   i. The holding of a title insurance license in another state, should not be a sufficient condition for acquiring a Florida license. The same Florida specific examination should be required of all applicants.

   ii. Out of state agents should be required to meet their continuing education requirements with Florida specific education.

b. Because of the substantial differences between title insurance and other types of insurance, a title insurance agent should not be permitted to meet continuing education requirements through education designed for life, auto, property and casualty or other unrelated types of insurance.

c. The statutes governing continuing title insurance education should permit the office or department to outsource their education review and approval functions.

d. All courses approved by The Florida Bar for real property certification credit and/or ethics credits should automatically be recognized for title insurance continuing education credit.

10. <u>Illegal Inducements</u>. Illegal inducements in any industry increase the expenses of the service provider, which in turn increase consumers' costs. Illegal inducements cause a "trusted advisor" to push a consumer to a particular service provider, not because of the level of service performed or the consumer's best interests, but because the "trusted advisor" has received an additional form of compensation or incentive for sending the business to a specific provider. Illegal inducements harm competition in the marketplace, which is detrimental to consumers. This law in Florida is particularly important because RESPA enforcement by state officials is authorized only if there is a specific state statute authorizing the state official to enforce RESPA. Florida does not have this type of statute.

Therefore, we recommend that:

The law prohibiting the payment of illegal inducements should be strengthened to:

a. Clarify that the receipt as well as the payment of an illegal inducement is a violation.

b. Allow a regulatory body having jurisdiction over a licensed participant in the real estate industry to assess penalties for the violation of RESPA regulations.

11. <u>Rate Simplification and Clarification</u>. While this can be accomplished solely through rule changes, this is a significant industry problem and thus suitable for consideration by the Council. The current rate structure in Florida makes it difficult for lenders to provide an accurate estimate of title charges for the Good Faith Estimate, which is even more important under the new HUD regulations. Simplifying rates will allow consumers to easily compare rates and charges so that they can get the best deal.

12. <u>Clarify the Results of HB 111</u>. In light of the changes to RESPA, it is very important that the interpretation and application of HB-111 not only is consistent with RESPA, but also clearly sets forth the guidelines for agents. The HUD-1 Settlement Statement is one of the most integral parts of the closing. It is very important that the charges are set forth clearly and can be easily explained to customers. A law that conflicts with not only RESPA, but also with the current rate structure, is counterproductive for several reasons. First, a law which is difficult to apply will not benefit consumers because the various agencies and underwriters may reflect charges differently on the HUD (thus, the initial goal of comparison shopping for customers would be frustrated). Second, creating a law that discourages the needs of servicemen and women undermines the "goal" of promoting consumer-friendly title insurance practices. Third, a law that results in inconsistencies in application and enforcement could penalize agents for essentially "playing by the rules".

Therefore, we recommend that: HB 111 should be clarified to confirm which charges are permitted and prohibited, and those charges should be conformed to the requirements of the new HUD RESPA rules. Note that the HUD required reporting of charges conflicts with the current Florida rate structure and that the term “closing services” mandated in Florida is not a permitted category of charge for a VA loan or refinancing – resulting in a disincentive to handle the needs of servicemen and women.

REAL PROPERTY DIVISION INFORMATION ITEM

REVISIONS TO
RESIDENTIAL LEASE FORMS FOR USE BY NON-LAWYERS
LANDLORD/TENANT EVICTION/DEFAULT FORMS FOR USE BY NON-LAWYERS

BACKGROUND

In 2007, the Landlord/Tenant Committee of the RPPTL Section undertook a comprehensive review of a number of simplified forms pursuant to Rule 10-2.1(a) of the Rules Regulating the Florida Bar. These forms are intended for use by non-lawyers (i.e., "Simplified Forms"), and have been in use throughout the state since 1992 and consist of (1) Residential Lease for Apartment or Unit in Multi-Family Rental Housing (Other than a Duplex), Including a Mobile Home, Condominium, or Cooperative (For a Term Not to Exceed One Year), (2) Residential Lease for Single Family Home or Duplex (For a Term Not to Exceed One Year), and (3) Residential landlord-tenant eviction forms. The Supreme Court also authorized publication of instructions accompanying the eviction forms, while not expressing an opinion as to the legal correctness of the instructions, and authorized the Chief Judge of each circuit to prepare supplemental directions for use with the forms.

Procedural History:

In 1992, the Court approved Residential Lease forms (602 So. 2d 914, 915 (Fla. 1992)) together with 17 landlord/tenant eviction forms and the accompanying instruction sheets.

In 1993 the Court approved six additional forms, numbered 76-81 (Motions for Default and Affidavits) (621 So. 2d 1025 (Fla. 1993)).

In 2000, the Court approved additional revisions to the Simplified Forms (774 So. 2d 611 (Fla. 2000)).

COMMITTEE REVIEW AND REVISIONS

The Landlord/Tenant Committee reviewed the Residential Lease and Eviction forms to update provisions, statutory references, correct inconsistencies and errors, and provide other suggested practical revisions. Comments were solicited from the FAR/BAR and Real Property Litigation Committees and Florida Legal Services.

APPROVALS AND FILINGS

A. RPPTL Landlord/Tenant Committee approval – May 22, 2008
Real Property Division approval – May 22, 2008
RPPTL Section Executive Council approval – May 22, 2008
Board of Governors approval – October 2008

B. First Supreme Court filing: February 11, 2009 (the "Petition"). Case No. SC09-250.

C. Supplemental filing: On April 30, 2009, the Supreme Court requested and directed the Bar to file a supplement to its Petition to provide a detailed description of the proposed revisions and the specific reasons therefor. On August 6, 2009, the Bar filed the following documents supplementing its Petition:

1. Appendix "A" contains the Residential Lease for Apartment or Unit in Multi-Family Rental Housing (Other than a Duplex), Including a Mobile Home, Condominium, or Cooperative (For a Term Not to Exceed One Year). In supplementing the form with an explanation of the changes, the drafters noticed that the attorneys' fees provision formerly in paragraph 25 had been deleted by mistake. The attorneys' fees language has therefore been added back to the form with some changes so that the language is consistent with Florida Statute § 83.48. A copy of the revised lease with the change is attached in Appendix "B."

2. Appendix "C" contains the Residential Lease for Single Family Home or Duplex (For a Term Not to Exceed One Year). In supplementing the form with an explanation of the changes, the drafters noticed an inconsistency. The second paragraph of the lease states that the Landlord, upon request, shall provide a copy of the Residential Landlord and Tenant Act to the tenant. The drafters had decided to make inclusion of the lease mandatory. The language in the second paragraph was inconsistent with that and with later language in the lease. Consequently, the language in the second paragraph has been amended to make it consistent with the rest of the lease. A copy of the revised lease with the change is attached in Appendix "D."

3. Appendix "E" contains the landlord-tenant residential eviction forms with explanatory language.

D. Supplemental response to Steinwand. In response to the Petition, on August 10, 2009, John A. Steinwand, an owner/broker of a realty company, filed comments to a number of provisions of the Residential Lease forms. By Response filed after consultation with the Landlord/Tenant Committee, the Bar provided explanatory responses to Mr. Steinwand's comments. No substantive form changes were recommended. The Court's review of these comments and response is pending.

CURRENT STATUS:

Pending final approval of the Supreme Court.

The Landlord/Tenant Committee intends to submit an Actionline article after final approval of the forms summarizing the process and salient issues.

The revised Residential Lease and Landlord/Tenant Eviction forms and redlines of the proposed changes pending Court approval are posted on the RPPTL.org website.

**PRELIMINARY DRAFT —
FOR DISCUSSION PURPOSES
ONLY – SUBJECT TO CHANGE**

DRAFT DATED SEPTEMBER 2, 2009

REPORT ON STANDARDS FOR THIRD-PARTY LEGAL OPINIONS OF FLORIDA COUNSEL

BY THE

LEGAL OPINION STANDARDS COMMITTEE OF THE FLORIDA BAR BUSINESS LAW SECTION*

AND THE

LEGAL OPINIONS COMMITTEE OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR*

EXPOSURE DRAFT DATED NOVEMBER __, 2009

* This Report reflects the consensus of the Committees. It does not necessarily reflect the views of the individual members of the Committees or their respective firms or organizations.

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BACKGROUND OF THE REPORT

A. Overview

This Report reflects customary third party legal opinion practices of Florida counsel for a myriad of commercial transactions, including loan transactions, real estate transactions, acquisitions of stock or assets and other types of commercial transactions. It has been prepared to provide guidance to Florida attorneys who render legal opinions, and to both Florida and out-of-state attorneys who receive legal opinions from Florida attorneys on behalf of clients, as to the nature and meaning of the content of legal opinions and to articulate the diligence required to render such opinions.

This Report is a joint effort of the Legal Opinion Standards Committee (the "**Business Law Section Committee**") of the Business Law Section of The Florida Bar (the "**Business Law Section**") and the Legal Opinions Committee (the "**RPPTL Section Committee**", and, together with the Business Law Section Committee, the "**Committees**") of the Real Property, Probate and Trust Law Section of The Florida Bar (the "**RPPTL Section**"). The Business Law Section and the RPPTL Section have a long and active history of promulgating standards for opinions of Florida counsel and this Report reflects an effort to update and consolidate all of the standards previously published.

This draft of the Report, dated November __, 2009, is an exposure draft. It is being distributed to interested members of the Business Law Section and RPPTL Section, and to persons around the country who are active in the third-party legal opinions community, for their comment prior to its finalization. Following a reasonable comment period, the Committee will consider additional changes to this Report in light of any comments received. It is expected that once this Report is finalized, it will be formally considered for adoption by the Executive Council of the Business Law Section, by the Executive Council of the RPPTL Section and ultimately by the Board of Governors of The Florida Bar.

B. History of The Florida Bar's Efforts to Create Opinion Standards for use by Florida Counsel

In June 1991, the Business Law Section Committee promulgated its "Report on Standards for Opinions of Florida Counsel" (the "**1991 Report**"). The 1991 Report, which was adopted by the Business Law Section, sought to create normative opinion standards for Florida counsel in an era during which normative opinion standards were first being considered. In that regard, shortly after the 1991 Report was adopted, the American Bar Association Section of Business Law (the "**ABA Business Law Section**") adopted its "Third Party Legal Opinion Report, Including the Legal Opinion Accord" (commonly called the "**Accord**"). The Accord, in the same manner as the 1991 Report but on a national scale, sought to establish normative standards for opinions in business transactions.

Normative opinion standards were intended to be objective standards adopted prospectively to be utilized in opinion giving and opinion receiving practices. These standards were to be followed in all situations (in the nature of a contract between the parties) in which the parties agreed to incorporate the standards into opinions of counsel, and were intended to simplify and improve the opinion process. With respect to the 1991 Report, the normative opinion standards reflected therein did not necessarily reflect the customary opinion practices of that era, but reflected a view of what opinion practices should be for Florida counsel on a going-forward basis. This can be compared to this Report, which is intended to reflect the customary practices of Florida counsel in rendering and (on behalf of clients) receiving third-party legal opinions. Notwithstanding and as more particularly described in this Report, the Committee believes that Florida customary practice (as reflected in this Report) is the standard of care to which Florida attorneys rendering third-party legal opinions should be held.

When the 1991 Report was published, it was anticipated that additional sections of the 1991 Report would be adopted thereafter to reflect standards for additional third-party legal opinions that were not covered by the 1991 Report. In that regard, three additional supplements to the 1991 Report were published in the years following the 1991 Report, as follows:

- in 1996, the RPPTL Section Committee promulgated a supplement to the 1991 Report entitled: "Opinions in Real Estate Transactions, including Loan Transactions," setting forth standards for opinions of Florida counsel with respect to Florida real estate transactions ("**RPPTL Report No. 1**");

- in 1998, the Business Law Section Committee promulgated a supplement to the 1991 Report setting forth standards for opinions of Florida counsel with respect to opinions under Article 9 and Article 8 of the Uniform Commercial Code (the "**1998 Secured Transactions Report**"); and
- in 2004, the RPPTL Section updated RPPTL Report 1 to reflect certain changes in opinion practices with respect to Florida real estate transactions subsequent to the publication of RPPTL Report No. 1. (**"RPPTL Report 2**").

The 1991 Report, RPPTL Report No. 1, the 1998 Secured Transaction Report and RPPTL Report No. 2 are sometimes collectively referred to in this Report as the "Prior Florida Reports."

Since the 1991 Report was promulgated, several trends in third-party legal opinion practices have emerged:

1. Although the Prior Florida Reports were well received in Florida and continue to be used to this day by attorneys rendering third-party legal opinions in Florida, many out-of-state counsel in multi-state transactions were unwilling to accept some of the approaches set forth in the 1991 Report, and as a result many Florida counsel moved away from using the standards established in the Prior Florida Reports;
2. Express and wholesale incorporation of normative opinion standards such as the 1991 Report and the Accord into third party legal opinions was not ultimately accepted by many opinion recipients, and particularly not accepted by counsel representing New York based money-center financial institutions and investment banking firms;
3. The remedies opinion standard set forth in the 1991 Report was not widely accepted, due to the fact that it was considered too "pro-opinion giver" and out of the mainstream at that time;
4. Since 1998, there have been a number of significant reports published by well-respected state and local bar associations or sections of bar associations setting forth their views regarding third-party legal opinion customary practices in their jurisdictions. This has included, among others, four reports by the TriBar Opinions Committee, two reports by the Legal Opinions Committee of the California Bar Business Law Section and reports by the Legal Opinions Committees of the Business Law Sections of the Pennsylvania Bar, the North Carolina Bar and the Maryland Bar. Further, during this same time-period, the ABA Business Law Section Committee on Legal Opinions (the "**ABA Committee**") has promulgated its "Legal Opinion Principles" and "Legal Opinion Guidelines." All of these reports have significantly added to the literature on third-party legal opinion customary practice;
5. In recent years, there have been a number of cases reported in jurisdictions other than Florida in which lawyers have been sued with respect to third-party legal opinions that they rendered. These cases have brought significant focus to the issue of what is customary third-party legal opinion practice, since customary practice is the standard of care to which lawyers rendering third-party legal opinions are likely to be held. This emphasis on liability for compliance with customary practice makes it imperative for the benefit of all Florida lawyers that the Business Law Section and the RPPTL Section, which represent the interests of lawyers on all sides of these issues, provide guidance to the judiciary in Florida regarding their views on what is the third-party legal opinion customary practice in this state;
6. For the first time since the Silverado Conference which led to the adoption of the Accord, there has been an effort led by the ABA and by a number of state and local bar associations or sections of bar associations (including the Business Law Section) with interests in third-party legal opinion practices, to begin a national dialogue on legal opinion issues. These efforts began with a program on Legal Opinion Risk Management in 2006 and continue to this day through the auspices of the Working Group on Legal Opinions ("**WGLO**"). The WGLO brings together, under what it calls its "big tent," opinion givers, opinion recipients (including financial institutions, insurance companies and investment banking firms) and those with an interest in legal opinion matters, including malpractice insurers and rating agencies from around the country and from outside the United States, to discuss and consider issues of interest with respect to legal opinion customary practice; and

7. The adoption of the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* (the "Customary Practice Statement") in 2008 focused on the importance of customary practice as a source of the criteria for determining whether an opinion giver has satisfied its obligations of competence and diligence. The Customary Practice Statement also reminded everyone that bar association reports (such as this Report) are valuable sources of guidance on customary practice. The Customary Practice Statement has been adopted to date by 28 bar associations or sections of bar associations, including the Business Law Section and the RPPTL Section. A copy of the Customary Practice Statement is attached hereto as Appendix "D" and is reprinted with the permission of the American Bar Association.

Over the last few years, many Florida practitioners have requested that the Business Law Section update the Prior Florida Reports. In response to these requests, in June 2006, the Business Law Section determined that because of the changes in third-party legal opinion practices in Florida since the 1991 Report, it would update the 1991 Report. The Business Law Section Committee, which had been dormant for several years, was reconstituted to take responsibility for this effort. Further, in September 2006 the RPPTL Section agreed to work together with the Business Law Section Committee in this effort. The RPPTL Section Committee was already organized and actively engaged, because it had recently completed the preparation of RPPTL Report No. 2.

The decision to update the Prior Florida Reports was made because the leaders of the Business Law Section and the leaders of the RPPTL Section believed that their members will benefit from the guidance provided in a comprehensive report detailing customary third-party legal opinion practices in Florida. Further, although the Committees applaud the efforts of the WGLO and the ABA Business Law Section to facilitate a national dialogue on third-party legal opinion issues and are actively participating in these efforts, they have concluded that the interests of their respective members will not be served by waiting until the conclusion of the national debate over customary third-party legal opinion practices before providing guidance to Florida counsel as to customary third-party legal opinion practices in this state.

The purposes and goals of this Report are described with more specificity in "Introductory Matters – Purpose and Goal of this Report." This Report is intended to report on current third-party legal opinion practices in Florida (what opinion-givers should be prepared to give and what opinion-recipients should be prepared to accept). It is also an effort to create a practice manual for use by Florida attorneys in their opinion-giving and opinion-receiving practices. See "How to Use This Report" below.

C. Materials Considered in the Preparation of this Report

Unlike 1991, when there was little published that provided guidance to the Business Law Section Committee for its use in developing the 1991 Report, the Committees have had the benefit of the myriad of national, state and local bar association reports that had been published since 1998 reflecting third-party legal opinion customary practice in a significant number of jurisdictions. In that regard, in the preparation of this Report, in addition to the Prior Florida Reports, the Committees actively reviewed and considered the following ABA, state and local bar reports:

1. "Third-Party Closing Opinions" report issued in 1998 by the TriBar Opinion Committee (the "**TriBar Report**");
2. "Legal Opinion Principles" adopted in 1998 by the ABA Committee;
3. "Inclusive Real Estate Secured Transaction Opinion Report" issued in 1999 (the "**Real Estate Report**") by the ABA Section of Real Property, Probate and Trust Law, now called the Real Property, Trust and Estate Law Section ("**RPTE**") and the American College of Real Estate Lawyers ("**ACREL**");
4. "Pennsylvania Third-Party Legal Opinions" report issued in 2000 by the Legal Opinion Steering Committee of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association;

5. "Guidelines for the Preparation of Closing Opinions" issued in 2002 by the ABA Committee (the "**ABA Guidelines**");

6. "U.C.C. Security Interest Opinions – Revised Article 9" issued in 2003 by the TriBar Opinion Committee;

7. "Real Estate Opinion Letter Guidelines" issued in 2003 by the RPTE and ACREL;

8. "Report on Third-Party Remedies Opinion" (the "**California Remedies Report**") issued by the Business Law Section of the State Bar of California (the "**California Business Law Section**"), which was originally issued in 2004 and was updated in 2007;

9. "The Remedies Opinion – Deciding When to Include Exceptions and Assumptions" issued in 2004 by the TriBar Opinion Committee;

10. "Third-Party Legal Opinions in Business Transactions, Second Edition" issued in 2004 by the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, as well as the Supplement thereto issued in March 2009;

11. "Legal Opinions in Business Transactions (Excluding the Remedies Opinion)" issued in 2005 by the Corporations Committee of the Business Law Section of the State Bar of California;

12. "Streamlined Form of Opinion" issued in 2005 by the Boston Bar Association;

13. "Report on Third Party Closing Opinions: Limited Liability Companies" issued in 2006 by the TriBar Opinion Committee;

14. "Report on Lawyer's Opinions in Business Transactions" issued in 2007 by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.; and

15. "Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions" issued by the Real Property Law Section of the State Bar of Georgia in 2009.

In the preparation of this Report, the Committees relied heavily on the reports of other bar associations and sections of bar associations that are set forth above. In that regard, the Committees viewed their task as first to determine the customary practice of Florida counsel with respect to third-party legal opinions and second to document those practices. Wherever the work of other bar associations best reflected what the Committee believed to be the customary third-party legal opinion practices in Florida, the Committee borrowed liberally from the work of these other bar associations. Although specific attribution to particular reports is not included for each section of this Report, the Committee acknowledges its use of all of these reports and thanks each of these bar associations and sections of bar associations for their fine thinking and cogent analysis that helped shape this Report.

The Customary Practice Statement provides that bar association reports are valuable sources for guidance of customary practice, and the Committees believe that this Report sets forth the customary practice with respect to opinions issued by Florida counsel. In addition to bar association reports, several treatises have been published that discuss and explain third-party legal opinion practice. These treatises do not necessarily reflect customary practice in Florida. Nevertheless, the Committees want to bring to the attention of Florida lawyers the following treatises which they may find helpful in connection with their opinion practices: (i) Glazer & Fitzgibbon on Legal Opinions, which is co-authored by Donald W. Glazer, a former chair of the TriBar Opinion Committee and the ABA Committee, Steven Weise, a former Chair of ABA Committee and of the ABA Business Law Section, and Scott Fitzgibbon; (ii) Legal Opinions in Business Transactions, which is authored by Arthur N. Field, another former chair of the TriBar Opinion Committee and the ABA Committee and the current chair of the WGLO, and (iii) Real Estate Opinion Letter Practice, which is authored by Robert A. Thompson, a former Chair of the legal opinion committees of both the RPTE and ACREL.

D. Process followed by the Committees in the Preparation of this Report

This Report is a joint effort of a broad cross-section of Florida lawyers representing the interests of both opinion givers and opinion recipients. Participants included attorneys practicing in large firms, mid-size firms and small firms, and attorneys practicing in a significant number of different practice areas. It also involved the participation of lawyers from around the state of Florida. In preparing this Report, efforts were made to involve a large group of attorneys in reviewing and commenting on this Report, so as to ensure that this Report reflects customary third-party legal opinion practices in Florida.

In September 2006, a steering/drafting committee was organized consisting of members of both the Business Law Section Committee and the RPPTL Section Committee. The members of the Steering/Drafting Committee (the "**Steering Committee**") took on the responsibility of drafting various sections of this Report.

During the period between September 2006 and May 2009, the Steering Committee, the Business Law Section Committee and the RPPTL Section Committee met on a regular basis. Many of these meetings were day-long, in-person meetings and others were telephonic conference calls. During those meetings and conference calls, various sections of this Report were reviewed. Thereafter these sections were redrafted by members of the Steering Committee and re-circulated to the members of the Business Law Section Committee and the RPPTL Section Committee for further review. In May 2009, the Committees began a joint collaborative effort to finalize the draft Report. This process continued until September 2009 when this Report was published as a study draft.

It is intended that over the next few months this exposure draft of this Report will be circulated to members of the Business Law Section, the RPPTL Section and The Florida Bar, as well as to other persons around the country who are knowledgeable about third-party legal opinion practices, for their comments. The Committees also intend to hold two public forums regarding this Report, one to be held on January 21, 2010 (in conjunction with the Business Law Section meetings being held on that date) and the second to be held on January __, 2010 (in conjunction with the RPPTL Section meetings being held on that date).

Following this comment period, it is expected that the Committees will review the comments received and determine whether to make any additional changes to this Report. Once this process is completed, it is anticipated that the final version of this Report approved by each of the Committees will be submitted for approval to the Executive Council of the Business Law Section, the Executive Council of the RPPTL Section and the Board of Governors of The Florida Bar.

E. Where this Report fits into Efforts to Nationalize Third-Party Legal Opinion Customary Practice

There has been considerable debate in the last few years at the national level over whether a national third-party legal opinions practice has developed. Topics discussed at sessions of the WGLO have included the similarities of and differences between various state and local bar reports and whether state and local bars should consider drafting reports for their members regarding issues of customary practice or refer their members to reports of other state and local bars that (in the view of those committees) reflect third-party legal opinion customary practices in their state or locality. This dialogue has been further fueled by the WGLO's organization of an Association Advisory Board (consisting of representatives of a large number or state and local bars (or sections of bars), including the Business Law Section, the business law sections of Texas, California, North Carolina, Pennsylvania, and the TriBar Opinions Committee, as well as other associations representing constituencies of lawyers, such as the National Association of Bond Lawyers, the American College of Commercial Finance Lawyers and the American College of Investment Counsel) as a forum for the discussion of these issues.

The Committees believe that opinion practices are determined on a state-by-state basis and that while customary practice is quite similar from jurisdiction to jurisdiction, there is not yet a national consensus on numerous aspects of third-party legal opinion practices. This Report will add to the body of literature describing

customary third-party legal opinion practices. To the extent that third-party opinion practices in Florida are similar to practices in other states (particularly in other large commercial states that (like Florida) have large number of commercial transactions), it will add to the mix of information that will be available for discussion as state and local bars and the ABA meet in the WGLO's "big tent" to consider these issues. In that regard, for a national opinion third-party legal opinion practice to emerge, various state and local bar associations and the ABA will need to engage in a meaningful dialogue to articulate customary practice standards that will be acceptable in the vast majority of jurisdictions.

The Committees also believe that standards with respect to opinions on certain areas of the law, such as issuances and sales of securities under the Securities Act of 1933 and opinions in cross-border transactions, are better left to development by the ABA Committee. Various members of the Committees are active participants in those efforts and, wherever appropriate, this Report cites to reports promulgated by the ABA Committee in order to provide Florida lawyers with meaningful guidance as to how to deal with opinion practices in those specialized areas of the law.

Finally, the Committees are pleased that this Report represents the joint efforts of lawyers who represent clients in all types of commercial transactions, including loan transactions, real estate transactions, acquisitions of stock or assets and other types of commercial transactions. For too many years, business lawyers and real property lawyers have gone their separate ways in developing customary third-party legal opinion practices. The Committees believe that their joint collaboration is in the best interest of lawyers in Florida and they urge those seeking to develop national consensus with respect to third-party legal opinion practices to make sure that both corporate lawyers and real property lawyers involved in third-party legal opinion practices are active participants in this dialogue.

F. Plans to Continue to Monitor Customary Practice so that the Guidance provided in this Report remains Current

Following the completion of this Report, the Business Law Section Committee and the RPPTL Section Committee intend to periodically review customary practice in Florida to determine whether to update or expand the guidance provided in this Report. The Committees also intend to monitor the activities of other state and local bar associations and sections of bar associations, the ABA and the WGLO so that Florida's practitioners continue to receive the benefits of future efforts by these other organizations. If considered necessary, one or more supplements to this Report may be issued in the future.

G. How to Use this Report

This Report is intended to be a practice guide rather than a treatise. As a result, the key to using this Report is the use of the forms of opinions that accompany this Report in conjunction with the commentary regarding the meaning of the words in the opinion and the diligence that should be undertaken to give the opinions set forth in this Report. This Report contains forms of four representative opinions: (i) a form of opinion to be used in a commercial lending transaction; (ii) a form of opinion to be used in a real estate lending transaction; (iii) a form of opinion to be used in a commercial transaction, and (iv) a form of opinion to be used in connection with a share issuance. It also contains a form of Certificate to Counsel that can be used with each of the forms of opinions. In the view of the Committees, these forms together cover substantially all of the third-party legal opinions given in the vast majority of commercial transactions in Florida.

The forms that accompany this Report have been developed to provide Florida practitioners with opinion forms that can be used in their opinion-giving practices. The forms key off of the various sections of this Report, which seek to interpret the words in the form opinions and provide guidance regarding the diligence that should be completed to render the particular opinions. In this regard, the electronic version of this Report includes hyperlinks from various sections of the forms into the applicable sections of this Report where the customary practice regarding such opinions is described.

We recommend that Florida attorneys who render opinions pay careful attention to the "Introductory Matters" and "Common Elements" sections of this Report. These sections include information about matters important to all of the third-party legal opinions covered by this Report. Following these sections, this Report includes guidance regarding the opinions that are generally rendered in commercial transactions. These opinions can be broken into the following categories:

1. Opinions that are the building blocks for or are necessary to render a remedies opinion, including opinions on entity status and organization, authorization to transact business in Florida, power and authority, authorization of the transaction, execution and delivery, no violation, no breach or default and no required governmental consents or approvals;
2. The remedies opinion;
3. The "no litigation" confirmation;
4. Opinions on particular substantive areas of commercial practice, including opinions with respect to the issuance of securities, opinions with respect to collateral under the Uniform Commercial Code ("**UCC**") and opinions in connection with real estate transactions; and
5. Special opinions that are often requested, including opinions on choice-of-law provisions in agreements and usury opinions.

This Report also includes advice regarding special matters to be considered when Florida counsel is acting as local counsel.

Finally, copies of the bar association reports and reference materials that are discussed in this Report are available on the Business Section Committee's webpage at: _____. Many of these same materials are also available in the "Legal Opinion Resource Center" that is contained on the webpage of the ABA Business Law Section's Committee on Legal Opinions.

H. Questions

The Committees welcome questions regarding this Report and regarding customary third-party legal opinion practices in Florida. Questions can be e-mailed to the Committees at FloridaOpinions@gmail.com.

INTRODUCTORY MATTERS

A. Purpose and Goal of this Report

This Report is intended for use by Florida lawyers who render third-party legal opinions on behalf of a client (the "**Client**") and for use by lawyers who represent client's receiving third-party legal opinions from Florida counsel. A third-party legal opinion, which is referred to in this Report as an "opinion" or an "opinion letter," is a written legal opinion letter that is delivered in connection with a commercial transaction (the "**Transaction**") and that is given by counsel to one party (the "**Opining Counsel**") to another party (the recipient of the opinion or a permitted assignee of the opinion recipient) that is not the client of the lawyer rendering the opinion (the "**Opinion Recipient**"). The Transaction may relate to a debt or equity financing, a real estate purchase, an acquisition of stock or assets, or any other type of commercial transaction. The opinion is usually part of the documentation exchanged in connection with the closing of the Transaction and is generally required to be delivered as a condition to the completion of the Transaction pursuant to the agreements between or among the parties and relating to the Transaction (the "**Transaction Documents**"). This Report:

1. articulates the custom and practice (often referred to as customary practice) regarding the nature and meaning of the content of opinions among Florida counsel and the recipients of opinions rendered by Florida counsel;
2. articulates the customary practice for diligence in rendering such opinions so that the expectations of Opinion Recipients and counsel for Opinion Recipients ("**Recipient's Counsel**") as to the diligence undertaken by Opining Counsel to render the opinion will be consistent with the customary practice of Florida counsel rendering such opinions;
3. articulates customary assumptions, qualifications and definitions generally used by and accepted by Florida counsel in giving and receiving opinions;
4. seeks to reduce the friction that often arises in opinion practice and seeks to reduce the costs incurred by clients in connection with the negotiation of opinions;
5. seeks to reduce the potential for misunderstanding between Opining Counsel and their Client regarding the issuance of opinions; and
6. seeks to improve the understanding of the public and the bar as to the purposes and limitations of opinions.

This Report is not intended to be a treatise on the subject of third-party legal opinions. Rather, it is intended to provide practical guidelines for counsel who are called upon to render third-party legal opinions in Florida or to receive third-party legal opinions from Florida counsel.

B. Purpose of Third Party Legal Opinions

The Restatement of the Law (Third) of the Law Governing Lawyers (the "**Restatement**"), Section 95, comment c, states, in part, that:

> "Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer's professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation."

This Report's description of the purpose of a third party legal opinion is similar, though not equivalent to, the Restatement's description of such purpose.

In Florida, an opinion is delivered in the form of a formal written letter that confirms the Opining Counsel's informed and reasoned understanding of certain facts or events relating to the Client and the Transaction and the

effect of certain legal principles applicable to the specific Client and Transaction. This informed and reasoned understanding is achieved after Opining Counsel has reviewed certain facts related to the Client and the specific Transaction to which the opinion relates and analyzed certain legal principles related to the Client and the Transaction. As such, an opinion is an expression of the Opining Counsel's informed and reasoned judgment, based upon an analysis of the facts, laws, assumptions and other matters relevant to the opinion, as to how the Florida Supreme Court "should" decide the legal issue considered in the opinion if the Court were properly presented with that issue as of the date of the opinion. However, an opinion is not a guarantee that the Florida Supreme Court would make this decision.

This Report's wording on this issue is slightly different than that taken in the Restatement, since the Committees believe that an opinion does not provide assurance that a particular legal issue "will be decided" in a certain way by the Florida Supreme Court, but rather reflects how the Florida Supreme Court "should" decide the legal issue based on the facts, law, assumptions and other matters relevant to the opinion as interpreted under customary practice in Florida. However, the Committees believe that the Restatement wording and the wording in this Report have the same substantive meaning.

C. What is Customary Practice and Why is it Important

This Report articulates the customary practice of Florida attorneys regarding the nature and meaning of the terms used in opinions, the content of the opinions typically given by Florida attorneys in Transactions, the qualifications and assumptions generally included in such opinions and the diligence or analysis which is generally to be performed by prudent attorneys in order to give such opinions. As more fully described in "Standard of Care" below, customary practice is the standard by which an Opining Counsel's activities with respect to an opinion are likely to be measured against for liability purposes. Customary practice serves as both a *sword* and *shield* for the practitioner – a *sword* if the practitioner fails to generally satisfy the appropriate level of diligence customarily performed by other practitioners in their legal community for similar third-party legal opinions under similar circumstances and a *shield* if the practitioner performs the appropriate level of diligence in connection with the legal opinion in question. Florida customary practice governs every opinion delivered by a Florida attorney to an Opinion Recipient (whether such Opinion Recipient is located within the State of Florida or otherwise), regardless of whether the opinion letter incorporates by reference or otherwise mentions Florida customary third-party legal opinion practice. If Opining Counsel chooses a different standard other than the customary practice articulated in this Report or if Opining Counsel desires to modify customary practice applicable to the opinion, then such standard or modification should be expressly stated in the opinion and would be applicable to such opinion.

D. The "Golden Rule"

In connection with the giving and receiving of third-party legal opinions, the "golden rule" means that an attorney should neither ask for, nor advise the Client to demand, opinions that an attorney qualified to render such an opinion would not reasonably be willing to give. Simply stated, if a Recipient's Counsel would not be willing to give a particular opinion under substantially similar circumstances, then Opining Counsel should not be asked to render such opinion. All attorneys who render third-party legal opinions or who receive third-party legal opinions on behalf of Opinion Recipients should abide by the "golden rule."

E. Standard of Care

Section 95 of the Restatement, entitled "An Evaluation Undertaken for a Third Person," provides that an attorney who provides an opinion to a non-client "must exercise care with respect to the non-client to the extent stated in Section 51(2)" and "not make false statements prohibited under Section 98." These two sections of the Restatement are described below regarding the "duty of care" and the potential liability for "false statements."

1. *Duty of Care*. Section 51(2) of the Restatement provides that "a lawyer owes a duty to use care" to a non-client when and to the extent that the non-client is invited to rely on the lawyer's opinion, the non-client relies on such opinion and "the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection; . . ." As noted in Section 95 of the Restatement, comment e, ". . . once

the form of the opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance."

Accordingly, whether a lawyer has satisfied the "duty to use care" standard in connection with the preparation and delivery of a third-party legal opinion begins with an understanding of customary practice with respect to the factual and legal diligence which should be performed by Opining Counsel in connection with the issuance of such legal opinion.

2. *False Statements*. Section 98 of the Restatement provides, in part, that "a lawyer communicating on behalf of a client with a non-client may not "knowingly make a false statement of material fact or law to the non-client . . ." Opining Counsel should be aware that this potential liability exists in the context of the issuance of a third-party legal opinion.

The Committees believe that the Restatement articulates the standard of care to which Florida lawyers who render opinions should be held. In that regard, the Committees believe that their position is consistent with the position on this issue taken in the Customary Practice Statement. The Restatement has not to date been adopted or cited by any Florida court relating to proper third-party legal opinion practices. However, the standard of care articulated by the Restatement provides valuable insight as to how judges and attorneys in other jurisdictions have addressed the issue of the appropriate standard of care that should be utilized in connection with the preparation and issuance of third-party legal opinions, and reflects the standard of care that the Committees believe will ultimately be adopted in Florida with respect to third-party legal opinions.

F. Use of Terms; Plain English

Wherever possible, the recommended forms of opinions that accompany this Report are written in "plain English" to eliminate legalese, jargon and the repetition of terms that have the same meanings or less inclusive meanings. In some cases, this Report modifies the traditional language often used in opinions so that opinions will be clearer and more readable.

For example, the recommended forms of opinions relating to entity status and organization, authorization to transact business in Florida, power and authority, authorization of the transaction and execution and delivery remove the words "duly" and "validly," since there is no clear understanding of what these words mean in the context of those opinions. The Committees believe that under customary practice, the use of these words in the context of those opinions has become anachronistic and is no longer necessary. On the other hand, the Committees believe that the continued use of these terms in opinions does not affect the meaning of the opinions or the diligence required to render such opinions.

G. No Implied Opinions

An Opinion Recipient is not entitled to assume that an express opinion on a particular matter addresses any other matter by implication unless it is unmistakably clear that inclusion of an implied opinion within an express opinion is both essential to the legal conclusion set forth in the express opinion and reasonable under the circumstances and in light of customary practice.

H. Diligence Expectations

This Report describes the diligence or analysis that Opining Counsel is expected to perform in order to render each of the opinions discussed in this Report and where appropriate recites typical factual data on which the Opining Counsel may rely in rendering each particular opinion. Accordingly, the forms of opinions that accompany this Report do not recite these steps. In cases in which an opinion is given that goes beyond the scope of the legal opinions covered by this Report or require additional factual data, Opining Counsel should consider specifying in the opinion the additional diligence, if any, performed or the additional factual data that serves as the basis for the opinion.

I. Negotiating an Opinion

Issues relating to opinions are best solved early in the negotiation of the Transaction to which they relate. The scope and text of the opinion, and the cost and time requirement relating to the opinion, should be negotiated at the same time as the Transaction Documents are negotiated and in the same manner as the material terms of the Transaction are negotiated.

Forms of opinions and factual certificates (to the extent they are to be attached to the opinion) should be reviewed and approved by Recipient's Counsel promptly after they are presented to Opining Counsel, and to the extent that Recipient's Counsel has substantive comments or requests for additional opinions, sufficient time should be allowed to enable Opining Counsel to research applicable legal principles, investigate facts and identify areas of uncertainty, if any, in the interpretation and application of legal principles. Gamesmanship has no place in the relationship between the lawyers representing the parties in the Transaction.

Further, it is never appropriate for the Opinion Recipient or the Recipient's Counsel to impose the business risk of the Transaction on an Opining Counsel by using economic or other leverage to demand inappropriate opinions.

J. Presumption of Continuity and Regularity

Throughout this Report, there are references to a "presumption of continuity and regularity" that allows Opining Counsel to presume the regularity of matters relating to the Client and to assume that the Client has acted with proper corporate or other entity formality over a period of time. Facts that can be assumed by Opining Counsel by reason of the presumption of continuity and regularity need not be investigated unless Opining Counsel has Knowledge that such assumptions are incorrect or inaccurate. See "Common Elements – Knowledge" for the definition of Knowledge. The presumption of continuity and regularity is part of the cost to benefit analysis that is inherent in this Report and is part of the customary practice with respect to the opinions covered by this Report. The presumption of continuity and regularity is not a legal doctrine, but rather a practical expedient under the circumstances.

Under the presumption of continuity and regularity, unless the parties agree otherwise and expressly so state in the opinion letter, it is unnecessary to review a Client's minute book in connection with the delivery of a third-party legal opinion. For example, an Opining Counsel who is rendering an opinion that a particular Transaction and Transaction Document have been approved by all necessary corporate action would be expected to review Articles of Incorporation and By Laws of the Client, and the resolutions adopted by the Board of Directors regarding the Transaction and the Transaction Documents, but would be allowed to assume, unless such counsel has Knowledge to the contrary, that the members of the Board of Directors who voted on and approved the Transaction and the Transaction Documents were properly elected at a shareholders meeting at which a quorum was present and were all of the members of the Board of Directors at the time the Transaction Documents were approved. The same presumption applies in the case of proceedings of other entities such as managers of a limited liability company or general partners of a partnership.

Reliance on the presumption of continuity and regularity is implied in all opinions of Florida counsel and need not be stated in the opinion letter. However, if an Opinion Recipient wants greater comfort with respect to any matters covered by the presumption of continuity and regularity, or requests that additional diligence be completed to support a particular opinion (such as a review of certain of the entity's records), and Opining Counsel agrees to provide such greater comfort or to conduct such additional diligence, then such agreement or diligence should be expressly referenced in the opinion letter.

K. Reasonableness; Inappropriate Subjects for Opinions

Some requests for opinions are reasonable under the circumstances and others are not. This Report provides guidance as to what opinions Florida lawyers should and should not be asked to give on particular legal issues. To a great degree, the reasonableness of a requested opinion requires weighing the amount of due diligence required to give the opinion (and the attendant cost of doing such diligence) against the benefits of such opinion

to the Opinion Recipient. Accordingly, in setting out the customary diligence standards that Florida lawyers should take to give these opinions, this Report establishes a "comfort level" for Opinion Recipients of opinions rendered in conformity with the customary third-party legal opinion practices of Florida lawyers that are described in this Report.

Certain opinions are never appropriate subjects to be covered by Opining Counsel for a variety of reasons, including the following:

(i) *Not Cost Effective*. The Opinion Recipient may not request Opining Counsel to provide opinions that would not be cost effective in a typical Transaction, usually due to the level of due diligence that would be prudently required to be conducted to render the opinion. Typically, these types of inappropriate opinion requests are handled through the process of negotiation of the opinion in order that the Transaction may be cost effective for all parties.

(ii) *Inappropriate Scope*. A number of opinions are inappropriate as a matter of customary practice because their scope is virtually unlimited and because the level of diligence that would be required to prudently give such opinion would be unreasonable, expensive and unreasonably time consuming under the circumstances. These include opinions on the following subjects:

(a) *that the Client is qualified to do business as a foreign entity in every jurisdiction in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the Client;*

(b) *that the Client has all necessary permits and licenses to operate its business and to own its properties;*

(c) *that the Client is not in violation of any contract, agreement, indenture, or undertaking to which it is a party or by which any of its property is bound;*

(d) *that a particular contract to which the Client or any of its property may be bound is "material" or whether a particular violation or breach of a particular contract is "material"; and*

(e) *that the Client is not in violation of any federal, state, or local law, regulation or administrative ruling.*

Opining Counsel should appropriately refuse to provide these types of open ended, unlimited opinions. However, asking for each of the foregoing unlimited opinions might constitute a proper opinion request if the unlimited opinion were to be revised to limit the scope of the requested opinion in the manner discussed in other sections of this Report.

(iii) *Confirmation of Facts; Negative Assurance*. Opining Counsel should generally not be asked to state that he or she lacks Knowledge of particular factual matters. Matters such as the absence of prior security interests or the accuracy of the representations and warranties in the Transaction Documents do not require the exercise of professional judgment and are inappropriate subjects for an opinion, even when the opinion is limited by a broadly worded disclaimer.

Negative assurance opinions often read as follows:

> "Nothing has come to our attention that has led us to believe that the [Transaction Documents] contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading;"

or

> "Nothing has come to our attention that [certain facts] are not correct."

However, except as described below, factual confirmations are not appropriate and should not be requested nor given. Further, a request to "just tell me what you know" in the form of a negative assurance is inappropriate and should be rejected by Florida counsel.

There are, however, two generally accepted exceptions under Florida customary practice. These are: (i) Opining Counsel's Knowledge regarding legal proceedings to which the client is a party and violations of judgments, decrees or orders binding on the Client, and (ii) negative assurance regarding the adequacy of the disclosure in a prospectus or other disclosure document that is furnished to underwriters in connection with certain offers and sales of securities. These two accepted exceptions are discussed below and elsewhere in this Report.

(a) *Legal Proceedings and No Violations of Judgments, Decrees or Orders*. Opining Counsel may be requested to confirm whether, to their Knowledge, there are any legal proceedings pending or threatened against the Client or any property of the Client or whether there are any judgments decrees or orders binding on the Client. Many attorneys take the position that these are factual confirmations that do not constitute an "opinion." Although some commentators and state bars have debated whether one or both of these factual confirmations should be eliminated from opinions, it remains customary practice in Florida for an Opining Counsel to provide these factual confirmations so long as they are limited to the Knowledge of the Opining Counsel. See "No Litigation" for a more complete discussion of the proper formulation of the "no litigation" confirmation and "No Violation and No Breach or Default" for a more complete discussion of the proper formulation of the negative assurance statement regarding judgments, decrees or orders binding on the Client.

Some attorneys prefer to segregate these factual confirmations in a section of the opinion that is separate from the "opinion section" of the opinion to clarify that these factual confirmations do not constitute an "opinion." However, the responsibility or liability of an Opining Counsel for these confirmations is not different whether such confirmations are segregated from the other opinions being given or kept in the "opinion section" of the opinion.

(b) *Negative Assurance – Securities Transactions*. In the context of a public securities offering or a Rule 144A offering, Opining Counsel who has actively participated in the preparation of a disclosure document being used in connection with such offering may be asked to provide "negative assurance" regarding the disclosure document. Such negative assurance generally states that Opining Counsel is not aware of any material misrepresentation or material omissions in the disclosure document relating to the securities offering in question. This statement is typically accompanied by a limitation based upon the level of due diligence performed by Opining Counsel with respect to such statement, together with a description of the role played by Opining Counsel in the preparation of the disclosure document. See "Opinions Outside the Scope of this Report – Securities Law Opinions" for more information regarding this negative assurance statement.

(iv) *Issues of Significant Legal Uncertainty*. Consistent with the Golden Rule, Opining Counsel should not generally be asked to provide a third-party legal opinion regarding an area of the law or with respect to a legal issue which has a moderate or high degree of legal uncertainty. These types of legal opinions are usually called "reasoned opinions" or "explained opinions." In a reasoned or explained opinion, Opining Counsel (a) explains the various legal issues presented by such opinion, (b) generally provides a prediction of the holding of a court of competent jurisdiction (in Florida, the Florida Supreme Court) if it were presented with the issue, and (c) makes clear in the opinion letter that the opinion is not free from doubt and that potentially differing positions exist with respect to the legal issue in question. Whether the conclusion reached by Opining Counsel in the opinion uses the words "would," "should," or "more likely than not" to express the Opining Counsel's prediction, a reasoned opinion has the same meaning.

In most cases, the lawyer for the Client engaged in the Transaction is in the best position to advise the Client regarding issues of legal uncertainty. Further, issues of legal uncertainty are typically fact sensitive and not conducive to the standard types of opinions generally rendered in Transactions. Such Opinions are also often not cost effective. Finally, Opining Counsel often attempts to limit, through negotiations with Opinion Recipient's counsel, the requested opinion so that it does not constitute a "reasoned opinion" or an "explained opinion."

There are two specific, recognized exceptions, however, within Florida customary opinion practice to this general prohibition against "reasoned opinions" or "explained opinions": (i) true sale, substantive consolidation or other insolvency-related opinions, and (ii) choice of law opinions. A discussion of these two types of opinions are continued below in "Choice of Law Opinions" and "Opinions Outside the Scope of this Report – True Sale, Substantive Consolidation and Other Insolvency Related Opinions." In these two situations, Florida customary practice is for the Opining Counsel to deliver a reasoned or explained opinion with respect to the issue in question by explaining the various legal issues presented by such opinion and providing a prediction of the likely holding of a court with competent jurisdiction (in Florida, the Florida Supreme Court) which is required to decide the issue after being fully briefed as to the applicable law and facts presented by the issue in question.

L. Local Counsel Opinions

It is becoming increasingly common for Florida attorneys to be involved in transactions involving parties located in various states and countries. In some cases, Florida attorneys may be called upon to serve as "local or special counsel" in connection with a particular Transaction. For instance, a Florida attorney may be retained by a borrowing entity to provide the Florida law enforceability opinion for the out-of-state lender's loan documents encumbering Florida real property or other assets. In other cases, Florida counsel may be called upon to render an opinion in a multi-state transaction, such as a transaction in which a Florida borrower borrows money from an out-of-state financial institution. There are special issues that need to be considered in these circumstances. See "Special Issues to Consider When Acting as Local Counsel" below for a discussion of the special issues to consider when rendering an opinion while acting as local counsel.

M. Ethical and Professional Issues

Rule 4-2.3 of the Florida Bar's Rules of Professional Conduct (the "**RPC**"), promulgated by the Florida Supreme Court (Evaluation for Use by Third Persons), applies to the rendering of Opinions. Rule 4-2.3 provides:

A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(i) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(ii) The client consents after consultation.

In reporting the evaluation, the lawyer should indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Opinions given on a Client's behalf for use by a third-party Opinion Recipient can create tension between an attorney's obligations to the attorney's own Client and the attorney's obligations to those third-parties whom the attorney knows will rely upon the Opinion. An attorney's ethical duties in the rendering of third-party legal opinions should be understood in the following contexts:

1. *Duty of Loyalty.* An attorney owes a Client a duty of loyalty. So long as a Client's informed consent is obtained, rendering an opinion to a third party Opinion Recipient is not a breach of the attorney's duty of loyalty to the Opining Counsel's Client. Before an attorney renders an opinion, the attorney should explain to his or her Client the scope of the opinion and the requirements and consequences that may arise from the issuance of the opinion, particularly if the Opining Counsel knows or reasonably believes that the delivery of the opinion may affect materially and adversely the Client's interests. For example, an attorney should advise a Client that once the attorney's opinion is rendered, it may be more difficult for the Client to argue positions contrary to the legal conclusions expressed in the opinion.

   Similarly, it is not a conflict of interest for a Florida attorney to render an opinion to a third-party in a Transaction. For example, a member of The Florida Bar representing a borrower in a loan transaction

may properly give an opinion to the lender that the loan agreement is "enforceable" against the attorney's own Client, provided the attorney reaches that opinion after appropriate diligence and legal analysis and provided the opinion is subject to appropriate exceptions and limitations. See "The Remedies Opinion."

2. *Conflict Between an Attorney and the Attorney's Client.* If delivery of a particular opinion appears to be in the best interest of the Client (where, for example, the Opinion Recipient will not close a Transaction without the delivery of the opinion), but the attorney is reluctant to deliver the opinion out of concern about the attorney's own potential liability for issuing the opinion (because of uncertainty about a legal issue or for other reasons), a conflict can exist between the "zealous representation" obligation of the attorney and the attorney's own self-interest. In such a situation, the attorney should discuss with the Client the issues that cause the attorney to be unwilling to give a requested opinion and request the client's support in seeking modifications to the requested opinion.

3. *Confidentiality*. The contents of an opinion rendered to a third party are not protected by the attorney-client privilege. Accordingly, if client confidences would be disclosed in the opinion, the attorney should consider this before rendering the opinion and confirm that the Client understands this fact and its ramifications. Although closing opinions normally benefit clients and seldom involve the disclosure of information that would work to the Client's disadvantage, it is possible for the Opining Counsel to be aware of or to disclose a legal problem that the Client would prefer to keep confidential. This situation illustrates the tension that exists between a lawyer's duty to preserve Client confidences and the Opining Counsel's ethical obligation to communicate honestly with the Opinion Recipient. When confronted with this situation, Opining Counsel should seek to exclude from the Opinion the information that gives rise to the issue. In some cases, the Recipient's Counsel may agree to this and in other cases the Client may decide that its best interest is served by closing the Transaction and consenting to the issuance of the opinion despite the disclosure of confidential information. If the opinion cannot be excluded by agreement and the Client does not agree to consent to the disclosure of confidential information, the information must be kept confidential and the Opining Counsel should not render the opinion in question. Maintaining confidentiality by declining to render an opinion does not breach an obligation to the Opinion Recipient. However, Opining Counsel should recognize that to hide this type of issue by relying on a standard opinion qualification, exception or exclusion might cause the opinion to be misleading in a material way to the Opinion Recipient.

4. *Client Consent.* As noted in Rule 4-2.3 of the RPC, the consent of the Client is required before an attorney is permitted to render a third-party legal opinion. Client consent is generally accomplished in one of two ways: (i) by obtaining a written consent from the Client (the form of Certificate to Counsel that accompanies this Report contains such an express consent); or (ii) where the Transaction Documents expressly call for delivery of the opinion as a condition to the closing of the Transaction (and the Client executes the Transaction Documents). Although the RPC does not require that client consent be obtained in writing, the Committees strongly urge Florida counsel to document in writing the receipt of Client consent to render an opinion through one of the two methods described above.

   In a situation where a Florida attorney is acting as local counsel in a multi-jurisdictional transaction, it is often a non-Florida attorney who is acting as the coordinating legal counsel for the Client who retains local counsel in Florida to provide an opinion on the Florida issues relating to the Transaction in question. In such a situation, it is often the case that local counsel will never have any direct contact with the Client, but will interface with respect to the opinion solely through the coordinating legal counsel. In this circumstance, it is appropriate for a Florida local counsel to obtain the requisite consent to deliver the opinion from the coordinating legal counsel, because, for this purpose, the coordinating counsel is acting as the agent for the Client. See "Special Issues to Consider When Acting As Local Counsel."

5. *Good Faith.* As articulated in "The Golden Rule" above, an attorney should neither ask for, nor advise a Client to demand, opinions that an attorney qualified to render such an opinion would not reasonably be willing to give.

6. *Candor*. If the Recipient's Counsel involved in the delivery, negotiation or receipt of an opinion has Knowledge that the assumptions, information, facts or law upon which the opinion is based are incorrect in any respect that is material to the opinion, then Recipient's Counsel should advise the Opining Counsel of these matters so that they can be appropriately addressed in the opinion. Under these circumstances, Opining Counsel may not rely on the incorrect assumptions, information, facts or law in rendering the opinion unless they have the informed consent of the Opinion Recipient. Similarly, if the Opining Counsel concludes that an area of law that otherwise would be excluded from the scope of the opinion clearly affects the legality of the Transaction, Opining Counsel should, bring this fact to the attention of Recipient's Counsel. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" below. In addition, it is generally accepted that an attorney should not render an opinion that is technically correct if the Opining Counsel has Knowledge or has concluded that the opinion is reasonably likely to be misleading to the Opinion Recipient in any material respect. Finally, under the RPC, a lawyer may not counsel or assist a client in conduct that the lawyers knows is criminal or fraudulent. If the lawyer learns that the Client is engaged in wrongdoing, the lawyer may not assist or facilitate that behavior. This includes delivering an opinion, even one that is technically correct.

7. *Securities and Exchange Commission and Sarbanes-Oxley Act of 2002*. If a third-party legal opinion is filed with the Securities and Exchange Commission (the "**SEC**") as an exhibit to a Client's registration statement, then Opining Counsel should be aware that Opining Counsel is "appearing and practicing" before the SEC and is subject to the SEC's standards of professional conduct. Certain portions of the Sarbanes-Oxley Act of 2002 apply to lawyers who appear and practice before the SEC. Although all of these laws and rules are outside the scope of this Report, Counsel should be aware that these laws and rules may apply to an Opining Counsel delivering a third-party legal opinion in connection with an entity whose securities are publicly traded to the extent that their activities constitute "appearing and practicing" before the SEC. See "Opinions Outside the Scope of This Report – Securities Law Opinions."

COMMON ELEMENTS OF OPINIONS

A. Date

The date of an opinion is usually the date on which it is delivered, which is usually the closing date of the Transaction as to which the opinion relates. Unless specifically noted in the opinion, the date of the opinion is the date as of which the legal conclusions contained in the opinion are expressed, and Opining Counsel has no duty to update the opinion to a date later than the date of the opinion regardless of whether or not there are any subsequent changes in the law upon which the opinion was based or whether Opining Counsel subsequently discovers facts unknown to Opining Counsel at the time of the issuance of the opinion that would modify the conclusions set forth in the opinion. These limitations on the lack of a duty to update an opinion are implicit and Opining Counsel need not expressly disclaim such duty in the opinion. However, the Committees recommend that Opining Counsel include a statement in the opinion letter expressly stating that the opinion speaks as of the date of the letter, and the forms of opinions that accompany this Report include such a statement. The recommended language is as follows:

> **This opinion speaks only as of the date hereof and we assume no obligation to update or supplement this opinion if any applicable laws change after the date of this opinion or if we become aware after the date of this opinion of any facts that might change the opinions expressed above.**

If Opining Counsel is relying on documents that are dated prior to the date of the opinion, this should be specifically noted in the opinion.

If Opining Counsel updates an opinion, the updated opinion should be treated as if it were an entirely new opinion given as of the date of the updated opinion. An updated opinion should only be rendered upon the request of or with the consent of Opining Counsel's Client and not at the sole request of the Opinion Recipient.

B. Addressee(s) and Reliance

Unless otherwise noted in the opinion, only the Opinion Recipient, who is generally the addressee of the opinion, is entitled to rely upon it. Consequently, it is important that Opining Counsel specifically name the Opinion Recipient(s) – if not individually, at least by a description of a group whose members can be readily ascertained (e.g., the "Lenders set forth on Schedule 1 of the Credit Agreement"). This limitation on reliance and use applies implicitly to opinions rendered by Florida counsel and need not be expressly stated in the opinion. However, many times, Opining Counsel in Florida include a statement in their opinion letters substantially similar to the following, in an effort to avoid claims by third parties who are not expressly authorized to rely on the opinion (which statement has been included on the forms of opinions that accompany this Report):

> **This opinion is furnished to you solely for your benefit in connection with the [Transaction] and may not be relied upon by any third party or for any other purpose without our prior written consent in each instance.**

Occasionally, in a syndicated loan transaction or a structured financing arrangement, a rating agency will request the ability to rely on the opinion. In such circumstances the following language is often used:

> **The opinions herein are rendered for the sole benefit of each addressee hereof [and by the Rating Agency rating the certificate, note, participation or security evidencing a direct ownership interest in or secured by the loan] solely in connection with the [Transaction]. This opinion may not be relied upon by any third party for any other purpose without our prior written consent in each instance.**

Additionally, in syndicated loan transactions, the Opinion Recipient will often request that Opining Counsel permit future lenders and assignees to rely upon the opinion. Many Opining Counsel are reluctant to agree to this request because of concerns (a) that successors and assigns may not understand customary practice and thereby may not appreciate the assumptions and qualifications that limit the scope of the opinion letter (b) that the opinion may be deemed reissued as of the date that a new syndicate member acquires its interest in the loan, (c) that claims may arise in multiple jurisdictions or under the laws of multiple jurisdictions, or (d) that claims may be brought by "rogue" or "vulture" lenders or assignees that buy loans with a view to suing the opinion giver, among others. Nevertheless, syndicate lenders often insist that opinions permit successors and assigns to rely upon the opinion to the same extent as the original lenders.

Many Opining Counsel do allow successors and assigns permitted under the Transaction Documents to rely upon the opinion. Others permit successors and assigns to rely, but include a condition that reliance by such future lenders must be actual and reasonable under the circumstances existing at the time of assignment. Others only permit reliance if such future lenders become parties to the credit agreement within a specified period of time after closing. Finally, some Opining Counsel refuse to permit successors and assigns to rely at all on the opinion.

Historically, when Opining Counsel have agreed to allow successors and assigns to rely upon their opinions they have done so based on the expectation that the permitted assigns or successors are only permitted to rely upon the opinion to the same extent as, but no greater extent than, the addressee. In Florida, it is customary practice in syndicated loans for Opining Counsel to allow successors and assigns to rely upon the opinion if permitted under the Transaction Documents. However, the Committees believe that it is reasonable for Opining Counsel to include limitations on reliance so that it is actual and reasonable under the circumstances. A formulation that has gained acceptance reads as follows:

> **At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the [Transaction Documents] pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [__] of the [Transaction Documents], on the condition and understanding that (i) this opinion speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this opinion, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) *any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment*, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.**

Some Opinion Recipients may object to qualification (iii) because it limits the scope of the reliance by a future assignee. However, the Committees believe that such qualification is reasonable under the circumstances and ought to be reasonably acceptable to Opinion Recipients.

Occasionally, an Opinion Recipient in a loan transaction will also request that purchasers of loan participation interests be permitted to rely upon an opinion letter. The Committees believe that such request is inappropriate under Florida customary practice and should be refused.

C. Role of Counsel and Relationship with Client

The opening paragraph of the opinion will normally identify Opining Counsel as the Client's counsel and not as counsel to the Opinion Recipient. This typically is accomplished in a single sentence, such as:

> **We have acted as counsel to _____ (the "Client") in connection with the transaction contemplated by that certain _____ Agreement dated _____ (the "Agreement") [a specified Transaction Document] between the Client and _____ (the "Other Party").**

Opining Counsel sometimes designate their role as "general," "special" or "local" counsel. Although these terms are often understood as a description of the role or relationship that Opining Counsel plays with the Client or the Transaction, they should not be viewed as a substitute for appropriate substantive qualification or limitations attributable to the scope of Opining Counsel's role in the transaction. Further, the term "general counsel" should not normally be used unless the opinion is rendered by an individual who is inside general counsel for the Client. Where Opining Counsel has represented the Client in a particular Transaction or in a series of Transactions, but not on a continuing basis, the term "special counsel" is often used. Where Opining Counsel's role is limited to opining on matters of local law and the Opining Counsel is not otherwise representing the Client as primary Counsel in the Transaction, the term "local counsel" or "special Florida counsel" is often used.

In all cases, these designations do not limit or affect Opining Counsel's responsibility for the opinions rendered or the level of diligence required to support them. Accordingly, it is advisable that if Opining Counsel's limited involvement with the Client warrants a limitation on Opining Counsel's responsibilities or level of care, then such limitations should be expressly stated in the opinion letter through appropriate qualifications or assumptions relating to the facts upon which the opinion is based.

On a related matter, the Committees believe that there is presently no consensus under Florida customary practice as to whether it is necessary or appropriate for Opining Counsel to disclose in an opinion any relationships (other than an attorney-client relationship) between Opining Counsel (or members of Opining Counsel's law firm) and the Client. For example, a member of the Opining Counsel's law firm may be a member of the Client's Board of Directors ("**BOD**"), or have a significant financial interest in the Client or even, through the Client, in the Transaction to which the opinion relates. This Report takes no position on this issue, other than to suggest that Opining Counsel consider such disclosure whenever it may appear that the existence of such relationship (i) is reasonably likely to be considered material by the Opinion Recipient, or (ii) is reasonably likely to impair Opining Counsel's independent judgment or otherwise violate Opining Counsel's obligations as a lawyer under the RPC (and in which case it would probably be appropriate for Opining Counsel to refuse to render the opinion). In certain instances, the Opinion Recipient may request that Opining Counsel include an affirmative statement in the opinion to the effect that Opining Counsel has no conflict of interest relating to the Client. However, the Committees believe that such request is inappropriate. Notwithstanding, if Opining Counsel agrees to provide the requested confirmation, which is in the nature of a factual confirmation, Opining Counsel should take such steps as are reasonable under the circumstances to confirm that its response to such request is truthful and accurate. Further, if such confirmation is included in the opinion, Opining Counsel may wish to qualify the statement to its "Knowledge."

D. Brief Description of Transaction and Request for Opinion Letter

The opinion should include a brief description of the Transaction to establish the context in which the opinion is being delivered. Opining Counsel should always obtain the Client's consent prior to the issuance of the opinion to a third party and should include a statement in the opinion to the effect that the Client has consented to the issuance of the opinion. See "Introductory Matters – Ethical and Professional Issues" for a discussion regarding Client consent. The foregoing is typically accomplished with a statement similar to the following:

> **This opinion is furnished to you at your request pursuant to Section _____ of the [Transaction Documents] with the consent of the Client.**

If the Transaction Documents do not specifically refer to the delivery of the opinion, but such delivery is nonetheless required to close the subject Transaction or to otherwise effect the Client's wishes, language similar to the following can be substituted:

> **This opinion is delivered to you with the consent of the Client.**

If consent is not obtained through the inclusion of the required consent language in the Transaction Documents, it is prudent for Opining Counsel to obtain the Client's consent to the issuance of the opinion in writing, and the Certificate to Counsel that accompanies this Report includes an express statement from the Client to this effect.

E. Transaction Documents

In preparing an opinion letter, Opining Counsel generally lists in the opinion letter the Transaction Documents as to which the opinions are being given. The Transaction Documents are the agreements between the parties relating to the Transaction. Transaction Documents might include a loan agreement, a security agreement, a mortgage, a promissory note, an asset or stock purchase agreement, or the like. Opining Counsel also generally reviews and often expressly lists in the opinion letter other documents relating to the Transaction that have been reviewed in connection with rendering the opinion or are part of the documents required to complete the Transaction (such as UCC financing statements, organizational documents, resolutions, incumbency certificates and the like), but are not contractual in nature. Further, Opining Counsel often reviews closing certificates, affidavits, and other closing deliverables. In drafting an opinion letter, Opining Counsel should be careful to delineate between Transaction Documents (as to which legal opinions are being rendered) and other documents (which are necessary to complete the Transaction or are required to be delivered at closing pursuant to the Transaction Documents but are not agreements as to which legal opinions are being rendered).

In that regard, Opining Counsel should recognize that the defined term "transaction documents" (or similar defined term) in the agreements between the parties relating to the Transaction are typically overly inclusive. Often the relevant defined term includes non specific reference to the primary documents to be executed at the closing (e.g., all security agreements executed by the Client), which although often appropriate subjects of the legal opinions rendered, should be specifically listed and described in the opinion letter. The defined term for "transaction documents" in the primary documents typically also references generic or specific certificates, affidavits, reports, UCC financing statements and other similar items, and furthermore, is addressing not only existing "transaction documents," but all replacements, modifications and the like, which do not even exist on the date that the opinions are being rendered. It is therefore important in rendering opinions that Opining Counsel not simply track in the opinion letter the definition of "transaction documents" given to such term in the Transaction Documents. Instead, Opining Counsel should create a new defined term for the opinion, which includes only those Transaction Documents that are appropriate subjects of the legal opinions being rendered.

One court in Florida has broadly construed the term "transaction documents" to include the legal opinions delivered by the transaction party's counsel at the closing of a particular transaction. The Committees believe that under Florida customary practice, the legal opinions delivered at the closing of a Transaction pursuant to the requirements of the Transaction Documents are delivered to provide comfort to the Opinion Recipient regarding certain legal matters and are never part of the agreements between the parties, no matter how broadly the term "transaction documents" is expressly defined in the Transaction Documents.

F. Definitions

Terms defined only in the opinion should be shown in quotation marks at the place in the opinion at which they are defined. Terms that are defined by reference to the Transaction Documents or to one of the Transaction Documents (such as a Loan Agreement) should be defined with a statement similar to the following:

> **Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the _____ Agreement [a specified Transaction Document].**

G. Reliance on Factual Certificates and Representations and Warranties; Assumption of Facts; Scope of Reliance

Opining Counsel often obtain from appropriate persons certificates covering factual matters and upon which Opining Counsel bases its legal conclusions. These matters typically include such matters as the identification of

material contracts to which the Client is a party, locations where the Client has offices or employees or maintains inventory or other assets, the existence of liens or judgments affecting the Client's assets and pending or overtly threatened litigation.

If an opinion is based on facts supplied by the Client, it is best practice to have these facts set forth in a written certificate in an effort to minimize any confusion concerning the facts disclosed in oral discussion. Opining Counsel can face evidentiary challenges if it bases an opinion on oral discussions with the Client or a representative of the Client. More importantly, formal certificates are often more effective than oral discussion or informal methods in eliciting accurate and complete responses to factual questions.

Unless Opining Counsel has Knowledge to the contrary, Opining Counsel may also rely on the accuracy and truthfulness of the objective facts contained in the representations and warranties made by the Client in the Transaction Documents. However, it is not appropriate to rely upon a statement contained in a representation or warranty or in a certificate that constitutes, directly or in practical effect, a legal conclusion, unless such statement is set forth in a public official's document or provided in a legal opinion of other counsel and such reliance is expressly stated in the opinion letter. Opining Counsel should make sure as part of its diligence with respect to the opinion that all material facts required to support the opinion have been obtained, whether they are obtained through reliance on the representations and warranties contained in the Transaction Documents, contained in a separate certificate from the Client addressed to Opining Counsel, or otherwise obtained.

Opining Counsel should prepare one or more factual certificates for execution by the person or persons who Opining Counsel reasonably expects to have knowledge of the factual matters to be set forth in the certificate. It is recommended that any such certificate include a statement that it is being delivered to Opining Counsel to be relied upon in connection with rendering the opinion and, if appropriate, that it supplements the factual assertions contained in the underlying Transaction Documents (which factual statements may be relied upon by Opining Counsel without separate written authorization from the Client). Care should be taken so that factual certificates state objective facts (such as "The Client's material agreements are as follows…") rather than legal conclusions (such as "The transaction does not violate the terms of any material agreement" or "The Client does business in States A and B"). However, a factual certificate that includes one or more legal conclusions is not ineffective in its entirety, but remains effective to the extent of the objective facts set forth therein. Opining Counsel is not obligated to investigate the accuracy of the factual matters contained in a certificate, but Opining Counsel may not rely on any facts contained in a certificate that Opining Counsel has Knowledge are incorrect.

Many Opining Counsel attach the factual certificates upon which they are relying to the opinion delivered to the Opinion Recipient. Although such practice is not universal, attaching the certificate to the opinion or otherwise providing the certificate to the Opinion Recipient and its counsel can avoid confusion regarding the facts upon which Opining Counsel is relying. In some cases, however, the information contained in the factual certificate will either be proprietary or confidential. If the information in the certificate is proprietary or confidential, the Client will most likely not want Opining Counsel to attach the certificate to the opinion (particularly if the opinion is to be filed with a public agency), but may be willing to give the Opinion Recipient a copy of the certificate on a confidential basis. If the information in the certificate is protected under a claim of privilege (such as Opining Counsel's Knowledge of an unasserted claim which is possible of assertion), the disclosure to the Opinion Recipient is likely to waive the privilege.

If the opinion relies on one or more factual certificates, the opinion should state:

> **We have also relied upon, and assumed the accuracy of, the representations and warranties contained in the [Transaction Documents] and the certificate to counsel supplied to us by the Client with respect to the factual matters set forth therein, [which is attached hereto as Annex ____].**

In many circumstances, it may be appropriate to assume in an opinion a factual matter required to support a particular opinion. Such assumption will never be appropriate if Opining Counsel has Knowledge that the factual matter being assumed is inaccurate. Further, in certain tax opinions relying on factual assumptions to support an

opinion without investigating the facts to determine the accuracy of such facts may not be permissible under Circular 230 issued by the Internal Revenue Service. See "Opinions Outside the Scope of this Report-Tax Opinions."

An Opinion Recipient is not entitled to rely upon the factual representations contained in a certificate from the Client to the Opining Counsel (and upon which Opining Counsel is relying in issuing its opinion). If the Opinion Recipient were entitled to rely on such factual representations, then the certificate could have the unintended consequence of expanding and/or altering the Client's representations and warranties contained in the Transaction Documents. In order to avoid any confusion on this issue, Opining Counsel may wish to include an express disclaimer in the opinion and/or in the certificate stating that the certificate is being provided solely for the benefit of Opining Counsel in rendering the subject opinion and that no party, other than Opining Counsel, shall be entitled to rely upon the factual matters set forth therein. The recommended language is as follows:

The factual matters [upon which this opinion is based/set forth in this certificate of counsel] have been provided to counsel solely for counsel's benefit in issuing the [this] opinion and no party, other than Opining Counsel, is entitled to rely upon them.

H. Opinions Under Florida or Federal Law; Opinions Under the Law of Another Jurisdiction

Opining Counsel typically renders an opinion covering the laws of a state where it is admitted to practice and applicable federal law and sets forth this limitation in the text of the opinion. This is usually addressed in the opinion in the following manner:

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida and the United States of America.

Opining Counsel may also be requested to furnish an opinion on matters governed by the laws of another jurisdiction. Unless the limited nature of the review of another jurisdiction's law is expressly described in the opinion, because Opining Counsel would likely be held to the same duty of care and competence as a lawyer licensed in the other jurisdiction, Opining Counsel should, in most instances, seek the advice and opinion of local counsel.

Nevertheless, there are certain uncomplicated questions under the laws of another state or jurisdiction on which Florida lawyers often render opinions. For example, many Florida lawyers experienced in corporate matters are familiar with Delaware corporate law (including court decisions interpreting that law) and believe themselves competent to render opinions that cover matters related to the incorporation and good standing of a Delaware corporate client and with respect to the authorization of the Transaction and other routine corporate matters relating to the Client. Similarly, Florida counsel often opine on other routine and uncomplicated matters of foreign law, such as good standing and qualification of a corporation to do business in a foreign jurisdiction, and base the opinion on a certificate from the officials in such foreign jurisdiction and/or a certificate from the Client. Further, many Florida lawyers also render opinions regarding Delaware limited liability companies and the Delaware UCC.

Opining Counsel should carefully evaluate its familiarity with the laws of jurisdictions where they are not licensed to practice before rendering an opinion based upon legal principles applicable in such jurisdictions. Even if carefully researched and prepared, an opinion covering the laws of a jurisdiction in which Opining Counsel is not admitted to practice could expose Opining Counsel to liability if Opining Counsel fails to meet the standards of a competent local lawyer.

Florida counsel who render opinions regarding Delaware limited liability companies should also be aware that, unlike corporations, limited liability companies are creatures of contract, in that the operating agreement between the parties overrides the default rules contained in the Delaware limited liability company act. As a result, an opinion regarding the status, power and authorization of a transaction of a Delaware limited liability company will be deemed to cover Delaware contract law unless expressly limited by the opinion letter. See "What's Your Opinion on Delaware Opinions" by Norman M. Powell, 50 Business Lawyer Today, May/June 2007.

Many Florida lawyers who render opinions on the laws of another jurisdiction seek to limit the scope of their opinion to statutory law. To do so, Opining Counsel often include in the opinion letter language similar to the following:

> **The foregoing opinions concerning _____ law are based solely upon our review of (i) certified copies of the certificate/articles of organization/incorporation of Client, and good standing certificates as to Client, in each case obtained by us from the _____ Secretary of State, and (ii) [the [identify corporate or other entity] statutory law of the State of _____ ("_____ Law") as set forth in the LEXIS™ and Westlaw™ online research services in the _____ Code on the State of _____ Official Web Site and not in the text of the _____ Law or in any other source material, any legislative history, the decisions of any federal or state courts, including federal or state courts in the State of _____, or any rules, regulations, guidelines, releases, interpretations or other secondary source material, relating to the _____ Law, and we have assumed that such online research services accurately set forth the provisions of the _____ Law as in effect on the date hereof. Except as described above, we have not examined nor have we expressly opined with respect to _____ law.**

This language may also be useful in rendering opinions under entity laws and under the Uniform Commercial Code ("**UCC**") of another jurisdiction. See "Opinions with respect to Collateral under the Uniform Commercial Code – Scope of UCC Opinions; Limitations" for a discussion of limiting the scope of opinions under the UCC of another jurisdiction.

It is always the prerogative of an Opinion Recipient to require an opinion on the laws of another state or jurisdiction be rendered by a lawyer licensed to practice in that jurisdiction. In determining whether to accept the opinion of Florida counsel on a matter of foreign or specialized law, the Opinion Recipient should consider the complexity of the issue, the cost of retaining local/specialist counsel and the basis for the expertise of Florida counsel. If Florida counsel renders an opinion on a statute of a foreign jurisdiction, the opinion will be understood to cover the statute and all regulations and judicial decisions interpreting it unless otherwise specified in the opinion. In that regard, Florida counsel should always consider whether such counsel has the expertise to render an opinion on a specialized area of law or on the laws of another jurisdiction before agreeing to give such opinion and should not provide an opinion on a specialized area of law or on the laws of another jurisdiction if such counsel does not have the requisite expertise.

I. Opinions of Local or Specialist Counsel

If local/specialist counsel ("**LSC**") is needed to give an opinion on matters of local law or on a specialized area of law, two issues arise: (a) the nature of the duty of the principal opining counsel (the "**POC**") with respect to the selection of the LSC, and (b) the responsibility of the POC for the legal opinions of the LSC.

1. *The Duty of the POC in selecting the LSC*. The Opinion Recipient has a right to approve or reject any LSC from whom the Opinion Recipient will receive opinions. Obviously, Opinion Recipients should not reject an LSC unless they have a reasonable basis to conclude that such LSC does not have the qualifications needed to provide the requested opinions. Further, even though the POC often proposes the LSC for the Opinion Recipient's consideration, the POC does not select the LSC and the POC does not have a duty to participate in the selection of the LSC. If the POC or the POC's client proposes an LSC for the Opinion Recipient's consideration, the POC (or the POC's client) has only an obligation to use reasonable care in making the recommendation.

2. *The Responsibility of the POC for the Opinion of the LSC*. Because the Opinion Recipient has the right to approve or reject the LSC, the Opinion Recipient should accept the LSC's opinion without looking to the POC for a confirming opinion. The LSC's opinion should be addressed to the Opinion Recipient (rather than to the POC) and the POC should not render an opinion on that subject. The POC should

exclude from the scope of the POC's opinion all matters covered in the opinion of the LSC and should state that these matters are covered by the opinions of the LSC by using language substantially similar to the following:

> **In rendering the foregoing opinion, we have not expressed an opinion on matters of [state or specialized area] law. These matters are covered by the opinion of [LSC] addressed to you and dated _____.**

There may be times when an Opinion Recipient will demand that the POC express an opinion on the matters covered by the opinion of the LSC so that the Opinion Recipient can be sure that all matters for which opinions have been requested are covered in a single opinion. Although such practice is discouraged, in such instances where the discouraged practice is followed: (i) the LSC's opinion should be addressed to both the Opinion Recipient and the POC, and (ii) the LSC's opinion should provide that the POC may rely on it to the extent necessary to render the POC's opinion without any investigation. In such event, the POC does not have a duty to review the accuracy of an opinion on which the POC proposes to rely (unless the POC has Knowledge that the opinion is incorrect or Knows that the facts or law on which the LSC's opinion is based are not correct). If the POC has such Knowledge, the POC should advise the LSC of this Knowledge.

It is unreasonable for an Opinion Recipient to refuse to permit the POC to rely solely on the LSC's opinion by requiring that the POC independently state that the LSC's opinion is satisfactory in form and scope, that the POC "concurs" in the opinion of the LSC, that the LSC's opinion is "satisfactory in form and substance," or that the Opinion Recipient "is justified in relying upon the opinion of the LSC." If the POC expresses any of these opinions, the POC must perform the diligence required to render the opinion, which duplicates the work performed by the LSC. Having two lawyers perform the same due diligence results in marginal value and unnecessary and substantial additional expense. If the POC does not expressly state that it is relying solely on the LSC's opinions and either gives the opinion or expresses any of the opinions contained in the LOC's opinion without actually performing the necessary diligence, the POC will be assuming the risk that the LSC's opinion is incorrect.

J. Reliance on Certificates of Public Officials

Opinion letters in Transactions often include legal conclusions based in whole or in part on certificates of public officials. Opinion Recipients should routinely accept opinions that are based on certificates of public officials dated as of a reasonably recent date. Because certificates of public officials typically bear a date before the delivery of the opinion, Opining Counsel must decide what additional verification, if any, is necessary for purposes of the opinion. Although in some instances telephonic updates of certain information can be obtained prior to the closing of the Transaction, this is not always the case. Opining Counsel bears the responsibility of determining whether or not additional verification is necessary based upon its familiarity with the Client and the facts and circumstances of the particular opinion. In general, customary practice does not involve updating every certificate of public officials for purposes of rendering an opinion. As a matter of prudence, Opining Counsel should consider making an express assumption in its opinion (such as the following) specifying if it is relying on certificates of public officials of an earlier date without "bring-down" certificates or other "bring down" verification:

> **With your consent we have assumed that certificates of public officials dated _____ [earlier then the date of this opinion letter] remain accurate from such earlier dates through and including the date of this opinion letter.**

K. Proposed Legislation

Opining Counsel has a duty to consider all relevant laws which have been enacted, regulations which have been adopted and decisions which have been published prior to the date of the opinion, including enacted laws

and adopted regulations which have effective dates in the future. In rendering an opinion, Opining Counsel has no duty to investigate whether proposed legislation or regulations will affect the opinion being given, and will not be held to have constructive Knowledge of proposed legislation or regulations. However, consistent with an attorney's overriding duty of good faith, honesty and candor if Opining Counsel giving substantive attention to a Transaction has actual Knowledge that a proposed law or regulation would affect an opinion being given, such attorney should confirm that Opining Counsel is aware of the proposal and consider expressly noting same in the opinion letter. Opining Counsel in this circumstance does not, however, have a duty to express an opinion on the effect that the proposed legislation or regulation would have on the opinion if the proposal were adopted.

L. Assumptions

It is customary practice for Opining Counsel to make certain assumptions in an opinion. Assumptions underlying the opinion can be implicit or made explicitly. It is not necessary for Opining Counsel to recite assumptions that are generally accepted in customary practice and, as such, are deemed implicit in opinion letters. These include factual matters that affect the Opinion that are too difficult or time consuming to verify and general law-related matters that are discussed in greater detail below. Opining Counsel is not required to refer to the existence of the implicit assumptions in the opinion letter. In accordance with customary practice, such implicit assumptions are deemed part of the opinion regardless of whether or not Opining Counsel refers to their existence in the opinion.

Opining Counsel may not make a factual assumption which is Known to be incorrect to Opining Counsel and may not rely on any statement of fact in a document which Opining Counsel has Knowledge is not correct, unless Opining Counsel discloses to the Opinion Recipient that the assumption or statement of fact is not correct and the Opinion Recipient expressly agrees that Opining Counsel may nevertheless make the assumption or rely on the statement of fact. Opining Counsel also may not assume a specific legal conclusion as to which Opining Counsel is rendering an opinion.

The assumptions set forth below are generally accepted in practice and thus are implicit, and need not be explicitly stated in the opinion letter. These assumptions are incorporated into opinions rendered by Florida counsel whether or not this Report is incorporated by reference into the opinion and whether or not these assumptions are expressly stated in the opinion letter. Nevertheless, many counsel expressly include one or more of these assumptions in their opinion letters, and the forms of opinion that accompany this Report expressly include several of these assumptions.

The assumptions that are considered incorporated into opinions rendered by Florida counsel are as follows:

> *In rendering the opinions set forth herein, we have relied, without investigation, on the following assumptions:*
>
> *a. The legal capacity of each natural person to take all such actions as may be required of each such person in connection with the Transaction;*
>
> *b. The legal existence of each party to the Transaction other than the Client;*
>
> *c. The power and authority of each party to the Transaction other than the Client, to execute, deliver and perform all Transaction Documents executed and delivered and to do each other act done or to be done by such party;*
>
> *d. The authorization, execution and delivery by each party, other than the Client, of each Transaction Document executed and delivered or to be executed and delivered by such party;*
>
> *e. The legality, validity, binding effect and enforceability as to each party, other than the Client, of each Transaction Document executed and delivered or to be executed and delivered and of each other act to be done by such party;*

f. The payment of all required documentary stamps or intangible taxes and fees imposed upon the execution, filing or recording of documents;

g. There have been no undisclosed modifications of any provision of any document reviewed by Opining Counsel in connection with the rendering of the Opinion and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;

h. The genuineness of each signature, the completeness of each document submitted to Opining Counsel, the authenticity of each document reviewed by Opining Counsel as an original, the conformity to the original of each document reviewed by Opining Counsel as a copy and the authenticity of the original of each document received by Opining Counsel as a copy;

i. The truthfulness of each statement as to all factual matters otherwise not Known to Opining Counsel to be untruthful contained in any document encompassed within the diligence review undertaken by Opining Counsel;

j. Each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the Opinion, and all official public records (including their proper indexing and filing) are accurate and complete;

k. The Opinion Recipient has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the subject transaction, and has complied with all laws applicable to it that affect the Transaction;

l. The Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;

m. Routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;

n. All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies constituting the law for which Opining Counsel is assuming responsibility are published (e.g., reported court decisions and the specialized reporting services such as BNA, CCH, and Prentice-Hall) or otherwise generally accessible (e.g., Lexis or Westlaw) in each case in a manner generally available (i.e., in terms of access and distribution following publication) to lawyers practicing in Opining Counsel's judicial circuit within Florida;

o. Agreements related to the Transaction and applicable court orders will be enforced as written;

p. No action, discretionary or otherwise, will be taken by or on behalf of the Client in the future that might result in a violation of law or otherwise constitute a breach or default under any of the Transaction Documents (or any other document related thereto) or under any applicable court order;

q. There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;

> *r. With respect to the Transaction and the Transaction Documents, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress;*
>
> *s. The constitutionality and validity of all relevant laws, regulations and agency actions, irrespective of whether a reported case has otherwise held or concern has been expressed by commentators as reflected in materials which lawyers routinely consult; and*
>
> *t. The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to the subsequent consummation of the Transaction or performance of the Transaction Documents.*

As used above and elsewhere in this Report, unless otherwise stated, the phrase "without investigation" means those matters within the Knowledge of Opining Counsel without any inquiry or investigation. The phrase "without inquiry" is synonymous with, and may be used in lieu of, the phrase "without investigation." See "Common Elements of Opinions – Knowledge" below for a discussion of the meaning of "Knowledge" in the context of a third-party legal opinion.

Specific assumptions that go beyond or modify assumptions that are generally accepted in practice or otherwise deemed implicit (for example, additional assumptions related to the perfection of a security interest under the UCC) should also be explicitly set out in the opinion letter. See "Opinions with Respect to Collateral Under the UCC" below for a discussion of specific assumptions related to opinions under the UCC.

M. Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law

An opinion issued by Florida counsel covers laws that a Florida lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents, or the Transaction to which the opinion relates. If the Client's business is regulated, this includes laws related to such regulated business. However, under Florida customary practice, an opinion does not cover the following federal or Florida laws or regulations unless the opinion letter specifically provides that the opinion covers such laws of regulations:

(a) securities laws and regulations;

(b) Federal Reserve Board margin regulations;

(c) laws and regulations regulating financial institutions, insurance companies and investment companies;

(d) pension and employee benefit laws and regulations such as the Employee Retirement Income Security Act (ERISA);

(e) labor laws and regulations, including laws on occupational safety and health (OSHA);

(f) antitrust and unfair competition laws and regulations;

(g) laws and regulations concerning specialized filing requirements (such as filings required under Hart-Scott-Rodino and Exon-Florio), but not the requirements applicable to filings related to articles of incorporation, articles of merger and the like or filings required for the Client to validly execute and deliver the Transaction Documents and close the Transaction;

(h) laws and regulations concerning compliance with fiduciary requirements;

(i) laws and regulations concerning the creation, attachment, perfection, or priority of any lien or security interest;

(j) laws and regulations relating to taxation;

(k) bankruptcy, fraudulent conveyance/transfer and insolvency laws;

(l) environmental laws and regulations, including petroleum products and its sale or distribution;

(m) laws and regulations relating to land use and subdivisions of land and any laws or regulations governing the marketing or sale of land, lots, condominiums, timeshares or mobile homes;

(n) any local law, statute, administrative decision, ordinance, rule or regulation, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State;

(o) laws relating to patents, copyrights, trade secrets and other intellectual property;

(p) the Communications Act and the rules, regulations and policies of the Federal Communications Commission promulgated thereunder and other federal acts and related rules, regulations and policies;

(q) matters within the jurisdiction of federal agencies, such as the Federal Trade Commission, which may have jurisdiction over any of the activities of the Client;

(r) criminal and state forfeiture laws and any racketeering laws or regulations, such as the Racketeer Influenced and Corrupt Organizations Act (RICO);

(s) other statutes of general application to the extent they provide for criminal prosecution (e.g., mail fraud and wire fraud statutes);

(t) any laws relating to terrorism or money laundering, including Executive Order No. 13224, 66 Fed. Reg. 49079 (published September 25, 2001) (the "Terrorism Executive Order") or any related enabling legislation or any other similar executive order (collectively with the Terrorism Executive Order, the "Executive Orders"), the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56, the "Patriot Act"), any sanctions and regulations promulgated under authority granted by the Trading with the Enemy Act, 50 U.S.C. App. 1-44, as amended from time to time, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, as amended from time to time, the Iraqi Sanctions Act, Publ. L. No. 101-513; United Nations Participation Act, 22 U.S.C. §287c, as amended from time to time, the International Security and Development Cooperation Act, 22 U.S.C. § 2349 aa-9, as amended from time to time, The Cuban Democracy Act, 22 U.S.C. §§ 6001-10, as amended from time to time, The Cuban Liberty and Democratic Solidarity Act, 18 U.S.C. §§ 2332d and 2339b, as amended from time to time, and The Foreign Narcotics Kingpin Designation Act, Publ. L. No. 106-120, as amended from time to time;

(u) laws, regulations and policies concerning (i) national and local emergency, and (ii) possible judicial deference to acts of sovereign states; and

(v) judicial and administrative decisions to the extent that they deal with any of the foregoing.

Although the exclusion from the opinion of the specialized areas of the law enumerated above (the "**Excluded Laws**") is considered implicit as a matter of customary practice, Opining Counsel often include a list of excluded laws in the opinion in order to make sure that the Opinion Recipient understands that the Opinion does not cover the impact of these laws in the Transaction. Such lists are usually limited to laws that Opining Counsel believes may be applicable to the Transaction. Inclusion or exclusion of a list of excluded laws from the opinion does not affect (under Florida customary practice) the implicit exclusion of the laws enumerated above from the scope of the opinion.

Under Florida customary practice, however, laws relating to usury, choice of law and non-competition agreements are covered by the scope of an opinion of Florida counsel unless expressly excluded from the coverage of the opinion in the opinion letter.

Opining Counsel should usually limit the opinions to applicable Florida law and United States federal law. If Opining Counsel opines on an issue of foreign law (i.e., the law of a state other than Florida or of a foreign country or jurisdiction), Opining Counsel is holding itself out as competent on that issue of foreign law. See " – Opinions of Local or Specialist Counsel" and – Opinions under Florida or Federal Law; Opinions Under the Law of Another Jurisdiction" above.

The laws determined to be applicable to the Client and the Transaction, excluding the Excluded Laws, are sometimes referred to in this Report as the "**Applicable Laws.**"

It is generally not beneficial to the Opinion Recipient to receive an opinion from Florida counsel who assumes that Florida law will apply to a contract when the contract expressly provides that another jurisdiction's laws will govern it. It is permissible for Florida counsel to give an opinion that hypothesizes that Florida substantive law governs the contract, notwithstanding the governing law provision in the contract to the contrary. Further, although it is not recommended (and its use is discouraged), some Florida counsel will render an opinion that hypothesizes that Florida law is identical to the law of another jurisdiction (even if that hypothesis is Known or believed by Opining Counsel not to be correct, provided Opining Counsel advises the Opinion Recipient that the hypothesis is not or may not be correct). If such an opinion is requested, Opining Counsel should include a statement in the opinion substantially similar to the following, as applicable:

We note that the [Agreement] provides that it is governed by the substantive law of the State of _____ (the law stipulated by the [Transaction Documents] to be the law governing its interpretation and enforcement). With your permission, our opinions are given based on what would be the case if a court were to refuse to apply the substantive law of the jurisdiction that is set forth in the [Transaction Documents] and instead were to apply the substantive law of the State of Florida.

or

We note that the [Agreement] provides that it is governed by the substantive law of the State of _____ (the law stipulated by the [Transaction Documents] to be the law governing its interpretation and enforcement). We have assumed, with your permission, that the substantive law of _____ is identical to the substantive law of the State of Florida in all respects material to our opinions.

See "Choice of Law Opinions" for a discussion of the impact of the governing law provision on the remedies opinion.

N. Knowledge

Opining Counsel is required to take all of the steps and make all of the legal and factual investigations that are necessary under customary practice to support each of the opinions in the opinion letter. However, factual investigations are often limited by reference to Opining Counsel's Knowledge. In determining whether or not to limit factual investigations to the Opining Counsel's Knowledge, the costs of the wider investigation must be weighed against the benefits that the Opinion Recipient will obtain from an opinion based on a broader investigation. These limitations take many different forms, although typical phrases usually include the following: "to our knowledge," "to our current actual knowledge," "to the best of our knowledge," "known to us," "we are not aware of," or "nothing has come to our attention that." In order to avoid confusion and to promote consistency among opinions, it is recommended that Opining Counsel include the following standard formulation of the Knowledge qualification in its opinion:

> **The phrases "to our Knowledge," "Known to us," or the like mean the conscious awareness of the lawyers in the "Primary Lawyer Group" of factual matters such lawyers recognize as being relevant to the Opinion or confirmation so qualified, and do not imply that we have undertaken any independent investigation within the firm, with the Client or with any third-party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Client. Where any opinion or confirmation contained herein is qualified by the phrase "to our Knowledge," "Known to us," or the like, it means that the lawyers in the Primary Lawyer Group are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. "Primary lawyer group" means any lawyer currently in this firm (i) who signs this opinion letter, or (ii) who is actively involved in negotiating or documenting the Transaction or the Transaction Documents.**

This standard formulation adopts the concepts of "conscious awareness" and "primary lawyer group" as the basis for the qualification. By limiting the scope of the Knowledge qualification to the "primary lawyer group," no additional inquiry should be required beyond the members of that group unless Opining Counsel is requested, and undertakes, to conduct an inquiry of other lawyers in Opining Counsel's firm. By incorporating the Knowledge qualification into the opinion, it will not be necessary for Opining Counsel to undertake an investigation of all other lawyers in the firm or to review all of the firm's files, nor will it be necessary for Opining Counsel to undertake an investigation with the Client or with any third parties (e.g., searches of governmental databases). The opinion is limited to matters that are within the conscious awareness of the person or persons who fall within the definition of the "primary lawyer group." This Report recognizes, and the "conscious awareness" concept contemplates, that what is "known" at one time may not be in the mind or may be forgotten altogether at another time.

The use of the phrases "to our Knowledge," "Known to us" or the like should be interpreted as having the meaning set forth above, regardless of whether or not Opining Counsel includes the recommended standard formulation of the meaning of same in the body of the opinion letter. Notwithstanding the foregoing, it is recommended that Opining Counsel include the standard formulation of the meaning of these phrases within the body of the opinion in order to avoid having these phrases interpreted as having a broader meaning, and the forms of opinion that are part of this Report include such formulation.

Notwithstanding, as a matter of prudent practice, Opining Counsel should consider inquiring with the attorney within their firm who serves as the principal relationship manager of the Client (regardless of whether or not such attorney otherwise falls within the purview of the Primary Lawyer Group) in order to avoid any claims in the future regarding the diligence in rendering the subject opinion. It may also be prudent in certain circumstances to list in the opinion the identity of the members of the "Primary Lawyer Group" so there is no ambiguity as to who was involved in the rendering of the opinion. Further, even if the opinion is signed in the

name of the firm, it does not modify the Primary Lawyer Group. Finally, Opining Counsel should recognize that the Primary Lawyer Group may have more or less Knowledge about issues that relate to the opinion depending on the role of Opining Counsel in connection with the Client or the Transaction. For example, if Opining Counsel is actively assisting the Client in the preparation of disclosure schedules to one or more of the Transaction Documents, or has actively represented the Client over an extended period, it is likely that they will know more than in a situation where Opining Counsel role with the Client in the Transaction is more limited. Opining Counsel would be prudent to consider what it Knows based on the particularities of the situation.

The phrases "to our Knowledge" or "Known to us" are recommended over the other common phrases described above in order to avoid confusion and promote consistency. Regardless of the terminology used by Opining Counsel, however, all these phrases are to be construed to have the same meaning under customary practice.

The phrase "independent investigation" should be construed to have the same meaning as "investigation." When Opining Counsel qualifies an opinion or statement with the phrase "without investigation," or "without inquiry," such qualification means that Opining Counsel has not undertaken any investigation with the Client or with any third party with respect to the matter so qualified; however, the use of the phrase "without investigation" or "without inquiry" does not obviate Opining Counsel's duty to consult with the Primary Lawyer Group as described above.

The recommended phrases; "to our Knowledge" and "Known to us" have been interpreted by one court as an affirmative representation that Opining Counsel has knowledge of the matters recited (as opposed to these words being a limitation on the scope of the Opinion). See, Nat'l Bank of Canada v. Hale & Dorr, LLP, 17 Mass.L.Rptr. 681, 2004 WL 1049072 (Mass. Super. 2004). This Report rejects this interpretation, as the Committees believe that this language is understood under customary practice in Florida to limit the opinion to matters of which the Opining Counsel has Knowledge.

O. Incorporation of Opinion Standards, Principles and Guidelines

This Report, and the exceptions, qualifications, limitations and assumptions set forth herein, are deemed incorporated into all legal opinions issued by Florida counsel, regardless of whether or not this Report is expressly incorporated by reference into the opinion itself. As a result, the implicit exceptions, qualifications, limitations and assumptions set forth in this Report need not be recited in an opinion. Notwithstanding, this Report recommends that Florida counsel provide a copy of this Report to Opinion Recipients represented by non-Florida counsel to avoid any confusion on the part of the Opinion Recipient regarding customary third-party opinion practices in Florida.

P. Signatures

If Opining Counsel practices as a solo practitioner, Opining Counsel should sign an opinion in Opining Counsel's own name. If Opining Counsel practices through a professional association or signs an opinion on behalf of a firm (including a firm that is a professional association), any one of the following is acceptable: "Name of attorney/On behalf of Firm," "Firm/By name of attorney," "Firm/Name of Attorney," "Firm/Name of attorney, a Partner or Officer, as appropriate," or the signed name of the firm only (provided the firm maintains an internal mechanism to identify the attorney(s) rendering the opinion). For multi-state firms with offices in Florida, the attorney who signs an opinion on matters of Florida law should be a member of The Florida Bar. Opinions given by inside counsel may be signed in the individual's name or in counsel's official capacity. In either case, inside counsel may be held liable for counsel's own negligence, and the corporation generally will be liable for the authorized act of its agent. See "Introductory Matters – What is Customary Practice and Why it is Important" and "Introductory Matters – Ethical and Professional Issues" above for a discussion of Opining Counsel's liability for opinions and the standard of care applicable to Florida attorneys who render opinions.

Q. Opinion

The operative opinions in an opinion are customarily presented as separately enumerated paragraphs, with a "lead-in" indicating that they are the opinions of Opining Counsel. The "lead-in" customarily refers to the qualifications and limitations contained in the opinion letter, both before and after the operative opinions. The following is a suggested form of "lead-in" to the opinion:

Based upon and subject to the foregoing, and to the assumptions, limitations and qualifications contained herein, I/we am/are of the opinion that:

ENTITY STATUS AND ORGANIZATION

In an opinion letter for a typical Transaction, Opining Counsel is usually asked to opine with respect to the Client's organization and existence and current status as a business entity under the laws of the jurisdiction where the Client is organized. This section of the Report discusses opinions rendered regarding entity status and organization with respect to Florida corporations, Florida limited partnerships, Florida general partnerships, Florida limited liability companies and Florida land trusts.

A. Organizational Documents

In opinions on many issues, including entity status and organization, entity power, and authorization of the transaction, it will be necessary to review the Client's organizational documents. When reference is made in this Report to the Client's "**Organizational Documents**" it means: (i) if the Client entity is a Florida corporation, the articles of incorporation that have been filed with the Department and the By-Laws, (ii) if the Client entity is a Florida limited partnership or a Florida limited liability limited partnership, the certificate of limited partnership that has been filed with the Department and the written limited partnership agreement, (iii) if the Client entity is a Florida general partnership, the written partnership agreement and, if filed with the Department, the partnership registration statement, (iv) if the Client entity is a Florida limited liability partnership, the partnership registration statement, as filed with the Department, the statement of qualification, as filed with the Department, and the written partnership agreement, (v) if the Client entity is a Florida limited liability company, the articles of organization, as filed with the Department, and the written operating agreement, and (vi) if the Client entity is a trust, the written trust agreement. In conducting diligence with respect to a Client's Organizational Documents, such documents as are available from the Department should be obtained (preferably as certified documents) directly from the Department. Client Organizational Documents that are not available from the Department should be obtained from the Client. Generally, Opining Counsel should obtain a certificate from the Client attaching copies of the Organizational Documents and certifying to Opining Counsel that the attached Organizational Documents are true and correct copies of such documents as amended to date and that such documents have not been modified, amended or rescinded. Generally, it is preferable that such certificate be certified by an officer, partner, manager or member of the Client who is not the officer, partner, manager or member executing the Transaction Documents on behalf of the Client. The form of certificate that accompanies this Report includes statements regarding these issues.

B. Florida Corporation

Recommended opinion:

The Client is a corporation organized under Florida law, and its status is active.

1. *The Basic Meaning of the Opinion*. The opinion that "The Client is a corporation organized under Florida law, and its status is active" or, the equivalent opinion: "The Client is a corporation *duly organized*, *validly existing* and in *good standing* under the laws of the State of Florida" means that, as of the date of the opinion: (i) articles of incorporation for the corporation were filed with the Florida Department of State (the "**Department**"), (ii) the corporation has not been dissolved, (iii) the corporation's articles of incorporation have not been revoked or suspended, (iv) the corporation has not merged with another corporation in any merger whereby such corporation was not the surviving corporation, (v) the corporation has not been converted into a different form of entity, (vi) in the case of a corporation whose term of duration is limited, the term of the corporation has not expired, and (vii) the requisite organizational actions have been taken with respect to the corporation.

2. *Organized*. An opinion that the corporation is properly "organized" is part of the corporate status opinion. Sometimes the word "duly" is added before "organized." However, it does not change the meaning of the opinion or change the diligence required to give the opinion.

   "Organization" is discussed in Section 607.0205 of the Florida Business Corporation Act ("**FBCA**"). Organization under the FBCA requires the adoption of by-laws and the election of directors and

officers. Under the Prior Florida Reports, an opinion regarding the "organization" of a corporation required Opining Counsel to confirm that the corporation was properly organized under the laws in effect at the time of its incorporation. However, such interpretation has become anachronistic and Florida customary practice no longer requires an Opining Counsel to determine if the proper steps were taken at the time the corporation was formed under the applicable law in effect at the time of such formation. Rather, Florida customary practice uses the term "organization" to address whether the necessary steps for the organization of the corporation are in place as of the date of the opinion. Thus, whether or not the necessary steps were completed at the time of the formation of the corporation, Opining Counsel can render the "organization" opinion if Opining Counsel confirms that at the time of the delivery of the opinion the corporation has adopted by-laws and elected or appointed directors and officers.

Notwithstanding, under Section 607.0732 of the FBCA, a corporation with 100 or fewer shareholders can entirely dispense with the requirements of a board of directors in a written agreement adopted by all of the corporation's shareholders. In such a case, it will be the actions of the shareholders rather than the directors that will govern. If an agreement under Section 607.0732 of the FBCA is in place and such agreement dispenses with requirements for a board of directors, "organization" will instead require the adoption of bylaws, having an agreement in place that conforms with the requirements of Section 607.0732 of the FBCA and the election or appointment of officers.

3. *Incorporated and Duly Incorporated*. Although Section 607.0128(2)(b)(1) of the FBCA uses the phrase "duly incorporated," the terms "incorporated," "duly" and "validly" are not used in any of the forms of opinion recommended by this Report because they do not add anything to the opinion or change the diligence required to give the opinion. Some commentators suggest that the term "validly existing" may be used to indicate that the company is a "*de jure*" as opposed to "*de facto*" corporation. However, because this opinion is intended to be supported by a certificate from the Department as to the filing of the articles of incorporation, the corporation will necessarily be a "*de jure*" corporation. The opinion that a corporation is a "corporation organized under Florida law" may be given on the basis of Section 607.0203 of the FBCA, a certificate from the Department that the corporation's articles of incorporation have been filed by the Department, and the organizational steps described above. Section 607.0203 of the FBCA states that the Department's acceptance for filing of the articles of incorporation of a corporation is conclusive proof that the incorporator(s) satisfied all conditions precedent to incorporation, except in a proceeding brought by the State of Florida to cancel or revoke the incorporation.

4. *Certificate of Status*. Section 607.0128 of the FBCA provides for the Department to issue a "certificate of status" for a corporation that states, among other things, that: (i) the corporation is duly incorporated, (ii) all fees and penalties owed by the corporation to the Department have been paid, (iii) the corporation's most recently required annual report has been delivered to the Department for filing, and (iv) articles of dissolution of the corporation have not been filed. To ensure that dissolution proceedings have not been commenced, Opining Counsel should obtain a certificate of an officer of the corporation confirming that no steps leading to the corporation's dissolution have been taken. Alternatively, Opining Counsel may review the records of the corporation to confirm that no steps leading to the corporation's dissolution have been taken. If Opining Counsel is aware that resolutions approving the dissolution of the corporation have been adopted, but articles of dissolution have not been filed, counsel may give the active status opinion, but should disclose the adoption of the resolutions in the opinion and consider the effect of the adoption of the resolutions regarding dissolution on the other opinions being rendered with respect to the Transaction.

5. *Active Status vs. Validly Existing and in Good Standing*. This opinion uses the phrase "its status is active" because the words "active status" are used by the Department in its certificate of status. However, Opining Counsel in Florida are often asked to render (particularly in transactions in which the counsel for the Opinion Recipient is an out-of state attorney) an opinion using the phrase "validly existing and in good standing." The use of the phrase "validly existing and in good standing" in an opinion of Florida counsel has the same meaning under Florida customary practice as the phrase "its status is active."

6. *General Exclusions from Active Status Opinion*. An opinion that a corporation's "status is active" merely indicates that the corporation exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the corporation, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution (either judicial or administrative) of the corporation. For example, if the corporation's annual report to the Department has not yet been filed, and is not filed by its due date, the corporation may be subject to administrative dissolution at a later date.

7. *Circumstances Affecting the Certificate of Status*. As noted above, Opining Counsel may opine that the corporation exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in the involuntary dissolution of the corporation with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the Client will usually constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve a corporation under Section 607.1420(a) of the FBCA if the corporation does not pay any required fee or penalty or file its required annual report. This same provision permits administrative dissolution by the Department under Section 607.1420(b) of the FBCA if the corporation fails to maintain a registered agent. Opining Counsel should be aware that a resignation by a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department. In that regard, a certificate of status issued by the Department under Section 607.0128 of the FBCA is not required to include information regarding the resignation of the corporation's registered agent.

8. *Organization Issue – Officer's Certificate*. In rendering an opinion as to "organization," Opining Counsel may rely upon an officer's certificate whereby an officer of the Corporation certifies that the by-laws have been adopted, certifying that the Transaction has been approved by the board of directors (often by attaching the resolutions approving the Transaction) and certifying the name(s) of the officer(s) of the corporation who is (are) authorized to execute and deliver the Transaction Documents on behalf of the corporation (while the second and third certificate items are not required for the "organization" opinion, the certificate often covers all three issues). Unless Opining Counsel has Knowledge to the contrary, Opining Counsel may rely, under the "presumption of continuity and regularity" described in "Introductory Matters – Presumptions of Continuity and Regularity," on the accuracy of the facts set forth in the certificate and on the proper election of the board of directors.

9. *No Need to Review Minute Book or Share Issuances*. Based on the presumption of continuity and regularity, it is not necessary for Opining Counsel to review the minute book of the corporation to issue an "organization" opinion. See "Introductory Matters – Presumption of Continuity and Regularity." It is also not necessary for Opining Counsel to confirm that the corporation has issued shares of stock in order to deliver the "organization" opinion. However, if the Transaction contemplates the issuance of securities by the corporation, Opining Counsel, in rendering opinions regarding the issuance of such securities, should consider the matters set forth in "Opinions with Respect to Securities."

10. *Foreign Entity*. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the entity organization, existence and status of a foreign corporation and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will be held to the standard of care of a competent lawyer in the jurisdiction of incorporation of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opining Under Florida or Federal Law; Opining Under the Laws of Another Jurisdiction." The diligence involved in rendering an entity organization, existence and status opinion with respect to a corporation organized under the laws of another jurisdiction, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Florida Corporation

In order to render an entity status and organization opinion with respect to a Florida corporation, Opining Counsel should take the following actions:

- Obtain a certified copy of the corporation's articles of incorporation from the Department and review the articles of incorporation to ensure that they substantially comply with the requirements of Section 607.0202 of the FBCA.
- Confirm by obtaining an officer's certificate from the Client that at least one director of the corporation has been elected (except in circumstances where the corporation is managed directly by its shareholders pursuant to an agreement that complies with Section 607.0732 of the FBCA and dispenses with the board of directors), that one or more officers have been elected or appointed and that by-laws for the corporation have been adopted.
- Obtain an "active status" certificate with respect to the corporation from the Department. If the certificate of status indicates that the Client has not yet filed its annual report or paid its annual fee for the current year, the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the corporation.
- Confirm that no steps leading to the corporation's dissolution have been taken. The recommended practice is to obtain a certificate to this effect from an officer of the corporation, and the form of certificate to counsel that accompanies this Report includes such a statement.

C. Florida Limited Partnership

Recommended opinion:

The Client is a [limited partnership/limited liability limited partnership] organized under Florida law, and its status is active.

1. *The Basic Meaning of the Opinion*. The opinion that "*the Client is a limited partnership organized under Florida law, and its status is active" or "the Client is a limited liability limited partnership organized under Florida law, and its status is active"* means that, as of the date of the opinion: (i) the partnership has complied in all material respects with the requirements for the formation of a limited partnership (or a limited liability limited partnership, as appropriate) under applicable law, (ii) government officials have taken all steps required by law to form the limited partnership (or a limited liability limited partnership, as appropriate), (iii) the partnership's existence began prior to the effective date and time of the opinion, (iv) the partnership is organized and is currently in existence, and (v) the partnership has not been converted into a different form of entity. Under Section 620.1201 of the Florida Revised Uniform Limited Partnership Act of 2005 ("**FRULPA**"), a Florida limited partnership is formed at the time a certificate of limited partnership is filed with the Department (or at any later time specified in the certificate of limited partnership) if there has been "substantial compliance" with the requirements of that section.

2. *Organized*. An opinion that a limited partnership or a limited liability limited partnership is properly "organized" is part of the partnership status opinion. Sometimes the word "duly" is inserted before "organized." However, it does not change the meaning of the opinion or the diligence required to give the opinion. The "organized" opinion means that Opining Counsel has verified that the Client has filed a certificate of limited partnership as required by Section 620.1201 of FRULPA and has a written and executed limited partnership agreement. Although partnership law does not require it, a written limited partnership agreement is such a rudimentary organizational step that Opining Counsel should not opine that the limited partnership is "organized" if there is no written limited partnership agreement.

   Further, in connection with the Transaction, there may be a need to file an amendment of the certificate of limited partnership under Section 620.1202 of FRULPA to reflect the admission or dissociation of a general partner. Although the filing of such amendment is not generally required to give the "organized" opinion, Opining Counsel should consider what amendments are needed to the certificate of limited partnership to reflect the correct state of affairs in connection with the Transaction (and such filing may be necessary to give other requested opinions regarding the Transaction).

3. *Substantial Compliance with Formation Requirements*. The "substantial compliance" provision in Section 620.1201(3) of FRULPA might suggest that a "*de facto*" limited partnership could exist, notwithstanding defects in the certificate of limited partnership. There are, in fact, Florida cases recognizing the existence of "*de facto*" limited partnerships under a previous version of the Florida limited partnership statute, but in 1986 the Florida Legislature repealed the statutory provisions under which those cases were decided. The Opinion Recipient will expect to do business with a "*de jure*" partnership, rather than a "*de facto*" partnership, and the opinion set forth above regarding limited partnership status should not be given if Opining Counsel concludes that the partnership is merely a "*de facto*" limited partnership and not a "*de jure*" limited partnership.

4. *Existence*. An opinion that a limited partnership exists under the laws of the State of Florida means only that one or more general partners and one or more limited partners have made an agreement to carry on a business as co-owners for profit, that a certificate of limited partnership has been filed with the Department and that no circumstance exists that would require the dissolution of the partnership and the winding up of the partnership's business. Although Florida law does not require that a limited partnership have a written limited partnership agreement (partnership agreements can be oral under Florida law), as a practical matter lenders and others doing business with a Florida limited partnership will generally be reluctant to lend money or enter into a Transaction with a business entity that is

organized with no more than a handshake, and Opining Counsel should be equally reluctant to opine about the legal existence of a limited partnership if such partnership has no written partnership agreement. If a limited partnership is engaged in a Transaction large enough or important enough to require a third-party legal opinion, then its business affairs are sufficiently complex to warrant a written limited partnership agreement, and Opining Counsel should not render an opinion that a limited partnership exists if there is no written partnership agreement.

5. *Certificate of Status*. The Department's standard form of certificate of status issued under Section 620.1209(1) of FRULPA states that the limited partnership "has paid all fees due this office through December 31, 20__, and its status is active." This statement that its status is "active" means that the limited partnership exists (as conclusively established by Section 620.1209(3) of FRULPA) and that it has not been dissolved as of the date of the certificate of status. Subsection (3) of that statute provides that, "[s]ubject to any qualifications stated in the certificate, a certificate of status issued by the Department may be relied upon as conclusive evidence that the limited partnership … is in existence." Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the limited partnership, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution (either judicial or administrative) of the partnership.

6. *Active Status vs. Validly Existing and in Good Standing*. This opinion uses the phrase "its status is active" because the words "active status" are used in the certificate of status provided by the Department. However, Opining Counsel in Florida are often asked to render (particularly in transactions in which the Opinion Recipient's counsel is an out-of-state attorney) an opinion that the limited partnership is "validly existing and in good standing." Under customary practice in Florida, the use of the phrase "validly existing and in good standing" in an opinion has the same meaning as the phrase "its status is active."

7. *Circumstances Affecting Active Status*. As noted above, Opining Counsel may opine that a limited partnership exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in the involuntary dissolution of the limited partnership with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the Client will usually constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve a limited partnership under Section 620.1809 of FRULPA if the limited partnership does not, within 60 days after the due date, pay any required fee or penalty or file its required annual report. This same provision permits administrative dissolution by the Department if the limited partnership fails to maintain a registered agent. In that regard, under Section 620.1116 of FRULPA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department, and a certificate of status issued by the Department under Section 620.1209 of FRULPA is not required to include information regarding the resignation of the limited partnership's registered agent.

8. *Involuntary Dissolution – Failure to Maintain General Partner and Limited Partner*. A limited partnership may be involuntarily dissolved by other circumstances, such as failing to maintain at least one general partner and one limited partner as provided in FRULPA. Under previous versions of the Florida limited partnership statute, the death, dissolution, bankruptcy or withdrawal of the last general partner was an event that dissolved the limited partnership unless all the partners agreed within 90 days to continue the activities of the partnership and to appoint one or more additional general partners. This 90-day grace period provision is continued in Section 620.1801(1)(c) of FRULPA with respect to the dissociation of the last general partner, accompanied by a new provision in Section 620.1801(1)(d) of FRULPA for admitting a new limited partner within 90 days after the dissociation of the last limited partner. Failure to admit a replacement partner within the 90-day period results in dissolution and mandatory winding up of the limited partnership, and the partnership must file a certificate of

dissolution with the Department. Within the 90-day grace period after the dissociation of the last general partner or the last limited partner, Opining Counsel may technically opine that the limited partnership exists even if a replacement partner has not yet been admitted; although if the Opining Counsel has Knowledge that such dissociation has occurred, then the Client should be advised to take the necessary curative actions because a resulting dissolution will likely violate the provisions of the Transaction Documents. As a practical matter, if a limited partnership has no general partner, it will likely be impossible for Opining Counsel to opine that anyone is authorized to execute and deliver the Transaction Documents on behalf of the limited partnership, so the lack of a general partner will have to be cured in any event in order to complete the Transaction.

9. *LLLP Certificate*. A Florida limited partnership may also qualify as a limited liability limited partnership ("**LLLP**") by including a statement to that effect in its certificate of limited partnership, as provided in Section 620.1201(1)(d) of FRULPA. Subsection 620.1404(3) of FRULPA provides that an obligation of a limited partnership incurred while it is an LLLP is solely the obligation of the limited partnership, and a general partner is not personally liable for such an obligation solely by reason of being or acting as a general partner. If an opinion is given that the Client is a limited liability limited partnership, then an applicable statement must have been filed with the Department as required by such Florida Statute. An amendment to the certificate adding or deleting a statement that the limited partnership is an LLLP requires the approval of all the general partners (Section 620.1406(1)(a) of FRULPA) and must be signed by all of the general partners listed in the certificate of limited partnership (Section 620.1204(1)(b) of FRULPA). Under Section 620.1202(5) of FRULPA, an amendment to the certificate of limited partnership for this or other purposes is effective when filed with the Department, unless a later effective date is specified in accordance with Section 620.1206(3) of FRULPA. The name requirements for a limited liability limited partnership are set forth in Section 620.1108(3) of FRULPA (the name must contain the phrase "limited liability limited partnership" or the abbreviation L.L.L.P. or the designation LLLP).

10. *General Exclusions from Opinion*. Unless otherwise expressly stated in the opinion letter, an opinion that the status of the limited partnership (or LLLP) is "organized under Florida law and its status is active" does not mean that (i) the partnership has established any tax, accounting or other records required to commence operating its business, (ii) the partnership maintains at its registered office any of the information required to be maintained under Section 620.1111 of FRULPA, (iii) the limited partner(s) (or general partner(s), in the case of an LLLP) of the partnership will not have personal liability, or (iv) the partnership will be treated as a limited partnership for tax purposes.

11. *Foreign Entity*. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the entity organization, existence and status of a LP or a LLLP organized under the laws of another jurisdiction, and agrees to render such Opinion, then with respect to the subject opinion such Opining Counsel will be held to the standard of care of a competent lawyer in the jurisdiction of incorporation of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in giving an organization, existence and status opinion with respect to a foreign limited partnership or a foreign limited liability limited partnership under the laws of another jurisdiction, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Florida Limited Partnership.

In order to render an entity status and organization opinion with respect to a Florida limited partnership or a Florida limited liability limited partnership, Opining Counsel should take the following actions:

- Obtain a certified copy of the Certificate of Limited Partnership from the Department and review the certificate to ensure that it substantially complies with the requirements of Section 620.1201 of FRULPA.
- Obtain an "active status" certificate for the limited partnership from the Department. If the certificate of status indicates that the Client has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the limited partnership.
- Obtain a copy of the written partnership agreement of the limited partnership, certified by a general partner as being a true and complete copy, including all amendments. If there is no written partnership agreement, Opining Counsel should not give an opinion with respect to the limited partnership and should counsel the Client to reduce their partnership agreement to writing.
- For purposes of the "active status" opinion, Opining Counsel should determine whether the partnership agreement creates a partnership for a definite term or for a particular undertaking (and if so, determine that the term has not expired or the undertaking has not been completed), and whether it contains an agreement to wind up the partnership business upon the occurrence of a specific event (and if so, determination whether or not the specific event has occurred). In most cases, such confirmation will best be obtained in a certificate from a general partner of the Client.
- Obtain a certificate from one of the partnership's general partners establishing that the limited partnership has at least one general partner and at least one limited partner, that no circumstances exist that would trigger dissolution under the partnership agreement or the limited partnership statute, and that no judicial or administrative proceedings have been commenced for the dissolution of the limited partnership. If the partnership's last general partner or last limited partner has dissociated from the limited partnership, then the "existence" and "good standing" opinions as to entity status and organization may be rendered within the statutory 90-day grace period for admission of a replacement partner, but the Opining Counsel should counsel the Client to make satisfactory arrangements for the admission of a replacement partner or partners.
- If any general partner in the limited partnership is a legal or commercial entity rather than an individual, then Opining Counsel must determine that the entity serving as the general partner has registered with the Department as required by Section 620.1201(1)(c) of FRULPA, either as an entity formed under Florida law or a foreign entity qualified to transact business in Florida, and currently maintains an active registration status as such.
- If the limited partnership is a LLLP, obtain and review a certified copy of the filed Certificate of Limited Partnership from the Department to confirm that the certificate includes a statement that the partnership is a limited liability limited partnership and that the name of the partnership meets the requirements of Section 620.1108(3) of FRULPA; if the statement of limited liability was added to the certificate by amendment, verify that the amendment was signed by all of the general partners named in the certificate as required by Section 620.1204(1)(b) of FRULPA.

D. Florida General Partnership

Recommended opinion:

The Client is a [general partnership or limited liability partnership] organized under Florida law [(and has registered the general partnership with the Department under the Florida Revised Uniform Partnership Act)/(has registered the name of the general partnership with the Department under the Florida Fictitious Name Act)].

1. *Definition of General Partnership*. A general partnership is "*an association of two or more persons to carry on as co-owners a business for profit*" as defined in § 620.8101(7) of the Florida Revised Uniform Partnership Act of 1995 ("**FRUPA**"). This broad definition sweeps many businesses into the Florida partnership laws that might not have intended to form a partnership and that might have little or no organizational documentation. If a partnership's chief executive office is located in Florida, then Florida law governs the relations among the partners and between the partners and the partnership. In addition, the same Florida laws applicable to general partnerships also govern joint ventures, which are essentially general partnerships of limited scope that are formed for a particular purpose or undertaking. Because a general partnership is the "default" form of business entity, the Florida partnership law requires no written agreement or governmental filing for creation or valid existence of a Florida general partnership.
2. *Basic Meaning of this Opinion*. An opinion that a general partnership is "organized " under the laws of the State of Florida means only that two or more general partners have made an agreement to carry on a business as co-owners for profit, and that no circumstance exists that would require the dissolution of the partnership and the winding up of its business. Although Florida law does not require that a partnership have a written agreement (partnership agreements can be oral under Florida law), as a practical matter lenders and others doing business with a Florida general partnership will generally be reluctant to lend money or enter into a Transaction with a business entity that organized with no more than a handshake, and Opining Counsel should be equally reluctant to opine about the legal existence of a general partnership if such partnership has no written partnership agreement. If a general partnership is engaged in a Transaction large enough or important enough to require a third-party legal opinion, then its business affairs are sufficiently complex to warrant a written partnership agreement, and Opining Counsel should not opine that a partnership is organized if there is no written partnership agreement.
3. *Active Status or Validly Existing and in Good Standing*. Because there are no governmental filing requirements for the creation or existence of a Florida general partnership, a request for a legal opinion regarding its "good standing" or "active status" is misplaced and as a result such opinions should not be requested or rendered.
4. *Written Partnership Agreement*. Although Florida partnership law does not require it, a written partnership agreement is such a rudimentary organizational step that Opining Counsel should not opine that a general partnership is "organized" if there is no written partnership agreement. Conversely, the "organized" opinion can be given if there is a written partnership agreement alone, since Florida law requires no other organizational documents for a general partnership.
5. *General Exclusions from Opinion.* The "organized" opinion for a general partnership does not mean that: (i) the partnership has established any tax, accounting or other records (other than the partnership agreement) required to commence operating its business, (ii) the partnership maintains books and records of its chief executive officer as required under Section 620.8403 of FRUPA, (iii) the partners will not have any personal liability, or (iv) the partnership will be treated as a partnership for tax purposes. Use of the terms "duly" and "validly" in this opinion does not affect the meaning of this opinion nor the diligence required to render it.
6. *Potential Registrations or Filings*. There are two possible filings that Opining Counsel should consider making with respect to a Florida general partnership:
   (a) *Florida Fictitious Name Act*. Under the Florida Fictitious Name Act, § 865.09, Florida Statutes, a filing registering the general partnership's name may be required if its business activities in Florida bring the partnership within the scope of that statute. The failure to comply with the

Fictitious Name Act does not affect the legal existence of the partnership, impair the validity of any contract, deed, mortgage, security interest, lien or act of the partnership or prevent the partnership from defending actions, suits or proceedings in courts in Florida, but it will subject the partnership to criminal liability and might prevent the partnership from maintaining actions, suits or proceedings in the courts of Florida. Opining Counsel may opine that the partnership "has registered with the Department under the Florida Fictitious Name Act" based solely on a certificate from the Department confirming that the partnership has so registered.

(b) *Optional Partnership Registration*. Under Section 620.8105 of FRUPA, general partnerships have the ability (but not the obligation) to register with the Department. Although this optional registration is not a prerequisite to partnership existence or to a partnership's power to make binding contracts, registration is a simple method of establishing the authority of a partner to bind the partnership, as discussed in "Authorization of the Transaction – General Partnership." As amended in 2000, the Fictitious Name Act, Section 865.09(7), Florida Statutes, exempts from its ambit any corporation, partnership or other commercial entity that is actively organized or registered with the Department, unless the name under which business is to be conducted differs from the name as licensed or registered. In other words, optional registration under FRUPA makes registration of a general partnership's name under the Fictitious Name Act unnecessary. Opining Counsel may opine that the Client "has registered with the Department under the Florida Revised Uniform Partnership Act" based solely on a certified copy of the partnership's registration statement from the Department.

7. *Limited Liability Partnership*. A Florida general partnership may qualify as a limited liability partnership ("**LLP**") by filing a statement of qualification with the Department under Section 620.9001(3) of FRUPA. If an opinion is rendered that the Client is a limited liability partnership, an applicable statement must have been filed with the Department as required by such statute. The terms and conditions on which a partnership becomes an LLP must be approved by the vote necessary to amend the partnership agreement, or if the partnership agreement provides for contribution obligations, then approval must be obtained by the vote required to amend those provisions. The statement of qualification requires the appointment of a registered agent for service of process in Florida (under Section 620.9001(3)(c) of FRUPA) and requires (under Section 620.9002 of FRUPA) that the partnership's name must end with "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP," or "LLP." The status of a general partnership as an LLP is effective on the later of the filing date for the statement of qualification or a date specified in the statement, and its status is unaffected by errors or later changes in the information required to be contained in the statement of qualification. Although most of the statutory provisions applicable to LLPs are found in Sections 620.9001 through 620.9105 of FRUPA, the key reason to qualify as an LLP is set forth in Section 620.8306(3) of FRUPA, which provides that an obligation of a partnership incurred while it is a limited liability partnership is solely the obligation of the partnership, and a partner is not personally liable for such an obligation solely by reason of being or acting as a partner.

8. *Mandatory Registration of LLP*. For a Florida limited liability partnership, the partnership registration procedures under Section 620.8105 of FRUPA are mandatory. Section 620.8105(4) of FRUPA provides that no statement of qualification under Section 620.9001 of FRUPA can be filed with the Department unless the partnership also files a registration statement. Under Section 620.8105(3) of FRUPA, one key requirement for a partnership registration statement is that all of the partners in a registered partnership (as well as any agent appointed by the partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) that are business entities must be organized or otherwise registered with the Department. After the LLP has registered with the Department under Section 620.8105 of FRUPA and filed its statement of qualification under Section 620.9001 of FRUPA, Opining Counsel should obtain a certificate of status for the partnership from the Department. Section 620.9001(6) of FRUPA provides that the filing of a statement of qualification with the Department establishes that a partnership has satisfied all conditions precedent to the qualification of the partnership as an LLP.

9. *Mandatory Annual Report and Fee for LLP*. A limited liability partnership is required under Section 620.9003 of FRUPA to file an annual report and pay an annual filing fee to the Department. Failure to file this Report or pay the fee may result in administrative revocation of the partnership's LLP status, but revocation is not an event of dissolution for the partnership. The statute does not provide for revocation of LLP status if the partnership fails to maintain a registered agent for service of process, although the annual LLP report must identify the name and address of the current registered agent. The opinion that the LLP's "status is active" does not mean or imply that there are no grounds existing under the statute for administrative or judicial revocation of its limited liability status, and Opining Counsel is under no obligation to conduct any investigation regarding this issue. If Opining Counsel is aware, however, that grounds exist to dissolve the entity, Opining Counsel should advise the Client to take the necessary steps to cure such circumstances, since dissolution of the Client will usually constitute a violation of the Transaction Documents.

10. *Foreign Entity*. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the entity organization, existence and status of a general partnership or of a limited liability partnership organized under the laws of a foreign jurisdiction, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in rendering the organization, existence and status opinion with respect to a foreign general partnership or a foreign limited liability partnership, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Florida General Partnership.

In order to render an entity status and organization opinion with respect to a Florida general partnership, Opining Counsel should take the following actions:

- Obtain and examine a copy of the written partnership agreement, certified by a general partner as being a true and complete copy (including all amendments). If there is no written partnership agreement, Opining Counsel should not give an opinion with respect to the partnership and should counsel the Client to reduce their partnership agreement to writing.
- Opining Counsel should determine whether the agreement creates a partnership for a definite term or for a particular undertaking (and if so, determine that the term has not expired or the undertaking has not been completed), and whether it contains an agreement to wind up the partnership business upon the occurrence of a specific event (and if so, determine whether or not the specific event has occurred). In most cases, such confirmation will be best obtained through in a written certificate to counsel from a general partner of the Client.
- Obtain a factual certificate from one or more of the general partners identifying the present partners (there must be at least two) and verifying the absence of any circumstances that would require the dissolution of the partnership and the winding up of the partnership's business (see Section 620.8801 of FRUPA). The negated circumstances should be itemized so that the certificate will provide a factual basis for the opinion, rather than merely expressing a legal conclusion.
- Determine whether any partnership registration statement or other statements authorized by FRUPA have been filed with the Department with respect to the general partnership, and if so, obtain a certified copy of such filing(s). A filed registration statement provides Opining Counsel a means of verifying the information contained in the factual certificate described in the preceding paragraph, such as the identity of the partners (or it will identify an agent who maintains a list of the partners). A filed statement of partnership authority will also support (or contradict) Opining Counsel's conclusions regarding authorization of the Transaction and the Transaction Documents. See "Authorization of the Transaction."

- If Opining Counsel is requested to opine with respect to the partnership's registration under Florida's Fictitious Name Act, F.S. § 865.09, or optional registration under Section 620.8105 of FRUPA, Opining Counsel should determine that the respective registration requirements have been met by obtaining a certified copy of the fictitious name registration or the optional registration from the Department. If the general partnership has filed an optional FRUPA registration statement, then Opining Counsel need not confirm the partnership's registration under the Fictitious Name Act (because the optional registration under FRUPA will make the partnership exempt from the registration requirements of the Fictitious Name Act).

Additional Diligence Checklist for a Florida Limited Liability Partnership.

- Obtain and review a certified copy of the partnership's registration statement filed with the Department to confirm it meets all of the requirements of Section 620.8105 of FRUPA, including the requirement that all partners (and any agent appointed under Section 620.8105(1)(c)2 of FRUPA to maintain a list of partners) that are business entities must be organized or otherwise registered with the Department and must maintain an active status.
- Obtain and review a certified copy of the filed statement of qualification from the Department to confirm it meets all of the requirements of Section 620.9001(3) of FRUPA and the name requirements of Section 620.9002 of FRUPA, and to confirm that the effective date of its status as a limited liability partnership is prior to the effective date and time of the opinion.
- Obtain an "active status" certificate for the "limited liability partnership" from the Department. If the certificate indicates that the partnership's registration statement or its LLP qualification statement has been voluntarily cancelled under Section 620.8105(7) of FRUPA, Opining Counsel should not opine that the partnership is a limited liability partnership.
- If the "active status" certificate indicates that the partnership has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an opinion that the partnership is a limited liability partnership.

E. Florida Limited Liability Company

Recommended opinion:

The Client is a limited liability company organized under Florida law, and its status is active.

1. *Basic Meaning of this Opinion*. A Florida limited liability company ("**LLC**") is governed by Chapter 608 of the Florida Statutes, which is called the Florida Limited Liability Company Act ("**FLLCA**"). The opinion that a company "is a limited liability company organized under Florida law, and its status is active" means that (i) the company has complied in all material respects with the requirements for the formation of an LLC under the FLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company's existence began prior to the effective date and time of the opinion, (iv) the company is currently in existence, and (v) the company has not been converted into a different form of entity. Under Section 608.409 of the FLLCA, a Florida LLC is formed at the time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization, if such date is within five business days prior to the date of filing, or at any later date specified in the articles of organization). Section 608.409(3) of the FLLCA provides that the Department's filing of an LLC's articles of organization "is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization."

2. *Organized*. An opinion that an LLC is properly organized is part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 608.407 of the FLLCA, (iii) the articles of organization have been filed with the Department, (iv) the Client has at least one member, (v) a written operating agreement has been adopted by the member(s) of the LLC, and (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members. Sometimes the words "duly" is added before "organized." However, it does not change the meaning of the opinion or the diligence required to give the opinion.

   Generally speaking, the articles of organization for a Florida LLC rarely contains more than the minimum required information, although its filing constitutes notice of all facts that are set forth in the articles. The operating agreement is generally more substantive and by definition contains the provisions adopted for the management and regulation of the affairs of the LLC and sets forth the relationships of the members, managers and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement and an oral limited partnership agreement, Opining Counsel should not opine that an LLC is properly organized and existing if the LLC has not adopted a written operating agreement.

3. *Active Status vs. Validly Existing and in Good Standing*. The opinion that an LLC's status is "active" means that as of the date of the opinion the company is a limited liability company and is current with all filings and fees then due to the State of Florida. This opinion should be based on a certificate of status issued by the Department. Unlike the FBCA and FRULPA, the FLLCA does not specify the contents of a certificate of status for an LLC or state that its issuance may be relied upon as conclusive evidence of the existence of the LLC. Section 608.702 of the FLLCA does provide, however, that "[a] certificate under the seal of the Department, as to the existence or nonexistence of the facts relating to a limited liability company or foreign limited liability company, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated." This opinion uses the term "its status is active" since the "active status" language is used in the certificate

provided by the Department. However, Opining Counsel in Florida are often asked to render an opinion that an LLC is "validly existing and in good standing, "particularly if the Opinion Recipient is represented by out-of-state counsel. Under customary practice in Florida, the use of the phrase "validly existing and in good standing" in an opinion has the same meaning as "its status is active."

4. *General Exclusions for Opinion*. Unless otherwise expressly stated in the opinion letter, an opinion that an LLC's status is "active" does not mean that: (i) the LLC has established any tax, accounting or other records required to commence operating its business, (ii) the LLC maintains at its registered office any of the information required to be maintained under Section 608.4101 of the FLLCA, (iii) the members of the LLC will not have personal liability, or (iv) the LLC will be treated as a partnership for tax purposes.

5. *Involuntary Dissolution*. An opinion that an LLC's "status is active" merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution of the LLC. The circumstances under which an LLC may be administratively dissolved by the Department are set forth in Section 608.448 of the FLLCA and the grounds for judicial dissolution are specified in Section 608.449 of the FLLCA. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will usually constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 608.448(1)(b) of the FLLCA if the company is without a registered agent for 30 days or more, and under Section 608.416(2) of the FLLCA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.

6. *Foreign Entity*. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the organization, existence and status of an LLC organized under the laws of a jurisdiction other than Florida, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in giving an opinion regarding the organization, existence and status of a foreign limited liability company, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Florida Limited Liability Company. In order to render an entity status and organization opinion with respect to a Florida LLC, Opining Counsel should take the following actions:

- Obtain a certified copy of the LLC's articles of organization from the Department and review the articles of organization to ensure that they substantially comply with the requirements of Section 608.407 of the FLLCA.
- Obtain an "active status" certificate for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the LLC.

- Obtain and examine a copy of the LLC's operating agreement, certified by a manager of the LLC (if manager-managed) or by a member of the LLC (if member-managed) as being a true and complete copy, including all amendments. If there is no written LLC operating agreement, Opining Counsel should not give an opinion with respect to the LLC and should counsel the Client to reduce its operating agreement to writing.
- Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, determine whether a manager or managers have been appointed in accordance with the requirements of those documents (generally through delivery of a certificate to counsel from the Client).
- Obtain a current factual certificate from a manager of the LLC (if manager-managed) or from a member of the LLC (if member-managed), certifying that there is at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.

F. Florida Trusts.

Recommended opinion:

The Client is a trustee of a duly formed land trust pursuant to the provisions of the trustee agreement dated [and Section 689.071, Florida Statutes].

1. **In General**. In each case in which title to real property is held by a trustee, whether or not the trustee has the benefit of any statutory presumption concerning the organization of the trust and his or her authority or deal with the property, Opining Counsel must review the trust instrument to ensure that the trustee complies with all its requirements. If Opining Counsel determines that the trust is "passive," that is, that the trustee has no active managerial or decision-making authority, then the beneficiaries, as well as the trustee, should execute all necessary Transaction Documents. See, Fund Title Note 31.03.03 (2001). Furthermore, Opining Counsel should cause to be recorded in the public real estate records either (i) the unrecorded trust instrument (to which the Client may object) or (ii) an affidavit by the trustee or the trustee's counsel establishing the identity of the trustee, the execution of the trust instrument, the power and authority of the trustee to act under the trust instrument, and that the trustee's power and authority have not been revoked and remain in full force and effect. Additionally, Opining Counsel should obtain a properly executed certificate of consent or similar instrument from each beneficiary of the trust who has a power of direction, in which (A) all such beneficiaries, as well as the holders of any security interests in their beneficial interests, are identified, and (B) the trustee is directed to consummate the Transaction and execute and deliver the Transaction Documents. If any holders of security interests are identified, Opining Counsel should confirm that they have consented to the Transaction.

2. **Effect of Presumption Arising Under Section 689.071, Florida Statutes**. A Florida land trust arises under Section 689.071, Florida Statutes (the Florida Land Trust Act), when a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers, as required by that statute. The trustee of a Florida land trust derives his, her, or its power or capacity to transact business on behalf of the trustee from Section 689.071, Florida Statutes, the trust agreement and the deed or other instrument of conveyance naming the trustee as grantee or transferee. However, even if Opining Counsel has determined that the deed of conveyance meets the requirements of Section 689.071 of the Florida Statutes and is presumed to be a valid land trust, Opining Counsel must still review the underlying trust agreement and observe the requirements of diligence and documentation described in paragraph 1 above. This means that Opining Counsel may not rely exclusively upon the statute in opining that the trustee has the power and authority to encumber or transfer the trust property, without examining the applicable trust instruments and obtaining any necessary consents or approvals disclosed by such examination.

3. **Effect of Presumption Arising Under Section 689.07, Florida Statutes**. Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, grants an absolute fee simple estate in the real property to the "trustee," individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida land trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should ensure that the 'trustee" executes the Transaction Documents in his or her individual capacity. In such case, however, the owner of the real property is not the trustee of a trust and no special form of opinion is necessary. Because the deed indicated that the putative "trustee" was acquiring title in a trust capacity, however, Opining Counsel should ask, and require a certificate from, the "trustee," regarding whether he or she has made a declaration of trust and, if so, whether any written trust instrument or instruments exist. If a trust actually exists, then Opining Counsel should comply with the provision of subsection 1 above regarding appropriate certificates from the trust beneficiaries.

Diligence Checklist – Trusts.

- If the Trustee is a corporation, confirm that the corporation is validly organized and in good standing in the state of its incorporation and, if it is a foreign corporation required to register to conduct business in Florida, it has so registered as required by Florida law.
- If the deed or other instrument of conveyance is dated prior to July 3, 1992, and the trustee is a corporation, confirm that the corporation has trust powers. As of July 2, 1992, those portions of Section 660.41, Florida Statutes, which mandated that corporate trustees have trust powers, were repealed. Thus, if the deed or other instrument of conveyance is dated after July 2, 1992, and the trustee is a corporation, it is unnecessary to confirm the existence of trust powers. See Fund Title Note 31.02.06 (12/2005). The existence of trust powers for state chartered institutions may be confirmed by obtaining a Certificate from the Department of Banking and Finance, and the existence of such powers for federally chartered institutions may be obtained from the Comptroller of the Currency, at the following address:

  Director, Division of Banking
  Department of Banking and Finance
  The Capitol Building
  Tallahassee, Florida 32399-0350

  Comptroller of the Currency
  Southeastern District
  Peachtree-Cain Tower, Suite 2700
  229 Peachtree Street, N.E.
  Atlanta, Georgia 30303

  Also, Opining Counsel should carefully examine any exculpatory or other language included with the trustee's signature to determine whether it affects any opinion to be given by Opining Counsel.
- In order to opine that the Client is the trustee of a land trust that is in compliance with the provisions of Section 689.071 of the Florida Statutes, Opining Counsel should examine the deed or other instrument or conveyance naming the trustee as grantee or transferee for compliance with the requirements set forth in such section.

G. Florida Not-For-Profit Corporation

Florida's not-for-profit statute (Chapter 617, Florida Statutes) sets forth the requirements regarding the organization and existence of a Florida not-for-profit corporation. These requirements are similar to those for a Florida for-profit corporation. As a result, the requirements described in "Corporation" above should be followed in connection with rendering an opinion with respect to the status and organization of a Florida not-for-profit corporation.

AUTHORIZATION TO TRANSACT BUSINESS IN FLORIDA

A. Qualification of a Foreign Entity to Transact Business in Florida

In connection with a Transaction that has a Florida nexus, if Opining Counsel's Client is a foreign corporation, a foreign limited partnership, a foreign general partnership, a foreign limited liability partnership, a foreign limited liability company or a foreign trust, Opining Counsel may be requested to provide an opinion as to whether the Client is required to register with the Department as a foreign entity authorized to transact business in Florida. Under Florida customary practice, it is allowable to request an opinion regarding whether a Client that is a foreign entity needs to register in Florida. In addressing that legal issue, Opining Counsel will need to determine whether the Client's activities in Florida are substantial enough to require that such foreign entity register with the Department to transact business in this state.

If the Client entity merely owns or mortgages real property or personal property located in Florida, without more, then the "safe-harbor" provisions of each of Florida's business entity statutes provide that the Client entity will not be required to obtain authorization to transact business in Florida. On the other hand, the widely held view is that the ownership in Florida of income-producing real or tangible personal property most likely constitutes transacting business in Florida and requires a foreign entity to register with the Department to transact business in Florida. As such, in most cases where the Client foreign entity has assets or business interests in Florida, the Client will be required to register to transact business with the Department.

Opinion Recipients often request that Opining Counsel provide an opinion that the Client is authorized to transact business as a foreign entity in every jurisdiction in which the Client's property or activities requires qualification or where the failure to qualify would have a material adverse effect on the Client. This is an inappropriate opinion to request. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." However, under Florida customary practice, it is appropriate to request an opinion that a foreign entity Client is authorized to transact business in Florida. Obviously, such an opinion can be given only if the foreign entity Client is so authorized, and if such opinion is rendered, it may be based solely on the receipt of a certificate of status issued by the Department. In that regard, in rendering this opinion Opining Counsel is not required to review the information that was provided by the Client to the Department in order to register the Client entity to transact business in Florida.

An opinion that the Client is authorized to transact business in Florida is premised on the fact that the Client foreign entity is properly organized and is in good standing as an entity under the laws of another jurisdiction. Accordingly, if Opining Counsel is not rendering an opinion as to the Client entity's status and organization, then in an effort to avoid any such implied opinion, the foreign entity's status under the laws of the foreign jurisdiction should be expressly assumed in the opinion letter.

Sometimes an opinion regarding "authorization to transact business" in Florida will use the words "qualified to do business" instead of "authorized to transact business." The words "authorized to transact business" are preferred because they are contained in the statutes governing foreign entities transacting business in Florida (the FBCA, the FLLCA, FRULPA and FRUPA). However, whichever words are used, they are deemed to have the same meaning under Florida customary practice.

Counsel should advise the foreign entity Client about the impact of failing to register to transact business in Florida, including fees that may be due to the Department for failure to register and the fact that the Client will not be permitted to prosecute litigation in Florida if the Client does not register (but will nevertheless be permitted to defend litigation brought against the Client in Florida whether or not the Client registers to transact business in Florida). The applicable sections of Florida's entity statutes that reflect the administrative penalties for failing to register to transact business in Florida are contained in Section 607.1502 of the FBCA, Section 620.1907 of FRULPA, Section 620.9103 of FRUPA and Section 608.5135 of the FLLCA. Opining Counsel should also advise the Client as to the ancillary consequences of registration, such as the application of the Florida corporate income tax under Chapter 220 of the Florida Statutes to a foreign corporation that registers to transact business in Florida.

1. Foreign Corporation

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a foreign corporation in the State of Florida, and its status is active.

If a foreign corporation has obtained a certificate of authority to transact business in the State of Florida, then the diligence required to render this opinion is simple. In such circumstances, Opining Counsel should obtain an "active status" certificate from the Department and may rely on such certificate in issuing an opinion that the Client foreign corporation is authorized to transact business in Florida and has active status in Florida. Section 607.0128(3) of the FBCA provides that, "[s]ubject to any qualification stated in the certificate, a certificate of status or authority issued by the department may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state."

If Opining Counsel is asked to opine as to whether or not Florida registration is required for a foreign corporation, Opining Counsel must evaluate whether such authorization is required. In carrying out the evaluation, Opining Counsel should obtain a factual certificate from a responsible officer of the Client describing the full scope of the foreign corporation's business activities in Florida. Opining Counsel should then review Section 607.1501(2) of the FBCA, which lists certain "safe harbor" activities in Florida that do not require a foreign corporation to obtain a certificate of authority to transact business. If the safe harbor exemptions do not apply, in virtually all other cases a foreign corporation will need to register with the Department. If registration appears to be required, Opining Counsel should not render an opinion regarding authorization to transact business unless such registration is effected.

Even if a foreign corporation is not deemed to be transacting business in Florida requiring registration with the Department, a so-called "RICO" agent will need to be appointed pursuant to Section 607.0505(10) of the FBCA if (A) the corporation owns Florida real property or (B) if the corporation owns a mortgage on Florida real property but is not exempt from this requirement as a "financial institution" as defined in Section 607.0505(11) of the FBCA. It should be noted that this agent is often called a "RICO" agent because this provision to the FBCA was added in 1984 in connection with the adoption of the Florida RICO Act, which sought to give law enforcement agencies expanded powers to fight organized crime. The "RICO" Agent provisions in the FBCA are very broad and are likely to apply to other types of foreign entities that own a mortgage on Florida real property, even though there are no comparable RICO provisions in the entity statutes in Florida with respect to such other types of entities.

The circumstances under which a foreign corporation's certificate of authority may be administratively revoked by the Department are set forth in Section 607.1530 of the FBCA, such as the foreign corporation's failure for 30 days or more to maintain a registered agent in the state, or its failure to file the required annual report or pay any required fees. Even if circumstances exist that could result in administrative revocation of the foreign corporation's certificate of authority with the passage of time, Opining Counsel may opine that a foreign corporation is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has Knowledge that circumstances for the future revocation of the Client's certificate of authority do exist at the time the opinion is rendered, the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will likely constitute a violation of the Transaction Documents and will also preclude the Client foreign corporation from maintaining any legal proceedings in a Florida court.

2. Foreign Limited Partnership

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a foreign limited partnership in the State of Florida, and its status is active.

FRULPA provides, in Section 620.1903(1), a "safe harbor" list of activities by a limited partnership that do not constitute transacting business in Florida, which list is similar to the safe harbor lists for foreign business entities contained in the FBCA and FLLCA. One noteworthy distinction is that Section 620.1903(3) of FRULPA expressly provides that "the ownership in this state of income-producing real property or tangible personal property," other than property excluded under the safe harbor list in subsection (1), constitutes transacting business in the State of Florida. The widely held view is that under Florida law all foreign business entities that own income-producing Florida property must qualify to transact business in Florida.

One notable safe harbor activity in Florida is a foreign business entity's ownership of a limited partnership interest in a limited partnership that is doing business in Florida, unless that limited partner manages or controls the partnership or exercises the powers and duties of a general partner. See Section 607.1501(2)(*l*) of the FBCA, Section 608.501(2)(*l*) of the FLLCA, Section 620.1903(1)(*l*) of FRULPA and Section 620.9104(1)(*l*) of FRUPA. Conversely, FRULPA requires, as a condition to the Department filing of a Florida certificate of limited partnership or a certificate of authority for a foreign limited partnership, that any general partner that is not an individual must be organized under Florida law or otherwise be registered to transact business in Florida. See Sections 620.1201(1)(c) and 620.1902(1)(e) of FRULPA.

In order to opine that a Florida certificate of authority is not required for a foreign limited partnership, Opining Counsel should obtain a factual certificate from a general partner of the Client describing the full scope of the foreign limited partnership's business activities in Florida, and then determine whether those activities go beyond the safe harbor exceptions listed in Section 620.1903(1) of FRULPA. However, in most cases, registration to transact business will be required.

If Opining Counsel is requested to render the recommended "authorized to transact business" opinion for a foreign limited partnership, Opining Counsel should obtain a certificate of active status for that partnership from the Department under 620.1209(2) of FRULPA. However, if the foreign limited partnership has not registered and obtained a certificate of authority from the Department, the Department cannot issue a certificate of active status. Thus, in such circumstance, the Opining Counsel will need to advise the limited partnership to apply for a certificate of authority in accordance with the requirements of Section 620.1902 of FRULPA.

To obtain a certificate of authority, a foreign limited partnership must comply with the name requirements set forth in Section 620.1108(2) of FRULPA (i.e., the name must contain the phrase "limited partnership" or "limited" or the abbreviation "L.P." or "Ltd." or the designation "LP") or adopt an alternate complying name under Section 620.1905 of FRULPA. Further, under Section 620.1902(1)(e) of FRULPA, the Department will not issue a certificate of authority for a foreign limited partnership unless all general partners that are business entities are either organized under Florida law or are authorized to transact business in Florida as foreign business entities.

The RICO agent registration provisions previously contained in Florida's limited partnership statute were removed from Florida's limited partnership statute in 2005 when FRULPA was enacted. However, the broad application of Section 607.0505(10) of the FBCA likely still requires a foreign limited partnership that is not required to register to transact business in Florida to appoint a "RICO" agent for service of process.

After the foreign limited partnership has obtained a certificate of authority to transact business in Florida, Opining Counsel can then obtain a certificate of active status for that partnership from the Department under Section 620.1209(2) of FRULPA. Subsection (3) of that statute provides that, "[s]ubject to any

qualifications stated in the certificate, a certificate of status issued by the Department may be relied upon as conclusive evidence that the … foreign limited partnership … is authorized to transact business in this state." Under customary practice in Florida, Opining Counsel may rely solely on the certificate of active status issued by the Department in rendering the recommended opinion.

The circumstances under which a foreign limited partnership's certificate of authority may be administratively revoked by the Department are set forth in Section 620.1906 of FRULPA, such as the foreign limited partnership's failure to maintain a registered agent in the state or its failure to file the required annual report or to pay any required fees. Even if circumstances exist that could result in administrative revocation of the foreign limited partnership's certificate of authority with the passage of time, Opining Counsel may opine that a foreign limited partnership is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has Knowledge that circumstances for future revocation of the Client's certificate of authority exist at the time the opinion is rendered, the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client foreign limited partnership's certificate of authority will likely constitute a violation of the Transaction Documents and will also preclude the Client foreign limited partnership from maintaining any legal proceeding in a Florida court.

3. Foreign General Partnership

Except to the extent that the Florida Fictitious Name Act (Section 865.09, Florida Statutes) might apply, there are no statutory requirements that a foreign general partnership register with the Department. Thus, it is not appropriate for Opining Counsel to render an opinion that a foreign general partnership is authorized to transact business as a foreign general partnership in Florida.

If Opining Counsel agrees to render an opinion that a foreign general partnership does not need to register to transact business in Florida, the recommended opinion language is a follows:

> ***The Client is not required to register to transact business in Florida.***

The optional partnership registration system under FRUPA is available to foreign general partnerships, and Section 620.8105(4) of FRUPA provides that a certified copy of a partnership registration statement filed in another jurisdiction may be filed in Florida in lieu of an original statement. If a foreign general partnership has filed an optional FRUPA registration statement in Florida, then the Client is exempt from registration under the Fictitious Name Act. On the other hand, a foreign general partnership that is transacting business in Florida and that has not elected to register under the optional partnership registration system under FRUPA may be required to register its name under the Fictitious Name Act. See "Entity Status and Organization – Florida General Partnership." The Fictitious name registration and the FRUPA registration are a different type of registration than registration to transact business in Florida.

4. Foreign Limited Liability Partnership

> ***Recommended opinion:***
>
> **Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a foreign limited liability partnership in the State of Florida, and its status is active.**

Sections 620.9001 through 620.9105 of FRUPA include a provision whereby a foreign LLP may file a "statement of foreign qualification" to transact business in Florida, and a provision (in Section 601.9104(1) of FRUPA) setting forth a "safe harbor" list of activities by a foreign LLP that do not constitute transacting business in this state (which list parallels the safe-harbor list contained in FRULPA). Like Section 620.1903(3) of FRULPA, Section 620.9104(2) of FRUPA expressly provides that "the ownership in

this state of income-producing real property or tangible personal property," other than property excluded under the safe harbor list in Section 620.9104(1) of FRUPA, constitutes transacting business in the State of Florida. The widely held view under Florida law is that Section 620.9104(2) requires all foreign business entities that own income-producing Florida property to register to transact business in Florida.

Because the safe-harbor lists in FRULPA and FRUPA are nearly identical, the diligence required to render the "authorized to transact business" opinion for a foreign LLP is similar to that required for a foreign limited partnership. In order to opine that a Florida statement of foreign qualification is not required for a foreign LLP, Opining Counsel should obtain a factual certificate from a general partner of the Client describing the full scope of the foreign LLP's business activities in Florida, and then determine whether those activities go beyond the safe harbor exceptions listed in Section 620.9104(1) of FRUPA. However, in most cases, registration to transact business in Florida will be required.

If Opining Counsel is requested to render the recommended "authorized to transact business" opinion for a foreign LLP, Opining Counsel must obtain a certificate of active status for that LLP from the Department. However, if the foreign LLP has not obtained a statement of authority from the Department, the Department cannot issue a certificate of active status. Thus, in such circumstances the Opining Counsel will need to advise the LLP to file a statement of foreign qualification in accordance with the filing procedures set forth in Section 620.9102 of FRUPA.

The statement of foreign qualification under Section 620.9102 of FRUPA requires the appointment of a registered agent for service of process in Florida and requires that the name of the foreign limited liability partnership must end with "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP" or "LLP." A statement of foreign qualification cannot be filed, however, unless the partnership also files a partnership registration statement with the Department in accordance with the requirements of Section 620.8105 of FRUPA. Under Section 620.8105(3) of FRUPA, one key requirement for a partnership registration statement is that all of the partners in the registered partnership (as well as any agent appointed by the partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) that are business entities must be organized or otherwise registered with the Department to transact business in Florida.

After the foreign LLP has registered with the Department under Section 620.8105 of FRUPA and filed its statement of foreign qualification under Section 620.9102 of FRUPA, Opining Counsel can then obtain a certificate of active status for the LLP from the Department. Unlike the FBCA and FRULPA, the LLP provisions of FRUPA do not contain a provision declaring that a certificate of status issued by the Department is "conclusive evidence" of the foreign LLP's qualification. However, as a diligence matter a certificate of status obtained from the Department with respect to a foreign LLP is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and Opining Counsel may rely on such certificate when rendering the recommended opinion.

A foreign LLP is required under Section 620.9003 of FRUPA to file an annual report and pay an annual filing fee to the Department. Failure to file the annual report or to pay the fee may result in administrative revocation of the partnership's status as a LLP, but revocation is generally not an event of dissolution for the LLP (unless the partnership agreement so provides). The statute does not provide for revocation of LLP status if the partnership fails to maintain a registered agent for service of process, although the annual LLP report must identify the name and address of the current registered agent. Neither the opinion that the foreign LLP is "registered to transact business" or "its status is active" means or implies that there are no grounds existing under the statute for administrative revocation of its limited liability status. However, if Opining Counsel has Knowledge that circumstances for future revocation of the Client's certificate of authority exists at the time the opinion is rendered, the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client LLP's certificate of authority will likely cause a violation of the Transaction Documents and will also preclude the Client LLP from maintaining a legal proceeding in a Florida court.

5. Foreign Limited Liability Company

Recommended Opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a foreign limited liability company in the State of Florida, and its status is active.

Section 608.501(1) of the FLLCA requires a foreign limited liability company ("LLC") to register with the Department prior to transacting business in Florida. Section 608.501(2) of the FLLCA provides a "safe harbor" list of activities in Florida by a foreign LLC that do not constitute transacting business; which list is substantially the same as those contained in Section 607.1501(2) of the FBCA and Section § 620.1903(1) of FRULPA, as discussed above.

If a foreign LLC has obtained a certificate of authority to transact business in the State of Florida, Opining Counsel should obtain an "active status" certificate from the Department. Unlike the FBCA and FRULPA, FLLCA does not contain a provision declaring that a certificate of status issued by the Department is "conclusive evidence" of the LLC's existence or authorization to transact business. The closest analogous provision is Section 608.505(1) of the FLLCA, which provides that "[a] certificate of authority authorizes the foreign limited liability company to which it is issued to transact business in this state subject, however, to the right of the Department to suspend or revoke the certificate as provided in this chapter." However, a certificate of status obtained from the Department with respect to a foreign LLC is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and Opining Counsel may rely upon such certificate when rendering an opinion that a foreign LLC is authorized to transact business in Florida.

If Opining Counsel is asked to opine as to whether or not Florida registration is required for a foreign LLC, Opining Counsel must evaluate whether such authorization is required. In carrying out that evaluation, Opining Counsel should obtain a factual certificate from a manager of the Client (if manager-managed) or a member of the Client (if member-managed) describing the full scope of the foreign LLC's business activities in Florida. Opining Counsel should then determine whether those activities fall within the safe harbor provisions of Section 608.501(2) of the FLLCA. If the safe harbor exemptions do not apply, in virtually all cases the foreign LLC will need to register with the Department.

A foreign LLC may not register to transact business in Florida unless its name satisfies the same requirements applicable to domestic limited liability companies under Section 608.406 of the FLLCA (i.e., its name must end with the words "limited liability company" or "limited company" or the abbreviations "L.L.C." or "L.C." or the designations "LLC" or "LC").

The circumstances under which a foreign LLC's certificate of authority may be administratively revoked by the Department are set forth in Section 608.512 of the FLLCA, such as the foreign LLC's failure for 30 days or more to maintain a registered agent, or its failure to file the required annual report or pay any required fees. Even if circumstances exist that could result in administrative revocation of the LLC's certificate of authority with the passage of time, Opining Counsel may opine that a foreign LLC is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has Knowledge that circumstances for future revocation of the Client's certificate of authority exist at the time the Opinion is rendered, the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the foreign LLC's certificate will likely constitute a violation of the Transaction Documents and will also preclude the foreign LLC from maintaining any legal proceeding in a Florida court.

6. Land Trust with Foreign Trustee

There is no statutory requirement that an individual non-resident of Florida serving as the trustee of a trust owning Florida real property register to conduct business in Florida prior to transacting business in this State. This is true whether or not the trustee is entitled to the benefits of Section 689.071, Florida Statutes

(the Florida Land Trust Act). Additionally, there is no statutory requirement that a foreign corporation or other foreign business entity serving as the trustee of a trust owning Florida real property register to conduct business in Florida prior to transacting business in this state merely because of its status as a trustee. Opining Counsel should be aware, however, that other Florida statutes may apply to require registration to transact business in Florida by the trustee entity independent of its trustee status.

7. Not-For-Profit Corporations

Florida's not-for-profit statute (Chapter 617, Florida Statutes) has provisions that require a foreign not-for-profit corporation to register to transact business in this state if such entity is engaged in business activities or holds income producing property in Florida. The requirements described in "Corporation" above should be followed in connection with rendering an opinion that a foreign not-for-profit corporation is registered to transact business in Florida.

B. Lender Not Required to Register As a Foreign Corporation in Florida to Make a Loan

When representing a Client in connection with a loan transaction, Florida Opining Counsel may be asked to opine on the issue of whether an out-of-state lender is required to be authorized to transact business in Florida in order to make a loan to a Florida entity or make a loan secured by Florida property. Each of the Florida business entity statutes (for corporations, limited liability companies and general and limited partnerships) includes the following activities in its safe harbor list of activities that do not require a lender to become authorized to transact business in Florida: (i) creating or acquiring indebtedness, mortgages, or security interests in real or personal property; and (ii) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts. See Sections 607.1501(2)(g) and (h) of the FBCA, Sections 608.501(2)(g) and (h) of the FLLCA, Sections 620.1903(1)(g) and (h) of FRULPA, and Sections 620.9104(1)(g) and (h) of FRUPA. For foreign limited partnerships and foreign limited liability partnerships, the following additional phrase appears at the end of Section 620.1903(1)(h) of FRULPA and Section 620.9104(1)(h) of FRUPA: "and holding, maintaining and protecting the property so acquired."

However, if a lender participates in any activity not specified within the safe harbor list, it may be required to register with the Department to transact business in Florida. These other activities could include having a physical premises in Florida, having loan officers in Florida, and operating a business on property that has been foreclosed, and could even include making a number of loans to Florida entities or secured by Florida property.

There is a possibility that with respect to an entity possessing a national or federal charter, such as a national bank, principles of federal preemption will prevent the entity from being subject to the Florida requirement for registration for authorization to transact business. That concept, however, is beyond the scope of this Report.

If such an opinion is rendered for an out of state lender, the recommended opinion is as follows:

> **Neither the making of or securing collateral from the [Loan] nor the enforcement of the [Transaction Documents] in the State of Florida, will, solely as the result of such actions, require the [Lender] to obtain a certificate of authority to transact business as a foreign [corporation/limited partnership/general partnership/limited liability partnership/limited liability company] in the State of Florida.**

The following language may be added by Opining Counsel if Opining Counsel wishes to state explicitly that no other activities are contemplated by the opinion:

> **However, we express no opinion with respect to the effect upon the [Lender] of engaging in any other activities in the State of Florida (including the making of additional loans in the State of Florida) or the effect upon the [Lender] of having a physical presence, if any, in the State of Florida.**

This opinion does not mean (among other things) that (i) the lender is not subject to personal jurisdiction in this State, (ii) the lender may not be served with process in this State, or (iii) the lender will not be subject to Florida taxes in connection with the loan.

If the Opinion Recipient requires a broader opinion which extends to otherwise requiring qualification or registration of the Lender in the State of Florida, and Opining Counsel agrees to give such an extended opinion, Opining Counsel should consider the possible applicability of the registration requirements of Section 607.0505, Florida Statutes, and the requirements governing mortgage lenders at Part III, Chapter 494, Florida Statutes. In such circumstances where an extended opinion is given, unless the applicability or non-applicability of the requirements is clear, the Opinion Recipient should be prepared to accept a qualification to the opinion such as the following:

... except that (i) if the [Lender] is not a "financial institution" as defined in Section 607.0505, Florida Statutes (which definition includes, but is not limited to, state and national banks and state and federal savings associations, insurance companies licensed or regulated by the United States or a state, and licensed Florida mortgage lenders) such person may be required to maintain a registered office and a registered agent in the State of Florida and file a notice thereof with the Department of State under Section 607.0505, Florida Statutes, (ii) upon the taking of title to any of the collateral or the operation of the facilities thereon located within the State of Florida, the person taking title or taking such action may be subject to doing business and registration requirements under Sections 607.0505 and 607.1501, Florida Statutes, (iii) the Lender may be required to be licensed as a Florida mortgage lender unless the Lender makes only nonresidential mortgage loans and sells loans only to institutional investors within the meaning of Chapter 494, Florida Statutes, or unless the Lender is a state or federally chartered bank, trust company, savings and loan association, savings bank or credit union, bank holding company regulated under the laws of any state or the United States, or insurance company if the insurance company is duly licensed in Florida, or is a wholly owned bank holding company subsidiary or a wholly owned savings and loan association holding company subsidiary that is formed and regulated under the laws of any state or the United States and that is approved or certified by the Department of Housing and Urban Development, the Veterans Administration, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or is otherwise exempt.

In some cases, the Opinion Recipient may ask for an opinion that describes the repercussions of the failure of an out of state bank to transact business or to register under Section 607.0505, as a matter of comfort for the Opinion Recipient. In such cases, the following may be included in the opinion:

Failure to become authorized to transact business under Section 607.1501, Florida Statutes, if required, will result in the inability of the entity to bring suit in the State of Florida (until qualified) but will not prevent the entity from defending itself in a lawsuit in Florida, and will entitle the Department to impose the fees and taxes that would have been charged if the entity had been qualified together with a civil money penalty of not less than $500 or more than $1,000 for each year or part thereof during which the entity transacted business without qualifying. Failure to register under Section 607.0505, Florida Statutes, if required, will not result in the inability of the entity to either bring suit or defend itself in a suit in the State of Florida, but will entitle the Department to impose the a civil money penalty in the amount of $500 for each year or part thereof during which the entity should have been registered. Such liability will be forgiven in full upon the compliance by the entity with the registration requirements. Additional penalties and consequences, including the filing of a lis pendens, could result from any proceedings brought by the Florida Department of Legal Affairs to enforce the registration provisions of this section. However, failure of an entity to become authorized to transact business under Section 607.1501, Florida Statutes, or failure to register under Section 607.0505, Florida Statutes, if required, does not adversely affect the creation or perfection of liens in favor of the entity.

C. Opinions regarding Qualification of a Florida Entity under the Laws of another Jurisdiction

Florida counsel are sometimes asked to opine whether a Florida entity is authorized (or qualified) to transact business in one or more other states.

A blanket request that an opinion be provided that the Client is authorized to transact business as a foreign corporation in every jurisdiction in which its property or activities requires qualification or in which the failure to qualify would have a material adverse effect on the Client is an inappropriate opinion request.

In a multi-state transaction involving a Florida business entity, an opinion may be requested as to whether a Florida entity is required to be qualified in a particular state where the entity engages in a particular activity in that other state. If such a request is made, Opining Counsel will need to determine whether it is competent to render such opinion, which is an opinion under the laws of another jurisdiction. Florida counsel who render such an opinion will be held to the standard of care of a competent lawyer in the jurisdiction on whose laws it is opining. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The form of such opinion and the diligence required to give such opinion are beyond the scope of this Report.

However, although opinions on authorization to transact business under the laws of states other than Florida are outside the scope of this Report, Florida counsel are often requested to render an opinion that a Florida entity (or an entity organized in another jurisdiction such as Delaware) is authorized (or qualified) to transact business in one or more states based solely on a "good standing" or "active status" certificate from the governmental agencies in such other states. Although technically such an opinion is considered an opinion under the laws of another jurisdiction, this opinion conveys to the Opinion Recipient the comfort that Opining Counsel has confirmed with authorities in such other state or states that the particular entity that is the subject of the opinion is in fact registered or qualified to transact business in such other state or states. Of course, on the other hand, it is not unreasonable to insist that an Opinion Recipient forgo requesting this opinion because the Opinion Recipient will usually be obtaining, and can rely directly on, the certificates of status from the governmental authorities in each state where the entity is qualified to do business. However, if Opining Counsel elects to render such opinion, Opining Counsel will have no obligation to assess the requirements of the laws of the other jurisdiction as to whether the requirements of that jurisdiction have been met, other than to obtain a "good standing" or "active status" certificate from the particular state's equivalent of the Department.

If this opinion is rendered, the recommended form is as follows:

> **Based solely on a [certificate of good standing/active status] from the _____ (the governmental authority in the state in which the Client is authorized to transact business), the Client is qualified [registered] to transact business as a foreign [corporation/limited partnership/limited liability partnership/limited liability limited partnership/limited liability company] in the State of _____.**

In all states, "good standing" or "active status" certificates are available from the Secretary of State, Department of Corporations, or other equivalent authorities that oversee entity formation and operation. In some states, but not in Florida, "good standing" certificates are also available from state taxing authorities. If Florida counsel renders an opinion that a Florida entity is authorized to transact business in another jurisdiction based solely on certificates of "good standing" or "active status" from the respective governmental authorities that oversee entity formation and operation in the states where the Client engages in business activities, Opining Counsel shall have no obligation to determine whether tax status certificates are available in those states and no obligation to obtain any such tax status certificates in rendering this opinion, and the opinion shall not be viewed as implying that any such tax status certificate has been obtained or that the Florida entity is in "good standing" from the perspective of its tax status.

ENTITY POWER (AND AUTHORITY)

An opinion regarding "entity power" addresses the capacity of the Client entity under the Florida law governing such entity's organization and existence and under such entity's Organizational Documents to execute and deliver the Transaction Documents and to perform its obligations thereunder. The "entity power" opinion expresses Opining Counsel's judgment that the Transaction will not be enjoined or challenged as being beyond the Client's statutory powers and beyond the powers granted by the Client's Organizational Documents. Although the words "power and authority" were both historically used in this opinion, the use of the term "authority" is believed by the Committees to be superfluous. Additionally, the historic use of the word "authority" in this opinion has often been misunderstood to relate to opinions regarding authorization of a Transaction. See "Authorization of the Transaction." Accordingly, the term "authority" has been omitted from the form of entity power opinion recommended by this Report. However, if the term "authority" is used in an entity power opinion (along with the word "power"), it does not change the meaning of the opinion. Nevertheless, the term "authority" is included in the title to this section of the Report (in parentheses) since this opinion is commonly referred to by Florida lawyers as the "power and authority" opinion.

It is unnecessary in an opinion on entity power to state that an entity has "full," "all" or "all necessary" entity power. Use of these terms does not add to the opinion and does not change the scope or meaning of the opinion in any manner. Similarly, the recommended forms of the entity power opinion do not reference entity power to "enter into" or "consummate" the Transaction Documents (or the main agreement among the Transaction Documents), because those terms are ambiguous. Rather, the entity power opinion reflects the power of the entity to execute and deliver the Transaction Documents and to perform its obligations thereunder (which are the specific acts to be performed by the entity). However, if the terms "enter into" and "consummate" are used in an entity power opinion, under Florida customary practice such opinion is deemed to have the same meaning as if the words "execute and deliver" and "perform" were used in the opinion.

In the context of this opinion, an entity's power to "perform" its obligations under the Transaction Documents means that the entity has the power under the entity's governing law and Organizational Documents to complete its obligations under the Transaction Documents as of the date of the opinion and under the circumstances then presented. It does not mean that the entity's performance of its obligations in the Transaction will withstand all challenges from all parties, but rather, only challenges under the entity's governing law and the entity's Organizational Documents on the grounds that the entity's actions are *ultra vires* or in breach of the entity's Organizational Documents. This opinion is different from an opinion that the entity's entering into the Transaction will not violate laws or agreements applicable to the entity or a remedies opinion regarding the enforceability against the entity of the Transaction Documents. See "No Violation and No Breach or Default" and "The Remedies Opinion." Further, an entity power opinion does not address the effect on the entity's purpose or powers under laws other than the entity's governing law. In particular, this opinion does not address: (i) the laws of any jurisdiction in which the entity is or should be qualified to do business as a foreign entity, (ii) laws that govern the activities of an entity that is in a regulated business, and (iii) laws that could create or restrict the exercise of entity power or purpose, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

Under Florida customary practice, an opinion as to the power of an entity to conduct its business and own its properties means that the entity has the power under the Florida laws governing the entity and under the entity's Organizational Documents to lawfully conduct its business generally and own its properties. In this regard, if the entity is engaged in a regulated business, such as the banking business, reference may be necessary to other governing statutes in order to determine whether the entity is in compliance with such laws, but not for the entity power opinion, which is solely limited to powers under the entity's governing law. As a result, only in rare circumstances will there ever be an issue as to whether an entity has the capacity to engage in a particular business, since the respective Florida statutes governing the powers of entities are very broad. However, for a discussion on the impact of SPE provisions on an entity's power, see "Special Purpose Entities" below.

An entity power opinion is not an opinion that the Client's business is being operated in a lawful manner and does not mean that Opining Counsel has evaluated how the Client entity is conducting its business. Further, such opinion does not address whether the Client has good title to its properties, possesses all required governmental licenses or has all required approvals from those governmental bodies that regulate the Client entity. Additionally, no diligence as to the manner in which the Client entity is actually operating its business is required in order to render the entity power opinion.

It is assumed in an opinion of Florida counsel on entity power that the Client entity is being operated in a lawful manner, unless Opinion Counsel has Knowledge to the contrary. However, if Opining Counsel has Knowledge that the Client entity is being operated in an unlawful manner, Opining Counsel should consider its ethical obligations under the circumstances and determine whether or not it should render any opinions with respect to the Transaction. See "Introductory Matters-Ethical and Professional Issues."

Although Opining Counsel often put language in the entity power opinion as to the power of the entity to conduct is business and own its properties, the use of such language is discouraged because of the limited scope of coverage of this opinion as it is defined under Florida customary practice.

The entity power opinion is premised on the fact that the entity is properly organized and is in existence. If an opinion on the issue of entity status and organization is not being given by Opining Counsel, then in order to give an entity power opinion the Client's entity status and organization should be expressly assumed in the opinion letter. Further, just as in the case of an opinion regarding entity status and organization, the Opining Counsel rendering an entity power opinion should pay attention to whether the entity has taken steps to dissolve. See "Entity Status and Organization." If the entity has taken steps to dissolve, the actions proposed to be taken in the Transaction and pursuant to the Transaction Documents may exceed the powers of a dissolved entity to wind up its affairs.

Finally, the entity power opinion does not mean that the persons acting on behalf of the entity with respect to the Transaction or the Transaction Documents are in compliance with their respective fiduciary duties with respect to the Transaction.

A. Corporation

Recommended opinion:

The Client has the corporate power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

Corporate power of a Florida corporation is derived from the FBCA and the corporation's articles of incorporation. To render a corporate power opinion, Opining Counsel should review the FBCA. Under Section 607.0301 of the FBCA, a corporation may be organized for any lawful purpose or purposes. Section 607.0302 of the FBCA then gives the corporation powers to act as if it were an individual, except to the extent of any limitations set forth in the articles of incorporation. Accordingly, Opining Counsel should examine the powers (and limits, if any) stated in the corporation's articles of incorporation to confirm that the corporation has the corporate power to execute and deliver the Transaction Documents and perform its obligations thereunder.

Although a corporation's articles of incorporation define its power, Opinion Counsel should also review the corporation's bylaws to determine whether such bylaws limit the powers of the corporation in any manner.

In most situations, the corporation's articles of incorporation will authorize the corporation to engage in any legal activity. However, there are exceptions to this general rule and Opining Counsel should be aware that some corporations may have expressly limited the freedom and power of the corporation to engage in certain transactions or included special purpose entity (SPE) provisions in the articles of incorporation that limit the power of the corporation. See "Special Purpose Entities" below. In any such case, Opining Counsel should carefully review the Organizational Documents of the corporation to determine whether any such provisions disable the corporation from undertaking the proposed Transaction.

B. Limited Partnership

Recommended opinion:

The Client has the limited partnership power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A limited partnership derives its power to transact business from the governing statute (FRULPA), its certificate of limited partnership and its limited partnership agreement. Section 620.1104(2) of FRULPA provides that a limited partnership may be organized under FRULPA for any lawful purpose. Section 620.1105 of FRULPA provides that a limited partnership has the power "to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership." Given this broad empowerment by FRULPA, Opining Counsel should review the certificate of limited partnership and limited partnership agreement, certified by one or more of its general partners, to confirm that there are no provisions in such documents that limit the partnership's ability to enter into the Transaction and perform its obligations under the Transaction Documents. If there is no written limited partnership agreement, Opining Counsel should not issue an entity power opinion regarding the Client limited partnership.

C. General Partnership

Recommended opinion:

The Client has the partnership power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A general partnership derives its power to transact business from the governing statute (FRUPA) and its partnership agreement. Opining Counsel should review a copy of the partnership agreement, certified by one or more of the partnership's partners, to determine that the proposed Transaction is not prohibited by its terms. If there is no written partnership agreement, Opining Counsel should not issue an entity power opinion regarding the Client partnership.

In many cases, the general partnership agreement will state that the partnership may engage in any lawful business. In the case of a joint venture or a general partnership for a particular undertaking, however, the agreement may expressly limit the scope of permissible business activities to one particular enterprise on project, thereby restricting both the power of the partnership to enter into the proposed transaction and the authority of the partners to bind the partnership to the Transaction Documents. In addition to reviewing the joint venture agreement or partnership agreement for such limitations, Opining Counsel should review any partnership statements that have been filed with the Department under Sections 620.8105, 620.8303 or 620.8304 of FRUPA which might also set forth limitations on the activities of the partnership and the authority of the partners.

D. Limited Liability Company

Recommended opinion:

The Client has the limited liability company power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A limited liability company ("LLC") derives its power to transact business from the governing statute (FLLCA), from its articles of organization, and from the operating agreement adopted by the members of the LLC. Unless its articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 608.404 of the FLLCA provides than an LLC has the same powers as an individual to do all things necessary to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in such section.

Opining Counsel should examine the LLC's articles of organization and operating agreement to confirm that there are no limitations on the LLCs ability to own assets, to enter into the Transaction or perform its obligations thereunder. Opining Counsel should also obtain a certificate from a manager of the LLC (if manager-managed) or a managing member or other member of the LLC (if member-managed) which confirms that the copies of the articles of organization and operating agreement attached to the certificate are accurate and complete. If there is no written operating agreement, Opining Counsel should not issue an entity power opinion with respect to the Client LLC.

In most cases, an LLC's operating agreement and sometimes the articles of organization empower an LLC to engage in any legal activity. However, some LLCs may have expressly limited the freedom and power of the LLC to engage in certain transactions. This may be the case, in particular, if the LLC has been formed as a special purpose entity or SPE. As is the case with a corporate SPE, Opining Counsel needs to carefully review the Organizational Documents of the LLC to determine whether any SPE provisions contained in the LLC's Organizational Documents disable the LLC from undertaking the proposed Transaction. See "Special Purpose Entities" below for further discussion regarding this issue.

E. Trusts

Recommended opinion:

The Client has the trust power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

The trustee of a Florida trust derives the power to own and deal with trust property and to transact business from the terms of the trust agreement. For this reason, Opining Counsel must obtain a copy of the trust agreement and carefully review such document, as well as certificates from the trustee and each beneficiary of the trust who has a power to direct the activities of the trust under the trust agreement, confirming the trust's power to enter into and perform the Transaction Documents and as to the trustee's power to execute and deliver the Transaction Documents on behalf of the trust.

In the context of a Florida land trust, third parties dealing with the trustee who do not have actual or constructive notice of the terms of the trust agreement may be entitled to the benefit of Section 689.071, Florida Statutes, if the conveyance into the trust qualifies under such statute. In that case, trust powers exist to the extent specified in the deed or other instrument of conveyance into the trustee. However, as stated in "Authorization of the Transaction," Opining Counsel should not rely solely upon Section 689.071, Florida Statutes, in rendering an opinion with respect to the power of a trust to enter into the Transaction and the power of the trustee to execute and deliver the Transaction Documents, but rather should insist upon reviewing a copy of the trust agreement and its amendments and certificates from the trustee and each beneficiary of the trust as set forth above.

F. Special Purpose Entities

In certain situations, if an entity intends to engage in a Transaction to obtain a loan to finance real or personal property and the lender wishes to isolate the assets being purchased with the financing being provided from the assets and liabilities of an affiliated parent entity, or if the lender intends to pool the loan with other loans and then sell the package of loans as part of a "securitized" financing (whether the pool of loans contains residential or commercial mortgages, auto loans or leases, trade receivables, commercial loans, equipment loans or other types of financial assets), it is likely that the lender or investors will require the entity's Organization Documents to include "special purpose entity ("SPE") provisions" that purport, among other things, to deprive the SPE of the capacity to take certain actions (such as engaging in activities other than those specifically authorized) without the consent of an "independent" director who is unrelated to the owners of the entity or its affiliates. Similarly, if an entity has previously engaged in such a transaction prior to the current proposed Transaction, it is possible that SPE provisions were included in the entity's Organizational Documents in connection with such prior transaction. Further, there may be other situations where the activities of an entity are limited in the Organizational Documents to a particular project or business and such limitation is expressly included in the entity's Organizational Documents. In all such cases, Opining Counsel must carefully review the Organizational Documents of the entity to determine if any SPE provisions are contained in such Organizational Documents, and if they are, if such SPE provisions affect the entity power of the entity to undertake the proposed Transaction, or if the SPE was formed for a prior transaction, that the SPE provisions either have been removed from the Organizational Documents or do not currently disable the entity from undertaking the proposed Transaction. If the SPE provisions disable the entity's ability to engage in the Transaction and such disability cannot be resolved (for example, by elimination of the SPE provisions from the Organizational Documents in a legal manner), an opinion as to the power of the entity to complete the Transaction should not be given.

AUTHORIZATION OF THE TRANSACTION

In connection with a Transaction, Opining Counsel will often be requested to opine that the entity entering into the Transaction has authorized the execution and delivery of the Transaction Documents and the performance by the entity of its obligations under such Transaction Documents. In order to render the "authorization" opinion, Opining Counsel should review the applicable governing statute and the entity's Organizational Documents to identify the persons or entities whose approval is required, as a matter of entity governance, to authorize the entity to enter into the Transaction at issue, and then Opining Counsel should obtain written evidence that all required approval actions have been taken by those persons or entities. Care should be taken to state the authorization opinion narrowly to comprise only the approvals required for entity governance purposes, in contrast to any approvals that might be required from a governmental authority. See "No Required Governmental Consents or Approvals".

A. Corporation

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary corporate action.

The reasonable expectation of the Opinion Recipient is that Opining Counsel will confirm that the person(s) acting on behalf of the corporation have the proper authority to do so and that all necessary approvals by the board of directors and shareholders (if shareholder approval is required) have been taken or obtained. In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on the affirmative acts of the corporation and its officers, directors and agents as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like.

To determine whether a corporation has authorized a transaction by all necessary corporate action, Opining Counsel should review: (i) the governing statute (the FBCA), (ii) the corporation's articles of incorporation and bylaws, (iii) the minutes of the meetings (or other corporate actions) at which the resolutions relating to the Transaction and the Transaction Documents were adopted by the board of directors and, if required, the shareholders of the corporation, and (iv) any shareholder agreement, voting trust or other agreement of which the corporation or Opining Counsel is aware that may affect the authorization of the Transaction and the Transaction Documents. Opining Counsel should obtain and rely on a certificate from an officer of the corporation that the articles of incorporation, bylaws, corporate resolutions and agreements made available to Opining Counsel (including any shareholders agreements or voting trust agreements) constitute all of the documents which affect or could have an impact on what is required to effect the authorization of the Transaction and the Transaction Documents and that these documents (other than the articles of incorporation, a copy of which should be obtained from the Department) are true and correct and have not been rescinded or repealed. Opining Counsel can rely on such certificate unless it has Knowledge that the factual information contained in the certificate is incorrect. With respect to shareholders agreements, voting trusts and the like, the certificate should confirm that there are no shareholders agreements, voting trust agreements or other agreements that affect corporate governance (or should identify the applicable agreements and specify that there are no others) and should not be phrased simply as a statement from the Client that there are no agreements that affect the authorization of the Transaction. Opining Counsel, and not the Client, should review any such agreements and make the legal judgment as to whether or not any of such agreements contain any limitations on or require any special approvals with respect to the authorization of the Transaction and the Transaction Documents.

In theory, rendering the authorization opinion would also require verification that all the steps in the chain of the elections of directors, transfers of shares (to determine current share ownership), all amendments to the bylaws, and all comparable matters since the corporation's formation were performed in accordance with the corporate law in effect when the actions were taken. However, under Florida customary practice, unless Opining Counsel has Knowledge to the contrary, Opining Counsel may rely on the "presumption of regularity and continuity" as the basis for concluding that all such actions were properly taken, including all steps in the chain

of the election of the directors presently in office. Similarly, unless Opining Counsel has Knowledge to the contrary, Opining Counsel can rely on a certificate from a corporate officer about resolutions adopted at a board of directors or shareholders meeting called to consider the proposed Transaction (or in a written consent action executed by the requisite percentage of the directors or shareholders required for approval) without having to go behind the particulars of any such meeting or written consent. See "Introductory Matters – Presumption of Regularity and Continuity." In that regard, the fact that Opining Counsel is relying on the presumption of regularity and continuity need not be expressly stated in the opinion letter.

However, Opining Counsel may not rely on the presumption of regularity and continuity if Opining Counsel becomes aware through the review of the corporate documents authorizing the Transaction, or the articles of incorporation, bylaws, certificates, or any other documents furnished to Opining Counsel by the Client, that there appears to be a problem with the facts on which Opining Counsel proposes to rely *(i.e.,* questions as to the presence of a quorum at a particular meeting, the completeness of meeting notices, the vote taken on the election of directors by the shareholders, or other historic activities). Often, but not always, these issues, if identified, can be resolved by the board of directors ratifying the prior acts of the corporation. Similarly, Opining Counsel may not assume facts that missing documents would customarily show if such counsel has reason to believe that the missing records would show something contrary to the presumed facts. See "Introductory Matters – Ethical and Professional Issues."

If a corporation has been formed as a special purpose entity ("**SPE**") or if the corporation's Organizational Documents contain SPE provisions, it may limit the corporation's ability to authorize and complete the transaction. See "Special Purpose Entities" below for a further discussion regarding this issue.

The authorization opinion does not mean that the directors, officers and shareholders of the corporation are in compliance with their respective fiduciary duties with respect to the Transaction.

B. Limited Partnership

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited partnership action.

The reasonable expectation of the Opinion Recipient is that Opining Counsel will confirm that any and all required approvals by the partners have been taken or obtained and that the partner(s) acting on behalf of the limited partnership have proper and actual authority, and not merely apparent authority, to do so. In particular, in order to determine who needs to approve the Transaction and the Transaction Documents on behalf of the limited partnership and who has the authority to bind the limited partnership, Opining Counsel should review (i) the governing statute (FRULPA), (ii) the certificate of limited partnership, and (iii) the limited partnership agreement. No opinion should be rendered unless the limited partnership has a written partnership agreement.

As more particularly described below, the governance provisions under FRULPA provide broad authority to any general partner of a Florida limited partnership to approve a Transaction and Transaction Documents and to bind the limited partnership. However, in addition to the governance provisions set forth in FRULPA, a limited partnership agreement or a certificate of limited partnership can limit that authority by providing that certain specified transactions require: (i) in cases where there is more than one general partner, the approval of one or more designated general partners or a specified number, percentage or group of the general partners, and/or (ii) in some cases, the approval of one or more designated limited partners or a specified number, percentage or group of limited partners. Thus, Opining Counsel must carefully review the limited partnership agreement and the certificate of limited partnership to determine which partners' approval is required for the Transaction, and then ascertain whether the requisite approvals (including any required written consents) of those partners have been obtained. In cases where there is more than one general partner, it is not uncommon, even if not required by the governing documents, for Opining Counsel to secure, as a basis for the authorization opinion, a written consent signed by all or a majority of the general partners approving the Transaction.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on the affirmative acts of the limited partnership and its partners as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates, affidavits, and statements of partnership authority are estoppel devices upon which third parties without contrary Knowledge may rely, they are not grounds under Florida customary practice to render an opinion regarding authorization of the Transaction.

Under Section 620.1402(1) of FRULPA, each general partner is an agent of the limited partnership for the purposes of its activities, and the limited partnership is bound by a general partner's act, including the execution of an instrument in the partnership's name, "for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership," unless the general partner did not have authority and the person with whom the general partner was dealing knew, or had received a notification, or had "notice" under Section 620.1103(4) of FRULPA that the general partner lacked authority. Section 620.1103(4)(f) of FRULPA provides that a person has notice of a limitation on the general partner's authority if the limitation is set forth in the initial limited partnership certificate, although a limitation that is later added by amendment or restatement of the certificate does not constitute notice until 90 days after the effective date of the amendment or restatement. This same subsection contains an overriding proviso, however, stating that a limitation on the authority of a general partner to transfer real property held in the name of the limited partnership is not notice to a person (other than a partner) unless the limitation appears in an affidavit, certificate or other instrument that bears the name of the limited partnership and is recorded in the public records of the county where the real property is located. Such an affidavit may be recorded under the provisions of Section 689.045(3) of the Florida Statutes, which is discussed below with respect to general partnerships.

Conversely, Section 620.1402(2) of FRULPA provides that if the general partner's act is not apparently for carrying on the limited partnership's activities in the ordinary course, or activities of the kind carried on by the limited partnership, then the limited partnership is bound only if the act was approved by the other partners as provided in Section 620.1406 of FRULPA. This latter section provides that each general partner has equal rights in the management and conduct of the limited partnership's activities, and any matter relating to its activities may be exclusively decided by the general partner, or if there is more than one general partner, by a majority of the general partners, except that certain actions listed in Section 620.1406(1) of FRULPA require the approval of all the general partners. Among those actions requiring unanimous general partner approval under Section 620.1406(1)(*i*) is "[s]elling, leasing, exchanging or otherwise disposing of all, or substantially all, of the limited partnership's property, with or without good will, other than in the usual and regular course of the limited partnership's activities." Further, under Section 620.1406(5) of FRULPA, this action also requires the approval of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective.

Generally speaking, a limited partnership's certificate of limited partnership or its partnership agreement typically empowers the partnership to engage in any legal activity. However, there are exceptions to this general rule, and Opining Counsel should be aware that some partnerships may have expressly limited the freedom and power of the partnership to engage in certain types of transactions and such limitations may be included in the partnership agreement or the certificate of limited partnership. Further, the partnership agreement or the certificate of limited partnership may expressly include SPE provisions. See "Special Purpose Entities" below and "Entity Power (and Authority) — Limited Partnership."

An opinion given with respect to a limited partnership may require Opining Counsel to look at the authorization of the Transaction by entities other than the Client limited partnership that is the party to the Transaction and the Transaction Documents. An Opining Counsel should examine the structure of the limited partnership in relation to the opinion, paying particular attention to entities that are partners. Opining Counsel rendering an authorization opinion with respect to a limited partnership should review the authorization of the Transaction by these other entities that are partners to a level where such counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the limited partnership entering into the Transaction and the Transaction Documents has, in fact, been obtained.

This authorization opinion does not mean that the partners of the limited partnership are in compliance with their respective fiduciary duties with respect to the Transaction.

C. General Partnership

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary partnership action.

Opining Counsel rendering the authorization opinion must determine whether the partnership has authorized the Transaction in accordance with the governing statute (FRUPA) and the partnership agreement and whether the general partner executing the Transaction Documents is, in fact, authorized by the partnership agreement or by the other general partners to bind the partnership to the Transaction Documents. Opining Counsel must determine the actual existence of the authority of the signing partner as recited in the certificate, affidavit or statement, and an opinion on partnership authorization reflects Opining Counsel's judgment that the partnership has properly approved the Transaction and the Transaction Documents and that the partner signing the Transaction Documents on behalf of the partnership has actual authority to do so. No opinion should be rendered unless the partnership has a written partnership agreement.

The authority of a general partner to bind a Florida general partnership to agreements such as the Transaction Documents is a function of the provisions of FRUPA and the partnership agreement. Under Section 620.8301 of FRUPA, all general partners are agents of the partnership and the partnership is bound by any partner's act, including the execution of an instrument in the partnership's name, "for apparently carrying on in the ordinary course of partnership business or business of the kind carried on by the partnership, in the geographic area where the partnership operates," unless the partner had no authority and the other contracting party knew or had received a notification that the partner lacked authority. Section 620.8101(2) of FRUPA defines "business" as "any trade, occupation, profession or investment activity." Conversely, if the partner's act does not meet the partnership business test, then the partnership is bound only if the act was authorized by all of the partners or is authorized by the terms of a written partnership agreement. These statutory provisions regarding a partner's authority, however, are subject to the effect of a statement of partnership authority filed with the Department under Section 620.8303 of FRUPA.

By way of example, in determining whether the partnership has authorized the Transaction, if the approval of all general partners of the partnership (or all partners of a particular group or class) is required by the terms of the partnership agreement in order for the partnership to borrow money or to mortgage or convey its real property, then Opining Counsel should obtain a copy of the written approval of all those partners, certified as being true and correct by a general partner (preferably one other than the partner who signs the Transaction Documents). Opining Counsel may be able to avoid unnecessary duplication by preparing the original of this written approval in the form of a recordable affidavit contemplated by Section 689.045(3) of the Florida Statutes or in the form of a statement of partnership authority to be filed and recorded under Section 620.8303 of FRUPA. On the other hand, no further approval is required if the certified copy of the partnership agreement expressly authorizes a specific general partner to bind the partnership in transactions of the type contemplated (preferably, the copy of the partnership agreement provided to the Opining Counsel in connection with the opinion should be certified to Opining Counsel by a partner other than the partner signing the Transaction Documents). Additionally, Opining Counsel should obtain and review a copy of any partnership statements filed with the Department and, if the Transaction relates to Florida real estate any statements recorded in the real estate records of the county where the real property is located, in order to discover any limitations or inconsistencies concerning partner authority. Even if third parties are not deemed to have notice of any such limitations contained in a filed (but unrecorded) statement, Opining Counsel should treat the statement as raising an authorization issue and resolve it before opining that the Transaction and the Transaction Documents have been authorized by the partnership.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on the affirmative acts of the partnership and its partners as the basis for the opinion, and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates, affidavits, and statements of partnership authority are estoppel devices upon which third parties without contrary Knowledge may rely, they are not grounds under Florida customary practice to render an opinion regarding authorization of the Transaction.

Some partnership agreements empower the partnership to engage in any lawful activity, Others include provisions that expressly limit the freedom and power of the partnership to engage in certain types of transactions. See "Special Purpose Entities" below.

If a partnership has filed an optional registration statement with the Department under Section 620.8303 of FRUPA, then the partnership may file a statement of partnership authority with the Department executed by at least two general partners and specifying the authority of some or all of the partners to transfer real property held in the name of the partnership. The statement may also specify the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership. Unless earlier canceled, the statement of partnership authority is valid for five years after its filing or its most recent amendment. The partnership or a partner may also file a statement of denial with the Department under Section 620.8304 of FRUPA, which acts as a limitation on the statement of authority. A certified copy of the partnership statement of authority as filed with the Department may be recorded in the public records of the county in which real property owned by the partnership is located.

The effect of the statement filing system under Sections 620.8303 and 620.8304 of FRUPA is to supplement the authority of a partner when dealing with third parties. In the case of a transfer (including a mortgage) of partnership real property, a grant of authority contained in a recorded statement of partnership authority is conclusive in favor of a third party who gives value without knowledge to the contrary, except and to the extent that a recorded statement containing a limitation on authority (such as a statement of denial) is filed of record in the county where the real property is located. Conversely, a third party is deemed to know of a limitation on the authority of a partner to transfer partnership real property contained in a statement of partnership authority or denial recorded in that county. In matters other than real property transfers, a filed statement of partnership authority (even if unrecorded) is conclusive in favor of a third party giving value without knowledge to the contrary, subject to the effect of any filed statement containing a limitation on authority. In matters of real property transfer, however, third parties are not deemed to have knowledge of a limitation on authority contained in a statement filed with the Department but not recorded in the county public records.

The FRUPA statement system requires some advance transaction planning and some additional filing expenses. Only certified copies of filed partnership authority statements can be recorded in the county real estate records in order to have the desirable conclusive effect set forth in Section 620.8303 of FRUPA; these certified copies are available only from the Department and payment of a fee is required. In addition, the Department will not file a statement of partnership authority for a partnership that does not also file a registration statement under Section 620.8105 of FRUPA, although the Department will accept both statements for filing concurrently. Because a general partnership that files a statement of qualification as an LLP under Section 620.9001 of FRUPA must also file the partnership registration statement, the marginal expense of also filing and recording a statement of partnership authority is not significant.

When transaction timing and budgets do not permit the recordation of a statement of partnership authority under Section 620.8303 of FRUPA, another alternative for establishing a partner's conclusive authority to transfer partnership real property is the execution and recordation of a partnership affidavit as contemplated in Section 689.045(3), Florida Statutes, which subsection provides as follows:

(3) When title to real property is held in the name of a limited partnership or a general partnership, one of the general partners may execute and record, in the public records of the county in which such

partnership's real property is located, an affidavit stating the names of the general partners then existing and the authority of any general partner to execute a conveyance, encumbrance, or other instrument affecting such partnership's real property. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

For opinions regarding the authorization of partnership conveyances or mortgages, partnership affidavits recorded pursuant to Section 689.045(3), Florida Statutes, work equally well for limited partnerships and for general partnerships. However, a statement of partnership authority under Section 620.8303 of FRUPA provides opinion support in the case of a general partnership only and not in the case of a limited partnership.

An opinion given with respect to a general partnership may require Opining Counsel to look at the authorization of the Transaction by entities other than the general partnership that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the partnership to determine what entities have to approve the Transaction and the Transaction Documents for the partnership. In reviewing the authorization of the Transaction and the Transaction Documents by the partnership, Opining Counsel should examine the structure of the general partnership in relation to the Transaction, paying particular attention to entities that are partners. Opining Counsel rendering an authorization opinion for a general partnership should review the authorization by those other entities to a level where such counsel feels comfortable that the requisite approval of the general partnership entering into the Transaction and the Transaction Documents has, in fact, been obtained.

The authorization opinion does not mean that the general partners of the partnership are in compliance with their respective fiduciary duties with respect to the Transaction.

D. Limited Liability Company

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited liability company action.

To render an authorization opinion, Opining Counsel must determine whether the LLC has authorized the Transaction in accordance with Florida law under the governing statute (the FLLCA), the articles of organization and the operating agreement, and whether the member or manager executing the Transaction Documents on behalf of the LLC is authorized to bind the LLC to the Transaction Documents. Further, no opinion should be rendered if the LLC does not have a written operating agreement.

In most cases, the operating agreement of the LLC provides that the LLC is empowered to engage in any lawful activity. Sometimes, however, the operating agreement will include provisions that expressly limit the power and capacity of the LLC to authorize a particular transaction. See "Special Purpose Entities" below.

The threshold question for Opining Counsel in determining which persons have authority to bind the LLC is whether the LLC is a member-managed company or a manager-managed company. Sections 608.402(22) and 608.422 of the FLLCA both provide that a Florida LLC is a member-managed company by default unless the articles of organization or the operating agreement provide that it is a manager-managed company (before its amendment in 2002, under Section 608.407(1) of the FLLCA this manager-managed designation needed to be set forth in the articles of organization to avoid the application of the default rule). The distinction between the two management models with respect to the authority of members and managers of an LLC is discussed below. However, in both cases, Opining Counsel must review the articles of organization and operating agreement of the LLC in order to opine with respect to the authorization of actions to be taken by the LLC.

Section 608.407(4) of the FLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 608.407(6) of the FLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or managing member; if either of these provisions are added or changed by an amendment or restatement of the articles of organization, then Section 608.407(5) of the FLLCA provides that the articles do not constitute notice of the addition or change until 90 days after the effective date of the amendment or restatement. As amended in 2005, Section 608.407(6) of the FLLCA provides that a provision in the LLC's articles of organization limiting the authority of a manager or managing member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless the limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records of the county where the real property is located.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on an affirmative act of the LLC, its members and/or manager, as applicable, as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates and affidavits of authority are estoppel devices upon which third parties without contrary Knowledge may rely, they are not grounds under Florida customary practice to render an opinion regarding the authorization of the Transaction.

The following sections reflect certain matters to consider in determining whether an LLC has properly authorized the Transaction, depending upon whether the LLC is member-managed or manager-managed.

1. Member-Managed. Under Section 608.422(2) of the FLLCA, unless otherwise provided in the articles of organization or operating agreement, the management of a member-managed LLC is vested in its members in proportion to the then-current percentage or other interest of members in the profits of the LLC owned by all of the members. Except as otherwise provided in the certificates of organization or operating agreement, in a member-managed LLC, the decision of a majority-in-interest of the members is controlling. Under Section 608.4231 of the FLLCA, the articles of organization or operating agreement may provide for classes or groups of members having such relative rights, powers, and duties as the articles of organization or operating agreement may provide. The articles of organization or operating agreement may provide for the taking of an action, including the amendment of the articles of organization or operating agreement, without the vote or approval of any member or class or group of members. The articles of organization or operating agreement may provide that any member or class or group of members shall have no voting rights. The articles of organization or operating agreement may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or manager on any matter. Voting by members may be on a per capita, number, financial interest, class, group, or any other basis. Unless otherwise provided in the articles of organization or operating agreement, on any matter that is to be voted on by members, the members may take such action without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, are signed by the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting, but in no event by a vote of less than a majority-in-interest of the members that would be necessary to authorize or take such action at a meeting. Within 10 days after obtaining such authorization by written consent, notice must be given to those members who have not consented in writing or who are not entitled to vote on the action.

   With respect to the agency authority of members, Section 608.4235(1) of the FLLCA provides that in a member-managed LLC, each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company, binds the company unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacks authority. An act of a member which is not apparently for carrying on in the ordinary

course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by appropriate vote of the other members. As noted in (3) below, however, the real estate rule in FLLCA § 608.4235(3) overrides these agency and authority rules for member-managed companies.

To render an opinion that a member-managed LLC has approved a Transaction and the Transaction Documents by all necessary action, Opining Counsel should review the articles of organization and operating agreement of the LLC (which operating agent should be certified to the Opining Counsel by a member as being a true and correct copy). Opining Counsel should then obtain evidence as to the approval by the requisite members required to approve the Transaction and the Transaction Documents (which approval should be documented in writing). Opining Counsel should also review the FLLCA to determine whether authorization of the members is required with respect to the particular Transaction even if not otherwise required in the articles of organization and the operating agreement.

2. Manager-Managed. Under Section 608.422(4) of the FLLCA, in a manager-managed LLC, the management of the company is vested in a manager or managers, and each manager has equal rights in the management and conduct of the company's business. Except as otherwise provided in FLLCA, in a manager-managed company any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers. Similarly, Section 608.4231(6) of the FLLCA provides that except as otherwise provided in the articles of organization or the operating agreement, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers if at a meeting, or by unanimous written consent. Section 608.422(4)(c) of the FLLCA provides that in a manager-managed LLC, a manager (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

   With respect to the agency authority of members in a manager-managed LLC, Section 608.4235(2) of the FLLCA provides that in a manager-managed company, a member is not an agent of the company for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacks authority. An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 608.422 of the FLLCA. As noted in (3) below, the general real estate rule in FLLCA § 608.4235(3) overrides these agency and authority rules.

   To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, such requisite vote of members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review the FLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement.

3. General Real Estate Rule. As an overriding rule applicable to real property held by an LLC, Section 608.4235(3) of the FLLCA provides that, unless the articles of organization or operating agreement limit the authority of a member, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the LLC's

interest in its real property. The transfer instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. This provision in subsection Section 608.4235(3) of the FLLCA expressly trumps the agency rules in other parts of Section 608.4235 of the FLLCA that are discussed above. However, for opinion purposes, Opining Counsel should obtain the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before issuing an opinion regarding authorization of the Transaction.

4. Authority. In the same manner as a general partnership, an opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel's judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, it should not be relied upon by Opining Counsel in rendering an opinion.

5. Other Entities. An opinion given with respect to an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the LLC, Opining Counsel should also review the authorization by these other entities to a level where such counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

6. Fiduciary Duties. The authorization opinion does not mean that the managers or the managing members, as applicable, of the LLC are in compliance with their fiduciary duties with respect to the Transaction.

E. Trust

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary action.

When title to property that is the subject of the Transaction Documents is held by a trustee, Opining Counsel should (1) review the trust agreement establishing the trust to determine which party or parties hold the power of direction over the actions of the trustee; (2) review any agreement that may have been made among the trust beneficiaries regarding their direction of the trustee, to determine compliance with any approval requirements in any such agreement; and (3) determine that such party or parties (or any required majority, if not unanimous) have executed a written direction to the trustee with respect to the action to be taken. Most institutional land trustees utilize a standard form of "direction to convey" that can be modified to direct the trustee to execute and deliver any required Transaction Documents. Of course, if the trustee is a business entity, Opining Counsel must also review the documents establishing and authorizing that entity to act as the trustee of the trust and to execute, deliver, and perform the Transaction Documents.

If the trust satisfies the requirements of Section 689.071, Florida Statutes (the Florida Land Trust Act), then the trust agreement and the deed or other instrument of conveyance naming the trustee as grantee or transferee provide the bases for the land trustee's authority to execute and deliver the Transaction Documents and perform its obligations thereunder. Section 689.071(2), Florida Statutes, provides expressly that any grantee or mortgagee dealing with a land trustee is not obligated to inquire into or ascertain the authority of the trustee to act within and exercise the powers granted under the recorded instrument. On the other hand, however, a grantee or mortgagee having actual knowledge of the provisions of the unrecorded trust agreement might not be entitled to rely on such statutory protection. Accordingly, when representing the trustee of a land trust that purports to comply with the requirements of Section 689.071, Florida Statutes, as borrower, Opining Counsel not only should review the instrument of conveyance to the trustee to determine whether such conveyance vested the trustee with full power and authority to manage, operate, and mortgage the property, but must also obtain and review the materials described in the first paragraph of this subsection above.

F. Special Purpose Entities

In certain situations, if an entity intends to engage in a Transaction to obtain a loan to finance real or personal property and the lender wants to isolate the assets being purchased with the financing from the assets and liabilities of an affiliated parent entity, or if the lender intends to pool the loan with other loans and then sell the package of loans as part of a "securitized" financing (whether the pool of loans contains residential or commercial mortgages, auto loans or leases, trade receivables, commercial loans, equipment loans or other types of financial assets), it is likely that the lender or investors will require the entity's Organization Documents to include "special purpose entity ("SPE") provisions" that purport, among other things, to deprive the SPE of the power and capacity to take certain actions (such as engaging in activities other than those specifically authorized) without the consent of an "independent" director who is unrelated to the owners of the entity or its affiliates. Similarly, if an entity has previously engaged in such a transaction prior to the current proposed Transaction, it is possible that SPE provisions were included in the entity's Organizational Documents in connection with such prior transaction. Further, there may be other situations where the activities of an entity are limited to carrying out a particular project or business and such limitation is expressly included in the entity's Organizational Documents. In all such cases, Opining Counsel must carefully review the Organizational Documents of the entity to determine if such SPE provisions are contained in such Organizational Documents, and if they are, if such SPE provisions disable the entity from undertaking the proposed Transaction, or if the SPE was formed for a prior transaction, that the SPE provisions either have been removed from the Organizational Documents or do not currently disable the entity from undertaking the proposed Transaction. If the SPE provisions disable the entity's ability to engage in the Transaction and such disability cannot be resolved (for example, by elimination of the SPE provisions from the Organizational Documents in a legal manner), an opinion as to the authorization of the Transaction by the entity should not be given.

EXECUTION AND DELIVERY

Contract formation requires (among other steps) that the Transaction Document be executed and delivered by the Client. In connection with the Transaction, Opining Counsel will often be requested to opine that the individual or entity Client entering into the Transaction has executed and delivered the Transaction Documents intending to create a binding contract thereby. The "execution and delivery" opinion, along with opinions on entity status and organization, authority to transact business in Florida, power and authority, authorization of the transaction, no violation of laws and no required government consents, are the building block opinions leading to an enforceable agreement. See "The Remedies Opinion."

An opinion that "the Transaction Documents have been executed and delivered by the Client" means:

- As to "execution," that an individual party to the Transaction Documents or the officer(s), manager(s), partner(s) or other individual(s) who have signed the Transaction Documents on behalf of an entity that is a party to the Transaction: (i) have signed the Transaction Documents; (ii) if the Client is an entity, the person(s) signing was authorized to execute the Transaction Documents on behalf of the Client, and (iii) Opining Counsel has no Knowledge that the signatures by or on behalf of the Client on the Transaction Documents are not genuine. The terms "executed" or "duly executed" have the same meaning, and the addition of the word "duly" does not affect the meaning of the opinion or the level of diligence required to give the opinion.
- As to "delivery," that the Client has given in some fashion the executed Transaction Documents to the Opinion Recipient intending to create a legally binding contract. The terms "delivered" or "duly delivered" have the same meaning, and the addition of the word "duly" does not affect the meaning of the opinion or the level of diligence required to give the opinion.

The opinion regarding execution and delivery covers only the execution and delivery of the Transaction Documents by the Client and not by any other Parties to the Transaction Documents. In Florida, it is customary practice for Opining Counsel to assume each of the foregoing matters with respect to all parties signing the Transaction Documents other than the Client. See "Common Elements of Opinions – Assumptions." Further, this opinion does not speak to the enforceability of the Transaction Documents or as to whether the formal requisites of contract formation have been completed.

The recommended opinion is as follows:

The [Transaction Documents] have been executed and delivered by the Client.

In giving the "executed" portion of this opinion, Opining Counsel may rely upon a certificate from the Client certifying that the officers, managers, partners or other individuals who are executing the Transaction Documents on behalf of the Client are the persons authorized to execute the Transaction Documents on behalf of the Client. See "Authorization of the Transaction." When the authorized persons are the officers, managers or partners of the Client, customary practice allows Opining Counsel to rely upon the "presumption of regularity and continuity" as to the election or appointment of such persons. Opining Counsel may rely upon the genuineness of the signatures of the individuals who signed the Transaction Documents as the Client or on behalf of a Client that is an entity unless such counsel has Knowledge that the individual or individuals executing the Transaction Documents as the Client or on behalf of the Client are not so authorized.

In rendering both the "executed" and "delivered" portions of the opinion, Opining Counsel or a member of Opining Counsel's firm should be present at the execution and delivery of the Transaction Documents or should have otherwise satisfied themselves regarding the Client's signing and the actual delivery of the Transaction Documents. Alternatively, Opining Counsel often confirms that delivery has taken place through a closing escrow instruction letter, a certificate to counsel, a document transmittal letter or other delivery procedures satisfactory to Opining Counsel to confirm delivery of the executed Transaction Documents. If the Client is

confirming delivery through a certificate to counsel, the certificate should address the factual components of delivery rather than the legal conclusion that delivery has occurred, and might include language to the effect that the Transaction Documents have been left in the possession of the Opinion Recipient or its counsel without reservation, escrow, or condition and with the intent of creating a binding agreement on the part of the Client. The certificate to counsel that accompanies this Report includes a statement to this effect.

In many cases today, the execution and delivery of the Transaction Documents does not occur in one location with all signatories to the Transaction Documents physically present for a "closing." Rather, it has become common practice for signature pages to be sent by overnight mail, scanned email or facsimile from a number of locations to a central location for assembly of counterpart signatures for the closing of the Transaction. Accordingly, Opining Counsel is often not physically present or represented when the Client executes and/or delivers the Transaction Documents.

When giving the "execution and delivery" opinion in this type of situation, Opining Counsel needs to determine to Opining Counsel's satisfaction that execution and delivery have taken place through means other then being present at the location where execution and delivery is taking place. However, although Opining Counsel must review copies of the Client's signature pages for each of the Transaction Documents being opined upon to confirm that the Transaction Documents reflect what purports to be a signature by the Client, Opining Counsel does not need to compare the Client's signatures on the Transaction Documents to the Client's signatures contained in a certificate of incumbency provided as part of the closing of the Transaction or included in the certificate of counsel. Rather, Opining Counsel may assume the genuineness of the signature of the individuals who signed the Transaction Documents as the Client or on behalf of a Client that is an entity unless Opining Counsel has Knowledge to the contrary. Under Florida customary practice, an assumption to this effect is automatically included in the "execution and delivery" opinion rendered by Florida counsel whether or not such assumption is expressly stated in the opinion letter. Opining Counsel may also (in an abundance of caution) include in the certificate to counsel a confirming statement that execution of the Transaction Documents by specified individuals has taken place; however, the failure to obtain a certificate to this effect is not fatal. However, if Opining Counsel has Knowledge that the Client's signatures on the executed Transaction Documents are not genuine, Opining Counsel should consider its ethical obligations under the circumstances and should not render any opinion with respect to the Transaction. See "Introductory Matters – Ethical and Professional Issues."

In order to alert the Opinion Recipient to the fact that Opining Counsel was not physically present to witness execution and delivery of the Transaction Documents, Opining Counsel may want to include the following statement in the opinion letter:

> **Please note that we did not physically witness the execution and delivery of the Transaction Documents, and our opinion herein regarding the execution and delivery of the Transaction Documents is based on our review of copies of executed signature pages for such Transaction Documents provided to us (electronically or otherwise).**

However, failure to include this statement in the opinion letter is not fatal if Opining Counsel has determined to Opining Counsel's satisfaction that the execution and delivery of the Transaction Documents by the Client has occurred.

In a transaction involving real estate, the execution and delivery opinion is sometimes combined with the opinion regarding whether the Transaction Documents are in a form suitable for recordation and filing. See "Opinions Particular to Real Estate Transactions – Requirements for Recording Instruments Affecting Real Estate."

THE REMEDIES OPINION

A. Overview of the Remedies Opinion

The "remedies opinion" addresses the enforceability of the Transaction Documents against the Client. Broadly speaking, enforceability with respect to a document means the ability to obtain relief from a court of competent jurisdiction in accordance with the terms of such document and with the law. Therefore, the remedies opinion requires Opining Counsel to determine whether a court, applying the law of the jurisdiction set forth in the opinion (which may or may not be the same as the law governing the Transaction Documents), should give effect to the Client's obligations under the Transaction Documents. See "Introductory Matters – Purpose of Third Party Legal Opinions." Although this opinion is sometimes referred to as the "enforceability opinion" rather than the "remedies opinion," the terms refer to the same type of opinion.

1. *The Standard Formulation of the Remedies Opinion*

The standard formulation of the remedies opinion, before setting forth any Qualifications (as defined below), is as follows:

> **The [Transaction Documents] are valid and binding obligations of the Client, enforceable against the Client in accordance with their terms.**

The remedies opinion is understood to have the same meaning so long as it contains one or both of the operative words, "binding" and "enforceable." Although this Report recommends the specific language above, verbatim recitation is not required. For instance, some formulations of the remedies opinion include the word "legal" (usually before the word "valid"). Others omit one or both of the words "valid" or "binding." However, neither the inclusion of the word "legal" nor any of these omissions expands or limits the generally understood meaning of the remedies opinion. Even where Opining Counsel omits the phrase "enforceable against the Client in accordance with its terms," substitutes the phrase "enforceable against the Client under the laws of Florida," or simply states that the "Transaction Documents are enforceable against the Client" or that they are "binding on the Client," the opinion is understood to have the same meaning as an opinion using the language provided above.

Consistent with customary practice, the remedies opinion must be expressly stated in an opinion letter. It may not be implied, whether from the issuance of building block or other related opinions, the use of Qualifications (regardless of whether such Qualifications address matters that would typically apply only to a remedies opinion) or any other basis. However, there are circumstances in which an Opining Counsel rendering an opinion in the context of a mortgage on real property or a security interest in personal property may imply within such opinion an enforceable contract and thereby implicitly provide a remedies opinion. See "Opinions with Respect to Collateral Under the Uniform Commercial Code – Scope of UCC Opinions; Limitations" and "Opinions Particular to Real Estate Opinions – Creation of a Mortgage Lien."

On the other hand, the issuance of a remedies opinion does imply the issuance of the building block opinions described below, and if Opining Counsel is not intending to render each of these opinions the Opining Counsel should expressly assume the particular opinion(s) that Opining Counsel is not rendering (and/or expressly specify the opinion(s) of another Opining Counsel on which Opining Counsel is relying). The following paragraphs describe the relationship between the remedies opinion and certain other opinions.

2. *Related Opinions that are building blocks for or necessary to render the Remedies Opinion*

An opinion regarding the enforceability of an agreement is predicated on contract law principles, such that Opining Counsel must be confident before giving a remedies opinion regarding an agreement that all of the requisite elements of contract formation (such as capacity, entity power, the taking of requisite entity action to approve entry into the contract, offer and acceptance, consideration, execution, delivery and mutuality) exist and that all conditions precedent to the formation of the agreement have been satisfied with respect to such

agreement. As a result, the following related opinions that are addressed elsewhere in this Report are building blocks for and are necessary prerequisites to rendering the remedies opinion: (i) opinions regarding the Client's existence and organization, entity power, authorization of the Transaction, and execution and delivery of the Transaction Documents, and (ii) no violations of law resulting from the Client entering into and performing its obligations under the Transaction Documents that would make them invalid. These opinions are vital in their own right because if, for example, the Transaction Documents have not been properly authorized, executed or delivered, then a contract may not have been formed. Similarly, if the contract violates a law that renders it invalid, it may not be enforceable. However, even though certain building block and other opinions may relate to similar issues, and even though, as a practical matter, all of these building block opinions are usually included in the same opinion letter that includes a remedies opinion, they are nonetheless separate opinions from the remedies opinion.

In light of the interconnected nature of the remedies opinion and these building block opinions, even where the building block opinions are *not* specifically included in the opinion letter, Opining Counsel will be deemed to have given them by implication if a remedies opinion is given. In that regard, it is essential that Opining Counsel perform the necessary diligence associated with each building block opinion or expressly assume in the opinion that one or more of such building block opinions have otherwise been satisfactorily addressed. For instance, where the existence of a corporation is determined by laws other than the laws of the State of Florida and no opinion is being rendered on entity status, Opining Counsel would need to expressly assume in its opinion the existence of such entity to avoid being deemed to have implicitly given an opinion on entity status because it has rendered a remedies opinion.

However, not every related opinion is assumed to be implicit in a remedies opinion. Only the building block opinions listed above should be implied from the issuance of a remedies opinion. In this regard, the remedies opinion does not include an opinion relating to the non-Client party or parties or to matters under the Uniform Commercial Code **(the "UCC")** or other applicable law on the validity, creation, perfection, or priority of any security interests, mortgage liens or other liens that may be the subject of the Transaction Documents. If such opinions are required, they need to be separately stated in the opinion letter. Notwithstanding, it is important to remember that the inverse connection may exist; an opinion on these other issues may, in fact, implicitly include a remedies opinion.

3. *The Meaning of the Remedies Opinion; Two Sides of a National Debate on Customary Practice; Florida's View*

Like other opinions described in this Report, the meaning of the remedies opinion and the diligence Opining Counsel should undertake to support it are based on Florida customary practice. Except in the case of real estate transactions which generally follow a nationally-prescribed practice standard utilizing a specific Qualification (see "The "Practical Realization" or "Generic" Qualification" below for a discussion of this Qualification), the Committees believe that the meaning of the remedies opinion is currently one determined on a state by state level rather than a national level, and that the meaning of the remedies opinion as described in this Report reflects customary practice in Florida. That is not to say that Florida's view is significantly different than the view taken in many other states, but rather that the view taken in other states does not necessarily represent Florida's view. Further, the meaning of the remedies opinion is impacted by the qualifications that are included in the opinion. These qualifications (the "**Qualifications**") exclude certain of the rights and remedies contained in the Transaction Documents from the scope of the remedies opinion or otherwise limit the scope of the remedies opinion.

There are, however, at a national level two highly influential and at least on a cursory level, contradictory standards or views regarding the meaning of the remedies opinion – one generally known as the "TriBar view" and the second generally known as the "California view" – each of which is described in more detail below.

The "TriBar view," is the standard adopted by the TriBar Opinion Committee in the TriBar Report. The Tri-Bar standard construes the remedies opinion to address the enforceability of "each and every" right, remedy and undertaking in the Transaction Documents. This standard is considered customary practice in many jurisdictions, and is the customary practice generally expected by Opinion Recipients in transactions involving many New York

based financial institutions and investment banks. However, many practitioners are troubled by the breadth of the TriBar view, because they believe it is not always feasible, cost-effective, or necessary for Opining Counsel to dedicate the time and resources needed to review the enforceability of each and every promise, covenant and other undertaking made in today's increasingly complex and lengthy Transaction Documents. Thus, in order to utilize the TriBar view in a more efficient manner, attorneys have developed extensive lists of specific and general Qualifications, assumptions, and clear exclusionary statements with respect to any matters about which such attorneys provide no opinion and/or seek to limit their opinion. In this manner, Qualifications are intended to reduce the potential breadth of the remedies opinion as interpreted under the TriBar view. Further, the TriBar Report states that in certain limited circumstances it may be appropriate for Opining Counsel to limit the scope of the remedies opinion by incorporating a general Qualification of "realization of the principal benefits" of the Transaction Documents.

Another view that historically has been used to construe the meaning of the remedies opinion is known as the "California view." Under the California view, regardless of whether Opining Counsel expressly provides any specific or general Qualifications, the remedies opinion is considered to address the enforceability of only the "essential" provisions of a Transaction Document. In the California Remedies Report, the California Business Law Section stated that the customary diligence for the remedies opinions is essentially the same whether Opining Counsel subscribes to the TriBar view or the California view. Indeed, as described below, not only might the diligence remain very similar, but the ultimate breadth and scope of the remedies opinion can also be the same if Opining Counsel effectively utilizes proper Qualifications to render consistent and appropriate opinions regardless of which view is used to interpret the remedies opinion.

A well understood example of the "essential" provisions view can be found in the "generic" qualification language included in the Real Estate Report, which is based on the ACREL "All Inclusive Opinion." It states that although certain provisions of the Transaction Documents may or may not be enforceable, such enforceability will not render the Transaction Documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note and foreclosure of the collateral in the event of a material breach of a payment obligation or in the event of a material default in any other material provision of the Transaction Documents. Some versions of the "generic" qualification limit the coverage of the remedies opinion to enforceability of specific remedies, while other versions cover enforceability of "material" remedies within the scope of the remedies opinion.

Another example of the "essential provisions" approach is contemplated by a "practical realization" qualification, which provides that although certain provisions of the Transaction Documents may not be enforceable, such unenforceability does not affect the Transaction Documents overall validity or interfere with the substantial (or practical) realization of the principal benefits (or security) purported to be provided by the Transaction Documents.

In light of the differences between the TriBar view and the California view, the Committees believe that the current Florida customary practice environment necessitates that attorneys understand the meaning of the remedies opinion under both the TriBar view and the California view, so that they can appropriately limit the scope of their opinion through the inclusion of Qualifications. In this regard, Opining Counsel should consider the basic remedies language and each of the standard Qualifications recommended by this Report as building blocks which, when included in an opinion letter premised upon either standard or view, will result in an opinion that is effectively the same under both of these customary practice standards. Flexibility and skill in navigating between competing practice standards is particularly essential in the context of multi-state transactions because, on the one hand, Florida attorneys are frequently involved in transactions (either as lead counsel or as local counsel) that involve lenders or buyers from New York and other states which have adopted the TriBar view, and because, on the other hand, the Florida market features a significant number of intellectual property, biotechnology and cross-border transactions that often include a nexus with parties represented by counsel in states that follow the California view. In this diverse practice climate, Florida attorneys will inevitably find themselves asked to deliver opinions in which the Opinion Recipient will expect an opinion under one of these practice standards and will need to understand the Qualifications required to limit their opinion to reflect Florida customary practice under each of these circumstances.

The Committees believe that Florida customary practice is an "essential provisions" view of the meaning of the remedies opinion and that this represents the right approach to the cost to benefit analysis that defines customary practice between Opining Counsel and Opinion Recipients. In that regard, the Committees believe that Florida customary practice allows inclusion in all opinion letters that include a remedies opinion of a "practical realization" or "generic" Qualification. To make this clear, the Committees have included such a Qualification in the forms of opinions that accompany this Report. The Committees urge Florida practitioners who render opinions to resist efforts by Opinion Recipients to remove such Qualification language from their opinions. They also urge Opinion Recipients to recognize that the inclusion of a "practical realization" or "generic" Qualification represents customary practice in Florida and makes sense and is fair in light of the cost to benefit analysis that defines third-party legal opinion customary practice in Florida.

Further, the Committees believe that the Florida customary practice defines the scope of a remedies opinion issued by Florida counsel, regardless of where the Opinion Recipient is located. However, Opining Counsel participating in multi-state transactions should recognize that Opining Counsel's opinion may ultimately be interpreted by a judge in a different jurisdiction who may be more familiar with another practice standard. Although the Committees believe that a judge in any jurisdiction ought to follow Florida customary practice as set forth in this Report in interpreting the opinion of a Florida counsel, that may not always prove to be the case. Therefore, in an effort to make sure that Opining Counsel's opinion is interpreted properly under any customary practice standard, the Committees believe that all opinion letters should expressly include the Qualifications recommended by this Report.

B. Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion

1. *Legal Issues Covered by the Remedies Opinion*

In connection with issuing a remedies opinion, Opining Counsel should read the Transaction Documents in their entirety and carefully consider the enforceability of the Client's promises, covenants and undertakings in the Transaction Documents, as well as each remedy expressly provided in respect of breaches thereof. In the course of this review, Opining Counsel should bear in mind that the remedies opinion is deemed to set forth three distinct but related legal opinions, in each case *subject to any Qualifications* that are implicitly included in the opinion or expressly set forth in the opinion letter.

Opining Counsel should ensure that the remedies opinion is not given in respect of Transaction Documents that do not in and of themselves give rise to a breach. Generally speaking, UCC financing statements, closing certificates, affidavits, and many other closing deliverables do not give rise to remedies outside of the remedies arising under the primary documents (such as under a promissory note, a loan agreement, a security agreement or an asset or stock purchase agreement), and are therefore not appropriate subjects of a remedies opinion to be requested or be given. See "Common Elements of Opinions – Transaction Documents."

As a starting point, the remedies opinion confirms that the contracts contained in the Transaction Documents have been formed. Although certain of the predicate opinions also address contract formation, in the context of a remedies opinion the focus is on the requirements under the law governing the Transaction Documents to make the agreements binding upon the Client. In contrast, the execution and delivery opinion, which is one of the predicate opinions, focuses on whether the person with the power and authority to bind him or her or an entity, as applicable, entered into the Transaction Documents so as to bind him or her individually or the entity, as applicable, by signing the Transaction Documents and delivering the signed documents to the Opinion Recipient (or its designee) with the intent to be bound thereby. In this regard, Opining Counsel should be sure to review relevant laws and statutes bearing upon whether a contract has been formed under applicable law and whether the actions or approvals necessary to bind the Client have in fact been taken or obtained.

Second, the remedies opinion confirms that the remedies specified in the Transaction Document can be expected to be given effect by courts with respect to breaches by the Client of the "essential" undertakings in the Transaction Documents. As discussed in greater detail below, Qualifications are required if (i) under applicable law the Opinion Recipient will not have a remedy for any such breach or (ii) a particular remedy specified in the

Transaction Document for any such breach will not be given effect under the circumstances contemplated. Accordingly, in terms of diligence, Opining Counsel should review each of the specified remedies and determine whether they will be available (to the extent they are not otherwise limited by customarily implied or expressly stated Qualifications or, in particular, a "practical realization" or "generic" Qualification).

As a general matter, customary practice requires that Opining Counsel consider bodies of law that lawyers who render legal opinions with respect to the type of transaction involved would reasonably recognize as being applicable to (i) transactions of the nature covered by the Transaction Documents and (ii) the role of the Client in the Transaction (for example, a borrower or a seller). The analysis required in (i) and (ii) is complex. Accordingly, under Florida customary practice, an issue is deemed to be covered by the remedies opinion only when it is both (i) essential to the particular conclusion expressed and (ii) reasonable under the circumstances for the Opinion Recipient to conclude that it was intended to be covered. If the business of the Client is regulated, the laws relating to such regulated business may be within the laws required to be considered for the opinion.

Some laws, however, are automatically excluded from the scope of an opinion of Florida counsel unless such laws are specifically addressed in the opinion letter. See "Common Elements – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" for a list of laws that are not covered under Florida customary practice by an opinion issued by Florida counsel unless such laws are expressly addressed in the opinion letter. Opinion Recipients should consider whether under their particular circumstances they want to require coverage in an opinion as to the impact of any excluded law. However, Opinion Recipients should be mindful only to ask for comfort that is reasonable under the circumstances. Although Opining Counsel should exercise diligence and do what is reasonably necessary to provide coverage of requested excluded laws, including consultation with lawyers with relevant experience or expertise, as appropriate, to render the particular specialized opinion in cases where Opining Counsel does not otherwise have the expertise to render such opinions. However, Opining Counsel should *not* generally be required to seek guidance from experts in every specialized field of law that might be implicated by the undertakings in a Transaction Document, because such an effort would never be cost-justified (even in very large transactions). See "Common Elements of Opinions – Opinions of Local or Specialist Counsel."

Further Opining Counsel may wish to exclude other areas of law from the opinion by expressly excluding them in the opinion letter. For example, Opining Counsel may wish to specifically exclude from the scope of the opinion certain laws that may affect the particular Client's business, such as (for example) laws and regulations overseen by the U.S. Food and Drug Administration ("**FDA**") or the U.S. Federal Aviation Authority ("**FAA**"). See "Examples of Specific Limitations to the Remedies Opinions (Additional Qualifications)" below.

Notwithstanding, a remedies opinion rendered by a Florida Opining Counsel *does* cover matters such as choice of law, usury, covenants not to compete and indemnification provisions unless such matters are excluded from the scope of the remedies opinion by express language in the opinion letter, such opinions are specifically addressed in a separate opinion, or such opinions are expressly assumed away by Opining Counsel in the opinion letter. However, if a separate opinion is given on issues such as choice of law or usury, then the scope of the remedies opinion with respect to such issue will be defined by the scope of the separate opinion and not by any interpretation under Florida customary practice of what such opinion means generally in the remedies opinion.

Additionally, because some Transaction Documents provide that they will be specifically enforced against a party, in the absence of proper Qualifications, a remedies opinion as to such a Transaction Document means that the specified remedy will be available. However, as discussed more fully below, because a remedies opinion is always subject to a bankruptcy exception and an equitable principles limitation (whether or not such Qualifications are expressly included in the opinion letter), the remedies opinion should generally be understood to mean that a court would *consider* whether to provide specific performance or any other specified remedy, but would not be viewed as opining that the Transaction Documents would or should be specifically enforced.

Third, the remedies opinion describes the extent to which courts can be expected to enforce the provisions of the Transaction Documents that are *undertakings*, regardless of whether such undertakings are linked to the

concept of breach. The remedies opinion does not apply to provisions that are not undertakings – even where such provisions can be breached by the Client. For example, the representations and warranties contained in the Transaction Documents are not undertakings and, therefore, any breach of the truthfulness, completeness and accuracy of any such representation or warranty is not covered by the scope of the remedies opinion. The breach, however, of any such representation or warranty, if material, may trigger the enforcement of remedies that are the subject of the remedies opinion.

The following section discusses the various types of undertakings that are customarily addressed in a remedies opinion, as well as those that are customarily excluded.

2. *Types of Undertakings*

The expansive reach of the remedies opinion can best be understood by considering the myriad types of undertakings to which it relates.

First, some provisions in a Transaction Document obligate the Client to perform some affirmative act, but remain silent with respect to what will happen if the Client fails to perform. For example, the Transaction Documents may require that the Client pay principal and interest in respect of a loan obligation or provide certain accounts and reports on a regular basis. For these provisions, the remedies opinion means that a court should either require the Client to fulfill its undertakings as written or grant damages or some other remedy in the event of a breach.

Second, some Transaction Documents contain provisions which specify a remedy to be applied if the Client fails to carry out particular undertakings. For provisions of this sort, the remedies opinion means that a court should give effect to the specified remedies as written. Accordingly, Opining Counsel should review each such provision in the Transaction Documents and determine the nature and validity of the stated remedy. Remedies provisions may be implied from the nature of certain affirmative undertakings (for example, a requirement to pay liquidated damages). More often, however, they take the form of a grant to the other party of a right to take action (for example, to accelerate the maturity of a loan). A Transaction Document may specify a remedy that the courts in the governing law jurisdiction would never enforce, such as forced entry to a debtor's premises to recover assets without judicial order. In respect of provisions of this sort, a general or specific Qualification to the remedies opinion should be taken (for example this undertaking would be excluded from the scope of a remedies opinion that includes a "practical realization" or "generic" Qualification). In other instances, whereby a court would enforce a stated remedy, but such enforcement will be subject to equitable principles, no additional Qualifications need be taken other than the customary limitations concerning the application of equitable principles.

Finally, other commonly utilized provisions in Transaction Documents establish ground rules for interpreting or administering the Transaction Documents and settling disputes under them. Provisions of this sort may establish the law by which each Transaction Document is to be governed, indicate how each Transaction Document is to be amended, designate the forum in which disputes are to be resolved (for example, arbitration or the courts of a particular state), or waive certain rights (such as the right to a jury trial). Although each of these provisions is typically expressed as a declaration, each provision constitutes an undertaking of a party to another party. In many cases, unless expressly excluded from the remedies opinion, Opining Counsel should assume that these provisions are covered by the remedies opinion, which is understood to mean that a court should enforce the provision as written and require the Client to abide by its terms.

C. A Note on Transaction-Specific Diligence

It is important to note that the nature of the diligence required to be performed by Opining Counsel will depend in large part upon the nature of the transactions contemplated by the Transaction Documents. For instance, Transaction Documents in respect of commercial financing transactions should be carefully reviewed for provisions which may be prohibited under the UCC. Similarly, noncompetition agreements are by their nature restrictive and tend to be carefully scrutinized in judicial tribunals. Because in Florida restrictive covenants are valid and enforceable only if they are supported by adequate consideration, are reasonable and do not conflict

with public policy, each of these matters should be considered by Opining Counsel. Further, the safe harbor rules under Section 542.335, Florida Statutes, regarding the enforceability of non-competition agreements under certain circumstances should also be considered. Alternatively, consideration should be given to excluding noncompetition agreements from the list of Transaction Documents covered by the remedies opinion or, if such agreements are part of an employment or other contract, expressly providing in the opinion letter that no opinion is being rendered with respect to these non-competition matters.

D. Qualifications For Narrowing The Scope of the Remedies Opinion

Opining Counsel should expressly set forth Opining Counsel's Qualifications in the opinion letter, although customary practice in Florida implicitly includes certain Qualifications in every opinion of Florida counsel even if not expressly stated. Thus, if Opining Counsel intends to issue a remedies opinion that does *not* cover each and every undertaking of the Client in the Transaction Documents, the recommended approach in this Report is for the opinion letter to unambiguously state the limitations Opining Counsel intends to impose and/or limit the Opinion through the use of a "generic" or "practical realization" Qualification (discussed in more detail below). Moreover, even if such Qualification is used, if Opining Counsel concludes that a particular remedy specified in the Transaction Documents, such as an indemnification provision, is unlikely to be given legal effect, Opining Counsel should consider including a specific Qualification to that effect in the opinion letter so as to avoid a later argument as to whether the specific remedy was "material" (and thus not excluded from a "practical realization" Qualification) from the standpoint of the Opinion Recipient.

Therefore, it is imperative that Opining Counsel carefully review the Transaction Documents to determine the Qualifications to be included. To this end, it is best practice if Qualifications are precisely tailored to the specific undertakings covered by the opinion. For example, when considering the enforceability of an acquisition agreement, Opining Counsel should give special attention to "lock-up" options and "no shop" and "non-competition" clauses, among others, as well as provisions relating to the resolution of disputes (such as choice of forum, *forum non conveniens* and provisions on subject matter jurisdiction). As an additional example, when foreign Clients are involved, some Opining Counsel will expressly exclude from the remedies opinion any judicial deference to acts of foreign sovereign states. However, notwithstanding that "comity" (i.e., deference to the laws of others) is viewed as an integral part of United States law, because the law of comity is of general application and broadly understood, comity is included as an implied exception in opinions of Florida counsel and, as such, an express exception in the opinion letter is not required.

E. The Bankruptcy Exception and the Equitable Principles Limitation

Two uniformly accepted Qualifications to the remedies opinion are the bankruptcy exception and the equitable principles limitation. They are usually stated together. In many cases, these Qualifications are placed within or immediately following the remedies opinion in the opinion letter. In other cases, the Qualifications are placed in a separate Qualifications section or portion of the opinion letter. In some cases, the separate Qualification specifically makes reference that it applies only to the remedies opinion. In other cases, no such express reference to the remedies opinion is included. In either case, the bankruptcy exception and equitable principles limitation only qualify the remedies opinion. The recommended form of this Qualification is as follows:

> **. . . except as may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or transfer, or other similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.**
>
> **or**
>
> **The opinion contained in [paragraph __] of this opinion letter is limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.**

The bankruptcy exception and the equitable principles limitation are implicit in every remedies opinion rendered by Florida counsel. However, Opining Counsel should recognize that it is customary practice in Florida and elsewhere to expressly include the bankruptcy and equitable principles Qualifications in an opinion letter in which a remedies opinion is given, and all of the forms of opinions that accompany this Report expressly include such Qualifications.

The following describes the scope of the bankruptcy exception and the equitable principles limitation.

1. *The Bankruptcy Exception*

The bankruptcy exception (which is sometimes referred to as the insolvency exception) excludes from the scope of the remedies opinion the effect of bankruptcy and similar creditors rights laws, as well as their effect on matters such as non-consolidation of entities, fraudulent conveyances and transfers, true sale matters, and preferences, which items do not address the enforceability of a Transaction Document and instead address the applicability of particular principles of bankruptcy and similar creditor rights law. As a consequence, the effects of these items are excluded from the scope of the remedies opinion by the "bankruptcy" exception. Although the use of the word "similar" in the language provided above is intended to denote that the bankruptcy exception does not operate to exclude from the scope of the opinion those laws affecting creditors' rights generally that are unrelated to laws grounded in insolvency, such as usury laws, the omission of the word "similar" does not broaden the scope of the exception.

Sometimes the recommended bankruptcy Qualification language is preceded by the words "except as enforcement may be limited by bankruptcy, insolvency…." However, use of the word "enforcement" is not intended, and should not be construed, to restrict the bankruptcy exception to matters relating to enforcement of contract provisions. Any narrowing of the bankruptcy exception requires unambiguous language rather than reliance on a single word.

The bankruptcy exception relates to a body of law rather than to a particular proceeding. Thus, the exception will have application, for example, to a fraudulent conveyance or transfer, even if the Client never becomes subject to a bankruptcy or insolvency proceeding. For example, the bankruptcy of another person or entity may affect the Client. Similarly, a bankruptcy court may not permit the enforcement of certain obligations of a party in a bankruptcy proceeding if such enforcement could disrupt the proceedings.

The bankruptcy exception is also an "insolvency law exception" in that it covers not only the federal Bankruptcy Code but also any other similar insolvency laws (state or federal) of general applicability. Insolvency is included in the bankruptcy exception even if the word "insolvency" is excluded. The "bankruptcy exception" tells the Opinion Recipient that a specific body of law has been excluded from the remedies opinion. The exception refers to all situations (whether involving insolvency proceedings or not) to which insolvency principles apply, including state and federal fraudulent conveyance and transfer laws. Sometimes the exception explicitly refers to those laws (often after the word "insolvency"). If not, they are assumed to be included in the phrase "other similar laws." Some lawyers choose to expressly include in the bankruptcy exception references to reorganization and moratorium laws, and the forms of opinions that accompany this Report reflect the inclusion of this language. However, both moratorium and "reorganization" (a term that is integral to the Bankruptcy Code) are within the scope of the bankruptcy exception even if they are not expressly mentioned.

2. *The Equitable Principles Limitation*

Opining Counsel may conclude that particular provisions of a Transaction Document are binding and yet, under certain circumstances, foresee that those provisions may not be given effect by a court, particularly a court sitting or acting in equity. Thus, the equitable principles limitation serves as the basis for qualifying the enforcement of a remedy under a Transaction Document from an equitable perspective. The limitation does not address equitable matters that may have preceded or otherwise affected the initial formation of a contract. For example, if before rendering the remedies opinion, Opining Counsel believes that coercion, duress or other inequitable conduct has or is likely to have prevented the formation of the Transaction Document in question,

Opining Counsel should not render the opinion (or should disclose Opining Counsel's concerns if the Client consents to such disclosure). On the other hand, to the extent Opining Counsel has no Knowledge to the contrary, Opining Counsel is entitled to assume, without so stating, the absence of conduct so egregious as to preclude formation of a contract.

The equitable principles limitation relates to those principles courts apply when, in light of facts or events that occur after the effectiveness of a Transaction Document, courts decline in the interest of equity to give effect to particular provisions in such Transaction Document (or otherwise limit the application of such provisions). For example, a court may determine that in certain circumstances, a provision in a Transaction Document specifying a certain notice period sets forth a period that is too short, or the withholding of a consent is unreasonable even though the Transaction Document provides that consent may be given or withheld in a party's sole and absolute discretion. These determinations obviously impact the applicability of remedies which would normally be addressed by the remedies opinion. The equitable principles limitation addresses circumstances where court determinations are grounded in the belief that to enforce the contract literally would be inequitable in the context in which the dispute has arisen. However, Opining Counsel should consider that if, in the example above, the notice provision would in all circumstances be held to be too short or if the withholding of consent would in all circumstances be improper, the equitable principles limitation may not have the effect of qualifying the remedies opinion as to those provisions. In these examples, relief would be expected to be denied because of the invalidity of the provision as a legal matter rather than because of the application of equitable principles. In addition, the equitable principles limitation covers those situations in which a court may decline to give effect to a contractual provision because the enforcing party has not been significantly harmed. For example, such would be the case where an alleged breach is not material and has not resulted in any meaningful damage to the party seeking enforcement.

In light of the foregoing, the equitable principles limitation should be understood to address not only the availability of traditional equitable remedies (such as specific performance or injunctive relief) but also defenses rooted in equity that result from the enforcing party's lack of good faith and fair dealing, unreasonableness of conduct (including coercion, duress, unconscionability, undue influence, and in some cases, estoppel), or undue delay (such as laches). However, because a court's interest in justice and its broad equitable discretion can lead to a wide-reaching range of outcomes, it is impossible to define with precision the limits of the equitable principles limitations. Thus, language purporting to narrow the equitable principles limitation should not be requested or provided. Even an opinion that a specific remedy in a Transaction Document will be given effect as written is subject to the equitable principles limitation.

Sometimes the recommended equitable principles Qualification language is preceded by the words "except as enforcement may be limited by … general principles of equity." However, use of the word "enforcement" is not intended, and should not be construed, to restrict the equitable principles limitation to matters relating to enforcement of contract provisions. Any narrowing of the equitable principles limitation requires unambiguous language rather than reliance on a single word.

F. The "Practical Realization" or "Generic" Qualification

1. *General Language to Express the "Practical Realization" and the "Generic" Qualification*

Although exceptions ordinarily identify with specificity the provisions of the Transaction Document to which they apply, both the "practical realization" Qualification and the "generic" Qualification take an entirely different approach. Under the "practical realization" Qualification, the remedies opinion should be understood to mean that a contract has been formed and that if inconsistent or legally defective remedies are set forth in a Transaction Document, the remedial provisions taken as a whole will nevertheless provide the Opinion Recipient, in the event of a material default by the Client, the benefit of its bargained-for ability to realize upon security or leased property or to realize the benefits of the Transaction, as the case may be, and to pursue a claim for damages. The "generic" Qualification (which is often included in opinions relating to loan transactions) further limits the "practical realization" Qualification in that it reduces the scope of the remedies opinion to the Opinion Recipient's ability to obtain judicial enforcement of the Client's principal obligations under the

Transaction Documents (such as the client's obligation to repay the principal and interest of a loan), to accelerate the particular obligation (i.e., to pay principal and interest) in the event of a material default under the Transaction Documents, and to foreclose on any security under such circumstances.

Opining Counsel most often use the "practical realization" or "generic" Qualification to limit the scope of their opinions on the enforceability of Transaction Documents that contain many specific remedies, some of which may be unenforceable as written or may be mutually inconsistent but are stated to be nonexclusive. By using the "practical realization" or "generic" Qualification, Opining Counsel can avoid the time and cost of analyzing each remedial provision in the Transaction Documents and its relationship with the other provisions of the Transaction Documents and reduce the need to take numerous, specific opinion Qualifications. This approach is an effective way to limit the amount of time and resources spent by Opining Counsel on the remedies opinion, particularly because in most Transactions, the bulk of the negotiation regarding the Transaction Documents relates to the business terms between the parties (the representations and warranties, covenants and default provisions of the Transaction Documents), but not to the remedies provisions of the Transaction Documents (which are often quite extensive but are generally not negotiable).

Many Opinion Recipients are receptive to this opinion "shortcut" because they have drafted the Transaction Document in question and are already advising their own client(s) regarding the enforceability of particular remedies provided for in the Transaction Documents. Others, however, view the "practical realization" or "generic" Qualification as depriving the Opinion Recipient of appropriate guidance from Opining Counsel concerning the availability of particular remedies. Despite their inherent ambiguities and limitations, the "practical realization" Qualification and the "generic" Qualification are used frequently in remedies opinions on many types of transactions, and customary practice in Florida contemplates inclusion of a "practical realization" Qualification or "generic" Qualification in all opinions (and such a Qualification is included in the forms of opinions that accompany this Report).

As set forth above in "Overview of the Remedies Opinion," the Committees believe that current Florida customary practice takes an "essential provision" view regarding the meaning of the remedies opinion. In that regard, the Committees believe that inclusion of a "practical realization" Qualification or a "generic" Qualification in each opinion letter of Florida counsel containing a remedies opinion most effectively limits the scope of the remedies opinion to an opinion regarding the "essential provisions" of the Transaction Documents and makes sense and is fair in light of the cost to benefit analysis that defines third-party legal opinion customary practice in Florida.

Like the remedies opinion itself, a reference to the "practical realization" or "generic" Qualification should always be understood to be subject to the bankruptcy exception and the equitable principles limitation and to any other specifically stated exceptions and Qualifications contained in the opinion letter. For the avoidance of doubt, Opining Counsel may wish to state expressly in the opinion letter that the exception is in addition to and not intended to limit the scope of the standard bankruptcy exception, equitable principles limitation, and any other specifically stated Qualifications. In that regard, it is inappropriate to request that the "practical realization" or "generic" Qualification language override the bankruptcy exception and/or the equitable principles limitation, and such an overriding opinion should never be requested or given.

2. *The "Practical Realization" Qualification*

The "practical realization" qualification is often expressed as follows:

> **Although certain of the provisions in the [Transaction Documents] may be unenforceable, such unenforceability does not affect the overall validity of the [Transaction Documents] or interfere with the substantial (or practical) realization of the principal benefits (or security) purported to be provided by the [Transaction Documents].**

The "practical realization" qualification is sometimes criticized for being overly broad, inasmuch as the parties may have conflicting understandings of the meaning of "practical realization" or "practical benefits." Under Florida customary practice, these words are interpreted under a commercially reasonable standard (i.e., what would a reasonable Opinion Recipient, who is acting in a reasonably commercial manner, expect).

3. *"Generic" Qualification Customarily Used by Opining Counsel in Real Estate Loan Transactions*

In negotiating real estate loan transactions, it has become widely accepted customary practice (including in Florida) to limit the remedies opinion so that it covers only repayment of the loan, acceleration of the maturity of the loan, and foreclosure upon the real and personal property subject to the foreclosure provisions of the Transaction Documents. To this end, most real estate practitioners throughout the United States favor the approach taken in the Real Estate Report and the ACREL "All Inclusive Opinion," which recommends the use of a "generic" qualification: that is, that certain provisions of the loan documents may be unenforceable, but that such unenforceability will not render the Transaction Documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provision of the Transaction Documents. The following is the suggested language for using this approach:

> **In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the [Transaction Documents/Note], (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest *[or upon a material default in any other material provision of the Transaction Documents,]* and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the [Collateral] created by the Security Documents upon maturity or upon the acceleration pursuant to (ii) above.**

The material default in material provisions language in italics above is often added at the request of the Opinion Recipient, but suffers from the same interpretation issue that is associated with the "practical realization" Qualification. When such language is included in the "generic" Qualification, it should be interpreted as defining "material provisions" and "material defaults" under a commercially reasonable standard.

Accordingly, given the customary use of a "generic" Qualification, and in light of the broad equitable principles limitation generally included in opinions, an opinion with respect to a real estate loan does not require the inclusion of additional specific Qualifications. In fact, Opining Counsel need only utilize additional Qualifications with respect to (i) matters that are not adequately addressed by the bankruptcy exception, equitable principles limitation and/or the "generic" Qualification, (ii) matters that may be of special importance to the Opinion Recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware, or (iii) in certain instances, provisions in the Transaction Documents that were particularly contentious during negotiations.

4. *Use of the "Generic" Qualification in other Transactions*

There is increasing use of a "generic" Qualification similar to the ACREL "All Inclusive Opinion" in opinions regarding other types of transactions, and particularly in non-real estate secured lending transactions. In such cases, the following "generic" Qualification to the remedies opinion is often used:

> **In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Client to [repay the principal, together with the interest thereon (to the extent not deemed a penalty),] as provided in the [Transaction Documents/Note], (ii) the acceleration of the obligation of the Client to [repay such principal, together with such interest,] upon a material default by the Client in the payment of such principal or interest *or upon a material default in any other material provision of the Transaction Documents*, and (iii) [the right to foreclose upon the security interest in the [Collateral] created by the [Transaction Documents], upon maturity or upon an acceleration pursuant to (ii) above].**

The Committees believe that use of this particular form of wording for the "generic" Qualification has become customary practice in Florida (particularly in non-real estate lending transactions), and the form of opinions that accompany this Report include either a "practical realization" Qualification or a "generic" Qualification.

Opining Counsel need only utilize additional Qualifications with respect to (i) matters that are not adequately addressed by the bankruptcy exception, equitable principles limitation and/or the "generic" Qualification, (ii) matters that may be of special importance to the Opinion Recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware, or (iii) in certain instances, provisions in the Transaction Documents that were particularly contentious during negotiations.

G. Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)

1. *Regulatory Issues*

(a) Regulatory Issues Involving the Client's Status or Activities Are Covered

The nature of the business conducted by the Client may affect the extent of the remedies opinion. Opining Counsel may be called upon to advise whether the Client has complied with regulatory statutes applicable to such Client because of the nature of the Client's business to the extent that non-compliance impairs enforceability. For example, if Opining Counsel is representing a pharmaceutical company or an airline, Opining Counsel would need to consider in issuing a remedies opinion with respect to such Client the effect of food and drug laws and regulations overseen by the FDA or the laws and rules governing the operation of an airline overseen by the FAA, respectively.

In determining whether to render an opinion regarding regulatory issues, Opining Counsel should consider whether Opinion Counsel is competent to render such opinion. If Opining Counsel is not competent in that regard, Opining Counsel should consider excluding the laws and regulations of the particular regulated industry from the scope of the opinion or obtaining specialist counsel knowledgeable about such regulatory issues to separately render the opinion directly to the Opinion Recipient. See "Common Elements of Opinions – Opinions of Local or Specialist Counsel."

(b) Regulatory Issues Involving Other Parties Are Not Covered

As stated above, a remedies opinion, as a matter of Florida customary practice, does not cover and should not be read to cover regulatory statutes that govern the Opinion Recipient. Thus, for example, in rendering a remedies opinion in a bank lending transaction, Opining Counsel in its representation of the borrower is not opining on whether the loan contravenes the bank's lending limit, whether the bank has obtained any required governmental approvals or the impact of other state or federal regulatory laws. However, in the context of a loan transaction, some Opinion Recipients may request an opinion regarding whether they must register to transact business in Florida in order to make the loan. See "Authorization to Transact Business – Lender Not Required to Register As a Foreign Corporation in Florida to Make a Loan."

(c) Regulatory Issues Involving Both Parties Are Sometimes Covered

Some regulatory issues affect both the Client and the Opinion Recipient. For example, Federal Reserve Board's margin regulations, may be germane to both parties in a loan transaction, since application of these regulations may render a loan void. However, such margin requirements are unusually complex and, as a result, are excluded from the scope of an opinion of Florida counsel (including a remedies opinion) under customary practice in Florida unless specifically included in the opinion letter. See "Common Elements – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law." Under such circumstances, an Opinion Recipient may wish to ask for a specific opinion with respect to this issue.

2. *Discharge or Disclosure of Fiduciary Obligation*

Opining Counsel will generally obtain certificates or other evidence of the various corporate or company approvals required to give an opinion. The certificate or other evidence is to the effect that the required vote has been obtained and, if necessary, that a meeting was held and proper notice was given. Because of the fundamentally legal nature of these matters, such a certificate is understood as not addressing (i) whether those voting were sufficiently informed about the matter on which they voted and (ii) whether those voting were doing so improperly because, for example, they had not disclosed an interest in the Transaction or had violated a fiduciary responsibility.

As for the first of those questions, Opining Counsel may assume without disclosure and without investigation (subject to customary limits on unstated assumptions) that the facts required to be presented to obtain an effective approval have been provided. Any assessment of the adequacy of factual disclosure (for instance, in proxy statements) is a significant task and one that is customarily not undertaken in order to render an opinion. Similarly, Opining Counsel is not required, as a matter of customary diligence, to inquire into whether those approving the Transaction have violated their fiduciary obligations or have an interest they failed to make known, unless the opinion explicitly covers those issues. The remedies opinion is based on the assumption, usually tacit, that those who have approved a Transaction Document have satisfied their fiduciary obligations and appropriately disclosed any interest therein.

3. *Other Common Qualifications*

Often, Opining Counsel expressly include specific exceptions and qualifications to a remedies opinion in the opinion letter. The purpose of using these specific exceptions is to bring limitations as to the scope of the remedies opinion to the attention of the Opinion Recipient. If a "practical realization" Qualification or a "generic" Qualification is included in the opinion letter, then many or all of these specific exceptions may not be necessary. However, some counsel may nevertheless choose to include in their opinion letter applicable specific Qualifications to the remedies opinion in an abundance of caution. Under Florida customary practice, if specific exceptions to the remedies opinion are included in an opinion that also includes a "practical realization" Qualification or a "generic" Qualification, then the inclusion of such specific exceptions will further limit the scope of the opinion. However, the inclusion of one or more specific Qualifications to particular provisions in the Transaction Documents does not override the interpretation of the remedies opinion that results from the inclusion of the "practical realization" or "generic" Qualification in such opinion, notwithstanding some level of potential overlap between the Qualifications and notwithstanding that not all of the exceptions for not all remedies that are excluded from the scope of the remedies opinion by reason of the inclusion of a "generic" Qualification or "practical realization" Qualification are expressly set forth in the opinion letter.

If a "practical realization" or "generic" Qualification is not included in an opinion letter, and if Opining Counsel wishes to make clear that not all rights and remedies in an agreement are enforceable, Opining Counsel should consider including in the opinion letter a list of provisions contained in the Transaction Documents as to which the opinion relates that might not be enforceable in accordance with their terms. Some provisions that Opining Counsel may want to expressly exclude from the remedies opinion through inclusion of a specific exception in the opinion letter include any provision in the Transaction Documents that:

(a) purports to excuse a party from liability for its own acts;

(b) purports to make void any act done in contravention thereof;

(c) purports to authorize a party to act in its sole discretion or that provide that determination by a party is conclusive;

(d) requires waivers or amendments to be made only in writing;

(e) purports to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws, waivers of any statute of limitations or any provisions that contain waivers of broadly or vaguely stated rights, of unknown future defenses or of rights to damages;

(f) imposes or permits (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv)

indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confession of judgment, or (vi) rights of self-help or forfeiture;

(g) purports to limit or alter laws requiring mitigation of damages;

(h) concerns choice of forum, consent or submission to the (personal or subject matter) jurisdiction of courts, venue of actions or means of service of process, waivers of rights to jury trials, and agreements requiring arbitration;

(i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;

(j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees;

(k) relates to the evidentiary standard or other standard by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;

(l) prohibits or unreasonably restricts (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, (iv) the ability of any person to transfer any property, or (v) activities in restraint of trade;

(m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;

(n) constitutes severability provisions;

(o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;

(p) purports to create rights to setoff otherwise than in accordance with applicable law; and

(q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due.

The preceding list of other common exceptions to a remedies opinion is not intended to be exhaustive but is rather intended to reflect an illustrative list of exceptions that Opining Counsel may wish to consider including in the opinion to the extent appropriate.

It is also noted that there are other qualifications and assumptions that are automatically included in every opinion that may affect the scope of the remedies opinion. See "Common Elements – Assumptions."

4. *Inappropriate Modifications to the "Practical Realization" Language*

Sometimes an Opinion Recipient, faced with numerous opinion exceptions which significantly diminish the strength of the opinion, will respond with a request that the "practical realization" language discussed above be modified to include the following: "Notwithstanding the exceptions noted above, the Opinion Recipient will achieve the practical realization of the benefits intended to be conferred by the Transaction Documents." This broad "practical realization" language is wholly different from the more limited versions described above. Unlike the more limited versions, which are subject to the bankruptcy exception and the equitable principles limitation, this version of the "practical realization" Qualification seeks to override *all* Qualifications, requiring Opining Counsel to conclude that Qualifications will not prevent the Opinion Recipient from enjoying the "benefits" of the Transaction Document(s). This form of opinion request is inappropriate and should not be requested or given.

H. Remedies Opinions and Arbitration

1. *Opinions with Respect to Arbitration Provisions*

An arbitration provision in a Transaction Document constitutes an "undertaking," a promise by each party to the other, concerning the forum for resolution of disputes. Unless expressly excluded, the remedies opinion covers arbitration provisions just as it covers other undertakings. Remedies opinions with respect to Transaction

Documents containing arbitration clauses customarily do not indicate when disputes arising under the Transaction Document are subject to arbitration, nor do they attempt to describe the differences between the resolution of disputes through litigation and arbitration.

Public policy sometimes requires that a dispute be resolved in a judicial forum instead of in arbitration. Public policy may also preclude the submission to arbitration of certain issues. For example, some courts will not give effect to an arbitration clause that provides that arbitration can only be initiated by one party to a Transaction Document. Accordingly, if Opining Counsel is unable to conclude that the arbitration provision will be given effect in all respects (other than possibly in bankruptcy or insolvency proceedings or where giving effect thereto would be inequitable such that those circumstances come within the bankruptcy exceptions and/or the equitable principles limitation), he or she should include in the opinion letter an exception to the remedies opinion. The recommended language is as follows:

We express no opinion with respect to the provision in the Transaction Document requiring arbitration as to matters of _____

Additionally, an additional Qualification is appropriate with respect to provisions that provide other problematic undertakings. For instance, some arbitration provisions provide for judicial review of the merits of an arbitration award in violation of applicable statutory provisions, and therefore may or may not be enforceable.

2. *Rules of Arbitral Tribunals Not Covered by Remedies Opinion*

Transaction Documents that contain arbitration provisions usually incorporate by reference the rules of an arbitral tribunal, such as the Commercial Arbitration Rules of the American Arbitration Association. Although a remedies opinion addresses the enforceability of the arbitration provision to require arbitration, as a matter of customary practice, the remedies opinion is understood not to address the enforceability of these types of rules.

I. Enforceability as of the Date of an Opinion Letter and in the Future

Opining Counsel must bear in mind that the remedies opinion calls on Opining Counsel to consider whether provisions of the Transaction Documents would be given effect by a court on the date of the opinion letter and also whether they would be given effect by a court in the future in various circumstances. In that regard, a remedies opinion should be evaluated based on the law in effect on the date of the opinion letter and based on the facts and possible future events that can be considered as reasonably possible under the facts as they exist on the date of the opinion letter, and does not include facts unknown and uncontemplatable at the time the opinion letter is issued. See "Common Elements of Opinions – Date." For this reason, Opining Counsel must review the Transaction Documents with particular attention given to any contingencies that can be reasonably expected to alter the circumstances in which a particular remedy, or in more general terms, enforceability would be sought by a party.

NO VIOLATION AND NO BREACH OR DEFAULT

The function of a "no violation and no breach or default" opinion, which is also commonly referred to as the "no contravention" opinion, is to provide assurance to the Opinion Recipient that the Client's execution, delivery and performance of the Transaction Documents does not: (i) violate the Client's Organizational Documents, (ii) trigger a breach of or a default under one or more of the Client's contractual requirements or under any judgments, decrees or orders applicable to the Client, (iii) result in the creation of a security interest in or a lien on the assets of the entity, except as set forth in the Transaction Documents, or (iv) violate federal and Florida laws, rules or regulations that are applicable to the Client. It is not an opinion that no adverse consequences will result to the Client if the Client enters into the Transaction. The individual components of the "no violation and no breach or default" opinion are discussed below.

The following is the recommended formulation of the "no violation and no breach or default" opinion:

> **The execution and delivery by the Client of the [Transaction Documents] and the performance by the Client of its obligations under the [Transaction Documents] do not: (i) violate the Client's Organizational Documents, (ii) constitute a breach of or a default under any of the Client's [["material"] agreements that are Known to us] or ["identified" agreements listed in _____ (a schedule to one of the Transaction Documents or a certificate to counsel)], (iii) result in the creation of a security interest in or lien on the assets of the Client, except as set forth in the Transaction Documents, (iv) violate any judgment, decree or order of any court or administrative tribunal applicable to the Client that is [Known to us] or [listed in _____ (a schedule to a Transaction Document or a certificate to counsel)], or (v) violate any federal or Florida law, rule or regulation.**

The suggested form of the "no violation of laws" opinion addresses both the execution and delivery of the Transaction Documents by the Client and the "performance by the Client of its obligations" of and under the Transaction Documents. There is a distinction between these terms. Reference to "execution and delivery" or words of similar import limits the opinion to the Client's obligations up to and including the closing of the Transaction contemplated by the Transaction Documents. Reference to the "performance" of its obligations under the "Transaction Documents" includes not only the Client's obligations at closing under the Transaction Documents, but also the Client's post-closing obligations under those agreements. To the extent that this opinion addresses future conduct, the opinion is limited only to conduct expressly required by the Transaction Documents or necessary in order to consummate the Transaction set forth in the Transaction Documents in accordance with its terms under the Applicable Laws as in effect on the date of the opinion. Opining Counsel may also assume that the Client will take no future discretionary action that would result in the violation of a law, and that the Client will obtain all permits and governmental approvals required in the future under relevant statutes or regulations. However, such assumptions and limitations are deemed to be implicit as a matter of customary practice in Florida and thus need not be expressly set forth in the opinion letter.

A. No Violation of Organizational Documents

The "no violation" opinion with respect to a Client's Organizational Documents provides the Opinion Recipient with comfort that neither the execution nor the delivery by the Client of the Transaction Documents, nor the performance by the Client of the Transaction Documents, will violate any of the Client's Organizational Documents. Because the Client's Organizational Documents govern its activities, this opinion addresses the Client's organic ability to enter into and complete the transactions contemplated under the Transaction Documents.

To render a "no violation" opinion with respect to the Client's Organization Documents, Opining Counsel should review: (i) the Transaction Documents, and (ii) the Client's Organizational Documents. Based on this review, Opining Counsel should determine whether the Organizational Documents are violated by the Transaction contemplated in the Transaction Documents.

B. No Breach or Default of Agreements

Historically the "no breach or default of agreements" opinion was rendered to the Knowledge of Opining Counsel, with Opining Counsel having to determine what agreements of the Client they were aware of and then determining whether any of those agreements were violated by the Client's execution, delivery and performance of the Transaction Documents. Further, this opinion generally presumed that Opining Counsel had a regular attorney-client relationship with the Client over a period of years and knew about the Client's agreements, which might or might not have been the case. Although the "no breach or defaults of agreements" opinion is still given regularly by Florida counsel using this historical type of format, it is less in favor today.

As a starting point, unless limited in scope the "no breach or default of agreements" opinion could be construed to cover every agreement to which the Client is a party. This result would be excessively onerous from both a diligence and cost standpoint. As a result, under customary practice in Florida it is generally inappropriate for an Opinion Recipient to request, and Opining Counsel (even if Opining Counsel is the Client's regular outside counsel) should resist the giving of, a "no breach or default of agreements" opinion unless the scope of such opinion is limited in some fashion to either "identified" agreements or to agreements Known to Opining Counsel where a definition of what is a "material" agreement has been agreed upon in advance between the Opining Counsel and the Opinion Recipient.

In rendering the "no breach or default of agreements" opinion, Opining Counsel should determine at an early date the nature and extent of those "agreements as to which the Opinion Recipient is reasonably concerned and which are to be reviewed. For example, in a real estate transaction, agreements recorded in the public records of the jurisdiction in which the real property is located may be of particular importance to the Opinion Recipient. Further, examples of identified agreements might include:

1. agreements identified and set forth: (a) on a schedule attached to the opinion, (b) in a certificate from the Client or from the Client's officers, partners, managers or members, as applicable, or (c) in the representations and warranties of the Client contained in the Transaction Documents or in schedule to the Transaction Documents; or

2. agreements identified by the Client as being "material" in its most recent filings with the U.S. Securities and Exchange Commission (if the Client is a reporting company under U.S. securities laws).

The Committees believe that the responsibility for identifying which agreements should be reviewed by Opining Counsel in order to render the "no breach or default" opinion ought to lie with the Client and/or the Opinion Recipient, and not with Opining Counsel. Further, even if Opining Counsel takes on the responsibility of determining which agreements of the Client are agreements that need to be reviewed in order to render this opinion, Opining Counsel should seek an agreement with the Opinion Recipient as to what constitutes an agreement to be reviewed, both with respect to the type and size of the transactions described in the other agreements and documents, so that the list of agreements to be reviewed with respect to the rendering of this opinion may be appropriately limited in light of the circumstances of a particular Transaction, taking into account the type and size of the Transaction, the diligence requirements to render the opinion, the timetable for closing the Transaction, and other relevant factors. If no agreement as to "materiality" has been agreed to between the Opining Counsel and the Opinion Recipient, then under Florida customary practice the definition of the Client's agreements to be reviewed shall mean "material" agreements under a commercially reasonable standard.

If the "no breach or default of agreements" opinion is simply rendered as to agreements of the Client (without identification as to which agreements of the Client are covered), such opinion should only cover "material" agreements Known to such Opining Counsel. In fact, a blanket statement that the Transaction does not violate material agreements of the Client without a Knowledge qualifier is a factual confirmation and therefore is not an appropriate opinion request. In contrast, however, if the Opinion Recipient agrees to allow coverage of the "no breach or default" opinion to be limited to "identified" agreements, then such opinion should not be limited to Opining Counsel's Knowledge.

Further, Opining Counsel only has Knowledge of agreements that it knows exist. The fact that Opining Counsel is aware that because of the nature of the Client's business the Client must have various types of agreements does not mean that Opining Counsel has Knowledge of any such agreements. Opining Counsel has no duty to inquire or investigate what agreements the Client is a party to in order to render this opinion, unless Opining Counsel expressly agrees to diligence this issue. On the other hand, Opining Counsel is deemed to be aware of agreements that it has become aware of in the course of its representation of the Client, even if it did not represent the Client with respect to such agreement or has not previously reviewed a copy of the agreement. For example, if Opining Counsel has previously reviewed the Client's financial statement and is aware that a prior loan transaction exists, it would be obligated to review the loan agreement with respect to such transaction.

Once the agreements as to which the opinion is being given have been identified, Opining Counsel should review the identified or "material" agreements in order to confirm that no breach or default would result thereunder from the Client's execution, delivery and/or performance of and under the Transaction Documents. In reviewing "identified" agreements (or, if the scope of the opinion is not limited to identified agreements, but rather to "material agreements of the Client Known to such Opining Counsel), Opining Counsel may assume that each of the Client's other agreements being reviewed for purposes of rendering this opinion will be interpreted in accordance with their terms. Under customary practice in Florida, a "no breach or default" opinion regarding "material" or "identified" agreements is only meant to address violations that are readily ascertainable from the face of the agreement(s), and unless the opinion letter clearly indicates otherwise, this opinion is not meant to address primarily factual matters (such as whether or not there are breaches or defaults in respect of ratios and other financial covenants, the effect on the question of whether a material breach or default will occur under provisions such as permitted "baskets" or other limitations on liens and indebtedness, or other covenants, representations and warranties or other provisions of material agreements that involve factual issues that are not readily apparent from Opining Counsel's review of the identified material agreement itself). This limitation would include matters that depend upon financial statements and reports or conclusions of other professionals (e.g., financial, accounting, appraisal or valuation reports or conclusions).

Further, in many instances the Client's agreements may be governed by the laws of states other than Florida. In those instances, Opining Counsel is entitled to assume that the laws of the other state are the same as the laws of Florida. Moreover, under customary practice in Florida, the "no breach or default" opinion regarding "material" or "identified" agreements does not constitute any opinions with respect to any of such agreements, including any opinions regarding the enforceability of any of such agreements.

Under Florida customary practice, it is not appropriate for an Opinion Recipient to request a "no breach or default" of agreements opinion from local counsel where local counsel has little or no Knowledge about the Client.

C. Creation of Security Interests or Liens

An opinion that the execution and delivery of the Transaction Documents will not result in the creation or imposition of a lien on the Client's properties or assets, is limited solely to liens which may be created as a result of entering into and performing the Transaction Documents and does not, in any case, cover any liens arising by operation of law (such as springing liens), regardless of whether or not the opinion letter expressly excludes liens arising by operation of law. It also does not cover the creation, attachment, perfection or priority of any lien created under the Transaction Documents. See "Opinions With Respect to Collateral Under the UCC" and "Opinions Particular to Real Property Transactions."

D. No Violation of Judgments, Decrees or Orders

Rendering a "no violation of judgments, decrees or orders" opinion poses similar problems of diligence to the rendering of a "no breach or default" of material or identified agreements opinion. The materiality and the scope of investigation with respect to judgments, decrees or orders should, if at all possible, be reached by agreement between Opining Counsel and Opinion Recipient. Unless specifically agreed otherwise and expressly

set forth in the opinion letter, under customary practice in Florida, Opining Counsel is not required to conduct any independent investigation regarding judgments, decrees or orders that apply to the Client (such as performing a lawsuit and judgment search of the court docket or public records or reviewing all litigation files of the Opining Counsel's firm). Further, if the Opinion Recipient agrees, Opining Counsel in rendering this opinion may rely on a certificate from the Client regarding the identification of any outstanding judgments, decrees or orders that are applicable to the Client or on a listing of any such judgments, decrees or orders applicable to the Client contained in a Transaction Document or in a schedule to a Transaction Document.

If the "no violation of judgments, decrees or orders" opinion is limited to identified judgments, orders and decrees, or if Opining Counsel knows of a judgment decree or order applicable to the Client, Opining Counsel must review each such judgment, decree or order identified to determine whether they are violated by the Client's executing, delivering and performing of any of the Transaction Documents. In that regard, Opinion Counsel is not permitted to rely in issuing this opinion on the legal conclusion contained in a certificate or Transaction Document in which the Client represents and warrants the effect of any such judgments, decrees or orders on the Client. Further, if an investigation as to any of these matters is performed by Opining Counsel, the scope of such investigation should be specifically noted in the opinion letter (for example if the Opining Counsel agrees to perform a judgment and litigation search in one or more jurisdictions where the Client does business). Similarly, to the extent that Opining Counsel has Knowledge that one or more parties to a Transaction (or their counsel) have conducted any judgment, order or decree searches in respect of the Client, Opining Counsel should request copies of such searches and review the documents identified on such search reports for any violation of such documents that would result from the Client's execution, delivery and performance of and under the Transaction Documents.

In general, unless the "no violation of judgments, decrees or order" opinion is limited to specifically "identified" judgments, decrees or orders, this opinion should relate only to judgment, decrees or orders Known to Opining Counsel.

E. No Violation of Law

The "no violation of laws" opinion means that the Client's execution, delivery and performance of its obligations of and under the Transaction Documents will not expose the Client to sanctions for violating a civil or criminal, statute or regulation. The standard formulation of the "no violation of laws" opinion is limited to Applicable Laws, which term includes the laws that a Florida lawyer exercising customary professional diligence would reasonably expect to be applicable to the Client, the Transaction Documents or the Transaction to which the opinion relates, including laws relating to the Client if the Client is in a regulated industry (such as a bank), but excluding any of the Excluded Laws. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" for the definitions of Applicable Laws and Excluded Laws. In that regard, it is understood under Florida customary practice that each of the Excluded Laws are excluded from opinions issued by Florida counsel unless the opinion letter expressly states that such laws are covered by the opinion letter. Among the laws that are within the definition of Excluded Laws are local laws (ordinances, rules and regulations adopted by counties and municipalities).

The "no violation of laws" opinion should not be interpreted to cover common law doctrines, such as those of contract or tort, that have not been enacted by a legislature. Further, although it may be appropriate in certain circumstances to request an opinion on certain specific local or excluded laws applicable to the subject Transaction (e.g., an opinion on zoning restrictions in a real estate transaction), the cost of requesting an opinion addressing all local laws would not be justified and it is inappropriate for an Opinion Recipient to request that Opining Counsel do so.

Opining Counsel might also be requested to provide an opinion that the Client is in compliance with applicable laws generally. Although in many circumstances it may be appropriate for the Client to make a representation or warranty in the Transaction Documents to this effect, this form of opinion is too broad and is an

inappropriate opinion to request. To render an opinion regarding compliance with applicable laws would require Opining Counsel to have extensive knowledge of the Client's past and present operations, and would require comprehensive and costly research. As a result, the Committees believe that under customary practice in Florida, the costs of rendering this opinion substantially outweigh the benefits of this opinion to the Opinion Recipient in all circumstances.

From a diligence perspective, in issuing a "no violation of laws" opinion, Opining Counsel must be familiar with the laws, rules, and regulations affecting the Transaction Documents (and the case law interpreting such laws, rules and regulations) and the Client's business related to the Transaction Documents. Opining Counsel should consider in that regard Opining Counsel's ethical obligation to be knowledgeable in the law of the area to which the Transaction Documents relate before rendering an opinion or representing the Client with respect to the Transaction. See Section 4-1.1 of the RPC in that regard, which defines the concepts of competent representation and requires that a lawyer have the legal knowledge, skill, thoroughness and preparation reasonably necessary for the particular representation. In appropriate circumstances, specialist counsel with expertise in the areas of law relating to the Transaction Documents or the activities of the Client should be selected. See "Common Elements – Opinions of Local or Specialist Counsel."

F. No Conflict

Frequently an opinion request for a "no violation and no breach or default" opinion will also request a "no conflict" opinion. The concept of "no conflict" is much broader than "no violation or no breach or default" and could be interpreted to include implicit or indirect conflicts, and include conflicts as to future performance requirements. It will usually be difficult for Opining Counsel to make a determination whether there is a conflict between the provisions of the Transaction Documents and identified or material agreements, for example, particularly if each provides numerous performance covenants, each expressed in a different way. As a result, under Florida customary practice, it is unreasonable for the Opinion Recipient to insist that the "no violation and no breach or default" opinion be expanded to include a "no conflict" opinion.

G. Material Adverse Effect

Sometimes, an Opinion Recipient will try to expand the "no violation and no breach or default" opinion by removing the scope limitations described above and inserting (in order to argue to the Opining Counsel that Opining Counsel's opinion is being limited) the concept that such violation would not "materially and adversely affect the Client," or words to that effect. Under customary practice in Florida, although this type of request may be reasonable when requesting representations and warranties from the Client, it is not an appropriate opinion to request.

NO REQUIRED GOVERNMENTAL CONSENTS OR APPROVALS

A. Meaning of the Opinion

The "no governmental consents or approvals" opinion means that the validity of the execution and delivery of the Transaction Documents by the Client (i.e., the actions required to make the Transaction Documents binding agreements with respect to the Client) is not conditioned on any consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the State of Florida or of the federal government on behalf of the Client. The opinion should identify any consents or approvals, authorizations, actions, filings or registrations that are required and specify whether such consents, approvals, authorizations, actions, filings or registrations have been made or have been obtained. The opinion should address only those consents, approvals, authorizations, filings or other actions that must be obtained or made in order to make both the Client's execution and delivery of the Transaction Documents and the closing of the Transaction effective.

This opinion is not an opinion that the Client has all governmental consents and approvals required to conduct its business. A request for an opinion covering this issue is an inappropriate opinion to request.

Some Opining Counsel seek to limit the "no governmental consents or approvals" opinion to their Knowledge. However, because this opinion is solely a conclusion as to an issue of law, a Knowledge qualifier, if included in this opinion will not have the effect of limiting this opinion in any manner. As a result, under Florida customary practice if this opinion is limited to the Knowledge of Opining Counsel, it has the same meaning and requires the same diligence as if this opinion were not limited to the Knowledge of the Opining Counsel.

The recommended form of the opinion is as follows:

> **No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the State of Florida is required by or on behalf of the Client to execute and deliver the [Transaction Documents] other than _____ (or other than those consents, approvals, authorizations, filings, actions and registrations as to which the requisite filings have been accomplished, the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished).**

B. Exceptions

Unless expressly stated in the opinion, under customary practice in Florida the "no required governmental consents" opinion does not include: (i) any consents, approvals, authorizations, actions, filings or registrations that may be required for performance of the Client's post-closing obligations under the Transaction Documents, or (ii) consideration of any consents, approvals, authorizations, filings or registrations by or with any local governmental authority or a political subdivision of a state, such as a county or municipality, that may be necessary to run the Client's business or to own and operate the Client's property. In addition, this opinion also does not cover filings required to perfect a security interest or grant a lien pursuant to the Transaction Documents. Any opinion regarding these types of matters should be explicitly stated in the opinion letter. For information regarding opinions as to these issues, see "Opinions with Respect to Collateral Under the Uniform Commercial Code" and "Opinions Particular to Real Estate Transactions."

Some Opining Counsel expressly state this exception in their opinion letter using the following language:

> **We express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the Client's business [or with respect to the Collateral].**

However, the failure to include this express qualification in the opinion letter is not fatal, since this qualification is implicitly included under Florida customary practice in every "no required governmental consents or approvals" opinion of Florida counsel.

C. Consents of Third Parties

Often Opinion Recipients will request that the opinion address whether consents and/or approvals of third parties are required to be obtained with respect to the Transaction. This opinion is not an appropriate opinion to request. However, Opining Counsel should be aware that if a "no breach or default" opinion of "identified" or "material" agreements is being rendered, then such opinion would nevertheless have the effect of opining as to whether there are any consents and/or approvals of the other third parties to the "identified" or "material" agreements that must be obtained so that the execution and delivery of the Transaction Documents by the Client does not violate the consent requirement contained in such "identified" or "material" agreements.

Sometimes, the Opinion Recipient will request a broader opinion covering such non-governmental consents and approvals, but limited to consents and approvals which, the failure to obtain, would not have a material adverse effect on the Client or its business. However, although it may be reasonable for a Client to provide this type of comfort in its representations and warranties, it is not an appropriate opinion to request under Florida customary practice.

D. Execution and Delivery vs. Performance

The meaning of "execution and delivery" can in some context encompass concepts of performance. However, under Florida customary practice, for purposes of rendering the required "no governmental consents or approvals" opinion, the words "execution and delivery" are deemed to mean only the act of signing and delivering the Transaction Documents or such other acts as are necessary to establish the Transaction Document(s) validity as a binding contract, and does not include any closing or post-closing "performance" by the Client of the Client's obligations under the Transaction Documents.

E. Certificate of Client and Review of Applicable Law

To render the "no required governmental consents or approvals" opinion, Opining Counsel often obtains a certificate from an officer, partner, manager or member, as applicable, of the Client which: (i) contains a general description of the type of business in which the Client is engaged and the jurisdictions in which its business is conducted, (ii) specifies those governmental authorities or agencies that regulate the Client and/or regulate the Client's businesses or assets, (iii) notes whether the Client is subject to any judgments, orders or decrees that may affect the Client or its business, and (iv) states whether such officer, partner, manager or member is aware of any governmental filings that must be made or governmental consents or approvals that must be obtained in connection with the Client's execution and delivery of the Transaction Documents.

Opining Counsel should then review Applicable Laws in light of the information described above to determine what governmental consents, approvals, permits or actions by, and what filings or registrations with governmental authorities may be required in connection with the execution and delivery of the Transaction Documents based on the information contained in the Client's certificate or otherwise Known to such Opining Counsel. If the Client conducts its business in multiple jurisdictions or in a regulated industry, Opining Counsel should consider obtaining opinions of local or specialized counsel with respect to those laws with which the Opining Counsel is unfamiliar. In negotiating the form of the "no required governmental consents or approvals" opinion, the parties should consider the additional expense of engaging separate counsel and whether the costs of such opinion would justify any benefits received by the Opinion Recipient from such opinion. Further, the opinion is deemed to exclude coverage of Excluded Laws unless the application of such laws are specifically covered in the opinion letter. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" for the definitions of Applicable Laws and Excluded Laws.

Some Opining Counsel further limit this opinion by adding the following language:

This opinion letter is based as to matters of law solely on such internal law of the State of Florida and such Federal law that, in each case in our experience, is normally applicable both to entities that are not engaged in regulated business activities and to transactions of the type contemplated by the Transaction Documents and to the Client, without our having made any special investigation concerning any other law, rule, or regulation, and which are not the subject of any opinion herein referring specifically and expressly to any particular law or laws.

If this qualification is included in the opinion letter, it may obviate the need for the officer's certificate described above and may limit the required review of Applicable Laws.

NO LITIGATION

A. Nature and Purpose of the "No Litigation" Statement

The statement of "no litigation" is a factual confirmation that is in the nature of a negative assurance statement. It is not a legal opinion which requires legal analysis and conclusions. For this reason, the statement is often set forth in a separate, unnumbered paragraph in an opinion letter, although its placement as part of the "opinions" section of an opinion letter does not change its meaning or the fact that it is a factual confirmation and not a legal opinion. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." The statement of "no litigation" is not intended, nor should it be ever be construed, as reflecting the anticipated results that are likely to be obtained in any of the Client's litigation matters.

Customary practice regarding the "no litigation" confirmation is in a state of flux. For many years, the "no-litigation" confirmation was requested and given as a matter of course in virtually all third-party legal opinions. Generally, its use was based on the assumption that Opining Counsel regularly represented the Client and had knowledge about the Client's legal affairs. The "no-litigation" confirmation historically provided comfort to the Opinion Recipient that there was no material pending or threatened litigation or proceedings against the Client or affecting the Transaction except as disclosed.

In the Prior Florida Reports, the scope of the "no litigation" confirmation was limited in several important respects. First, it was limited to the Knowledge of the group of lawyers that are defined in this Report as the Primary Lawyer Group. See "Common Elements of Opinions – Knowledge." Second, the determination of whether pending or threatened litigation was "material" was deemed in the Prior Florida Reports to be a subject for determination by the Client and the Opinion Recipient (and not the Opining Counsel), and the confirmation provided was that, to the Knowledge of the Opining Counsel, there were no litigation matters pending or threatened that met objective criteria as to materiality other than those identified (such as those listed in a schedule to the Transaction Documents or in a certificate to counsel). See "No Violation and No Breach or Default" for a discussion on determining an appropriate standard as to materiality. Third, with respect to "overtly" threatened litigation (where the potential claimant has manifested an awareness of and a present intention to assert a claim), the "no litigation" confirmation was limited to overtly threatened litigation that was threatened in writing.

In December 2004, the Massachusetts Business Court, following a bench trial, found a Boston law firm liable to the recipient of a closing opinion (the acquiring company in an acquisition) for more than $9 million in damages and costs. Dean Foods v. Pappatharasi, No. Civ. A. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. December 3, 2004). The basis of liability was negligent misrepresentation stemming from the firm's giving a no-litigation opinion without disclosing in the opinion a matter that the court found the firm should have disclosed. The Dean Foods case received widespread attention from lawyers around the country and has been the subject of extensive commentary. See Glazer and Field, *"No Litigation Opinions Can Be Risky Business,"* Vol. 14, No. 6. Business Law Today, July/August 2005 and the discussion of the Dean Foods case below in "The No Litigation Confirmation – Selected Issues".

Following the decision in the Dean Foods case, efforts were made by several bar associations (or sections of bar associations) to further limit the scope of the "no-litigation" confirmation under customary practice. Some argued that the "no litigation" confirmation should be eliminated altogether. Others sought to modify the confirmation by limiting its coverage. From this dialogue, three additional versions of the "no-litigation" confirmation have emerged:

- a "no litigation" confirmation that is limited only to pending litigation or governmental proceedings or to litigation or governmental proceedings that have been overtly threatened in writing affecting the Transaction;
- a "no litigation" confirmation that is limited to disclosure of matters which the firm providing the opinion is handling; and

- a "no-litigation" confirmation that combines both of these more limited versions of the "no litigation" confirmation.

B. The "No Litigation" Confirmation

The Committees believe that a "no litigation" confirmation remains a part of Florida customary opinion practice and that it is not inappropriate to ask for a "no litigation" confirmation. However, if the Opining Counsel does not regularly represent the client or is acting as local counsel or is otherwise only engaged with respect to a limited aspect of the Transaction, then a "no litigation" confirmation is not appropriate.

The Committees also believe that the traditional form of the "no litigation" confirmation contained in the Prior Florida Reports is no longer the "no litigation" confirmation that Florida counsel usually provide under Florida customary opinion practice. In fact, opinion practice today embodies a cost/benefit analysis that will often suggest that a more limited version of the "no-litigation" confirmation will be more reasonable and appropriate under the circumstances (and the forms of opinions that accompany this Report include one of these more limited versions).

Below are three versions of the "no litigation" confirmation that are often seen in Florida opinion practice. Opining Counsel and Opinion Recipients should negotiate the appropriate scope of the "no litigation" confirmation based on the circumstances of the particular Transaction (including the size of the Transaction) and the relationship of Opining Counsel to the Client.

If the "no litigation" confirmation is to be limited to disclosure regarding pending or overtly threatened litigation or governmental proceedings affecting the Transaction that are Known to the Opining Counsel, the following form is appropriate:

> **To our Knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Client that challenges the validity or enforceability of, or that seek to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction, except: [_____] or [except as listed in _____ (a schedule to the Transaction Documents or a certificate to counsel)]. For avoidance of doubt, please be advised that in rendering this opinion we have made no independent investigation, including, without limitation, any search of court records, search of the files of our firm or search of the files of our Client.**

Opining Counsel rendering this confirmation should generally obtain a certificate from the Client confirming the accuracy of this factual statement to the knowledge of the Client (see discussion below in that regard). Further, in light of the holding in the Dean Foods case and notwithstanding the view that customary practice does not require any search of the firm's files, prudence suggests that Opining Counsel in Florida should consider conducting some level of diligence within Opining Counsel's firm before rendering this confirmation. See "Selected Issues – Knowledge" below.

This version of the "no-litigation" confirmation is included in the forms of opinions that accompany this Report. The Committees believe that this version of the "no litigation" confirmation is the version that should be appropriate in most circumstances.

If the "no litigation" confirmation is limited only to disclosure of matters as to which Opining Counsel represents the Client, the following form is appropriate.

> **We do not represent the Client in any action, suit or proceeding, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____] or [except as listed in _____ (a schedule to the Transaction Documents or a certificate to counsel)].**

This is the only version of the "no litigation" confirmation that is not given to the Knowledge of Opining Counsel, due to the fact that it reflects a recitation of matters as to which the firm rendering the opinion is representing the Client. An even more limited form of this version of the "no litigation" confirmation narrows the scope of the disclosed litigation matters and governmental proceedings to only those litigation matters and governmental proceedings being handled by Opining Counsel's firm that are pending or have been overtly threatened in writing and that challenge the validity or enforceability of, or seek to enjoin the performance of, or to obtain damages with respect to, the Transaction or the Transaction Documents.

Finally, if Opining Counsel agrees to provide a more traditional "no litigation" confirmation, the following form is appropriate:

To our Knowledge, there are no [material (as that term is defined in _____)] actions, suits or proceedings, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____] or [except as listed in _____ (a schedule to the Transaction Documents or certificate to counsel)]. For avoidance of doubt, please be advised that in rendering this opinion we have made no independent investigation, including, without limitation, any search of court records, any search of the files of our firm or any search of the files of our Client.

If this traditional version of the "no litigation" confirmation is rendered, Opining Counsel should undertake all of the diligence steps described below. Such factual confirmation requires more diligence and involves greater risk than the other versions of the "no litigation" confirmation described above.

This broader formulation of the "no ligitation" confirmation usually references a disclosure schedule or an officer's certificate to identify the relevent pending or overtly threatened litigation matters or governmental proceedings. By referencing all such proceedings in this manner, Opining Counsel avoids the necessity of determining the materiality of any particular proceeding. The disadvantage of the disclosure schedule or the officer's certificate is that it may become cumbersome. If this occurs, then the Opinion Recipient and the Opining Counsel should agree on objective criteria for materiality. If that cannot be done (for example in an equitable proceeding) then generally the scope of the required "no litigation" confirmation should be more limited.

Under Florida customary practice, the rendering of a no-litigation confirmation does not require an inquiry to court or other third-party records, unless the parties agree otherwise and unless such searches are expressly referenced in the opinion letter.

Apart from obtaining an officer's certificate, the Opining Counsel should not be required to inquire of the Client about pending or overtly threatened litigation or governmental proceedings regardless of the version of the "no litigation" confirmation rendered by Opining Counsel. The Opining Counsel is not an auditor and Opining Counsel should not be required to speculate as to who within the Client organization has personal knowledge about litigation and governmental proceedings to which the Client is a party. Therefore, Opining Counsel should be permitted to rely on information provided in the Transaction Documents absent information Known to the Opining Counsel that would prevent the Opining Counsel from justifiably relying on such information. The Opinion Recipient and the Opining Counsel may agree, however, that for purposes of determining what is to be included in the disclosure schedules to the representations and warranties contained in the Transaction Documents, a broader investigation of Client representatives should be conducted, and in such case the scope of the Opining Counsel's Knowledge may be greater than that provided in the certificate of corporate officers usually provided to Opining Counsel to support the opinion because of their involvement in that diligence process.

As mentioned above, the proper scope of diligence for a "no litigation" confirmation will depend on the form of "no litigation" confirmation that is to be delivered. However, Opining Counsel should be mindful that a "no litigation" confirmation (even though not an opinion) is nevertheless subject to the general prohibition against rendering misleading opinions. See "Introductory Matters – Ethical and Professional Issues – Candor."

C. Selected Issues

The following issues should be considered in issuing a "no litigation" confirmation:

1. *No Action, Suit or Proceeding at Law or in Equity*. The phrase "no action, suit or proceeding at law or in equity" encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The language of the confirmation, regardless of the version of the "no litigation" confirmation rendered by Opining Counsel, is limited to legal proceedings before bodies that can render binding results on the parties to such legal proceedings. As a result, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.

2. *Pending or Overtly Threatened Litigation or Governmental Procedures*. The phrase "overtly threatened" is intended only to include claims in which the potential claimant has manifested an awareness of and a present intention to assert a claim and as to which the client has been notified of the potential claim in writing. This phrase is not intended to include unasserted claims that might arise from existing facts known to the Client or to Opining Counsel. However, if Opining Counsel is aware of unasserted claims as to which litigation has not been overtly threatened in writing as of the date of the opinion letter, it should consider advising the Client regarding whether to make disclosure of such facts to the other party to the Transaction in order to avoid potentially misleading the Opinion Recipient and if the Client refuses to allow disclosure, Opining Counsel should consider its ethical obligation under the circumstances. See "Introductory Matters – Ethical and Professional Issues."

3. *Diligence*. Opining Counsel often obtains a certificate from an officer of the Client to support the "no litigation" confirmation, and unless expressly agreed otherwise and expressly set forth in the opinion letter, no searches of public records are required or expected to be performed to render this factual confirmation regardless of the version of the "no litigation" confirmation rendered by Opining Counsel. The purpose of the confirmation is to elicit factual information already Known to Opining Counsel and not factual information that might be uncovered by outside research. It is unnecessary to include an express statement in the opinion letter that makes clear that no investigation has been undertaken. However, many counsel include an express statement in the opinion letter that no investigation has been undertaken by Opining Counsel, and the forms of opinions that accompany this Report expressly include such a statement.

4. *Knowledge*. Except as noted herein, a "no litigation" confirmation is always made to the Knowledge of Opining Counsel, and the Committees believe that the Knowledge qualifier emphasizes that the statement is fact-based and establishes the scope of the inquiry necessary to meet the diligence obligations of the Opining Counsel. In this context, Knowledge means the Knowledge of the "Primary Lawyer Group." See "Common Elements – Knowledge." In many cases, the Opinion Recipient may request that Opining Counsel expand the group within the Opining Counsel's law firm as to whose Knowledge is to be considered, and any such agreed-upon expansion of the Knowledge group should be expressly described in the opinion letter. Nevertheless, even if the group as to whose Knowledge this confirmation is given is expressly limited to the Primary Lawyer Group, based on the holding in the Dean Foods case, prudence may dictate that Opining Counsel in some manner poll the lawyers in their firm who are known to be providing legal services to the client (i.e., by reviewing recent time records) to determine if any of the lawyers know about any litigation matters or governmental proceedings with respect to the Client. Although Dean Foods has no precedential value in Florida, it reflects how a Florida judge considering the issue in that case might well have determined this issue. The diligence to give this version of the "no litigation" confirmation is likely to be similar to, but not as extensive as, the work required to support an auditor's request for information under the ABA Statement of Policy Regarding Lawyer's Responses to Auditor's Requests for Information, 31 Bus. Law. 1709 (1976).

5. *Limitations on Evaluation of Merits*. A "no litigation" confirmation does not provide an assessment of the merits of any particular pending or overtly threatened litigation matter or governmental proceeding. Further, it is inappropriate to request an opinion as to the evaluation of the possible outcome of pending

or threatened litigation matter or government proceeding, individually or in the aggregate. Such assessments are better left to the Opinion Recipient and its counsel in connection with the diligence they are performing with respect to the Client and in connection with the Transaction. Disclosure of information about pending or overtly threatened litigation or governmental proceedings may cause a waiver of the attorney-client privilege or work product privilege and may require disclosure of confidential information. As a result, counsel providing such information should consider their ethical obligations under the circumstances. See "Introductory Matters – Ethical and Professional Issues."

OPINIONS WITH RESPECT TO SECURITIES

In an opinion letter involving a Florida corporation that is issuing securities, exchanging securities, or engaging in a merger transaction in which it will be issuing securities, Opining Counsel may be asked to opine with respect to the Client's equity securities. Below are examples of opinions involving equity securities that may be requested for corporations organized under the laws of Florida, together with a discussion of the opinion language and the diligence required to render each type of opinion.

Customary practice in Florida with respect to issuances of securities by limited and general partnerships and by limited liability companies, and issuances of preferred shares by Florida corporations, are expected to be discussed in a future supplement to this Report.

A. Corporations – Authorized Capital

Recommended opinion:

The Client's authorized capitalization consists of _____ shares of common stock, $_____par value per share.

The authorized capital opinion means that, as of the date of the opinion, the Client entity is authorized to issue the number of shares of capital stock that are set forth in its articles of incorporation that have been filed with the Department, as amended to the date of the opinion. Pursuant to Section 607.01401(25) of the FBCA, **t**he term "shares" means the units into which the proprietary interest in a corporation are divided.

Section 607.0202(1)(c) of the FBCA requires corporations organized in Florida to set forth the number of shares that such corporation is authorized to issue in its articles of incorporation. A corporation is not allowed to issue more shares than the amount authorized in its articles of incorporation. Section 607.0601 of the FBCA also requires corporations organized in Florida to set forth the classes of shares and the number of shares of each class of shares that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must describe a distinguishing designation of each class, and prior to the issuance of shares of a class, the preferences, limitations and relative rights of that class.

A corporation organized in Florida may increase or decrease its authorized capital by amending its articles of incorporation pursuant to Section 607.1006 of the FBCA. If a corporation has amended its authorized capital by filing articles of amendment, Opining Counsel should review any and all articles of amendment to determine the current authorized capital.

The authorized capital opinion does not mean that Opining Counsel has reviewed the underlying organization of the corporation, which is covered by the "entity status and organization" opinion. See "Entity Status and Organization." However, because the authorized capital opinion assumes that a corporation is organized, Opining Counsel should not give the authorized capital opinion or any other opinion regarding a corporation's securities unless counsel is comfortable regarding the organization of the corporation. Because opinions regarding securities of Florida corporations are usually given at the same time as opinions on the entity status and organization of Florida corporations, this should rarely be an issue. Further, the authorized capital opinion does not mean that Opining Counsel has reviewed the documents with respect to the actions taken to approve a previous amendment to the articles of incorporation (or previously adopted amended and restated articles of incorporation). For purposes of rendering the authorized capital opinion, absent Knowledge to the contrary, Opining Counsel can assume that each previous amendment to the Client's articles of incorporation was properly proposed and adopted based upon the acceptance of the filing by the Department and the presumption of continuity and regularity.

Diligence Checklist – Corporation. In order to provide the authorized capital opinion with respect to a Florida corporation, Opining Counsel should take the following actions:

- Obtain a certified copy of the corporation's articles of incorporations, as amended, from the Department
- Review the initial articles of incorporation (or, if applicable, the most recent restated articles of incorporation) to determine the classes of shares and the number of shares authorized for each class as set forth therein.
- If there are amendments to the articles of incorporation since the date of the initial articles of incorporation (or, if applicable, since the date of the most recent restated articles of incorporation), review all such amendments to determine of there has been a change or changes to the authorized capital and determine the then current classes of shares and the then current number of shares authorized for each class as set forth therein.

B. Corporations – Securities Outstanding

An opinion regarding the outstanding securities of a corporation is in the nature of a factual confirmation. Often, a corporation will make a representation and warranty in the Transaction Documents with regard to the securities it has outstanding. However, Opinion Recipients often request an opinion on this issue in an effort to obtain further assume with respect to this issue.

The recommended opinion is as follows:

Based solely on a certificate of _____, the Client has _____ shares of its [common] stock outstanding.

Consistent with the above specified formulation of this opinion, under Florida customary practice, this opinion may be rendered by Opining Counsel, but only if based solely on a certification from the Client's transfer agent and/or a certificate from the Client. Although some Opining Counsel may elect to review the shares certificates or the stock register contained in the corporation's minute book and stock records as further support, such diligence is not required in order to render the opinion in the recommended form.

Notwithstanding, if Opining Counsel elects or agrees to engage in such further diligence, the limitation contained in the recommended opinion may be expanded to specify that such further review was conducted. Finally, Opining Counsel should be aware that if, contrary to the position stated above this opinion is rendered as an abulate opinion without the "based solely on" qualifying language, the Opinion Recipient may reasonably expect that such opinion was given based on a complete review by Opining Counsel of the share certificates and the stock register contained in the corporation's minute book and stock register.

C. Corporations – Reservations of Shares

The "reserved shares" opinion reflects that certain securities of the corporation have been reserved for future issue upon some future event, such as the conversion of convertible securities or the exercise of derivative securities (e.g., options or warrants to purchase shares of common stock). This opinion means that the corporation has taken the necessary corporate actions to reserve a portion of its authorized shares for future issuance. The FBCA does not specifically address reservations of shares or provide any legal effect to this "reservation" by the board of directors of the corporation. This opinion means that (i) sufficient additional shares have been authorized for issuance in the future on the exercise of the convertible or derivative securities, but are not yet issued, (ii) the board of directors has adopted a resolution to designate and reserve such authorized, but unissued shares, for future issuance, and (iii) such resolution of the board of directors has not been revoked as of the date of the opinion. Opining Counsel may rely upon an officer's certificate confirming the factual issues described in clauses (i), (ii) and (iii) above as the basis of this opinion.

The recommended form of opinion is as follows:

> **The Client has reserved _____ shares of its [common stock] for issuance upon [describe the triggering event with specificity, such as the conversion of convertible securities or the exercise of derivative securities].**

The "reservation of shares" opinion does not mean that there are no anti-dilution provisions in any convertible securities, options or warrants issued by the corporation that may be activated in the future which could cause such reservation of shares to become inadequate. In addition, this opinion does not address the ability of a corporation's board of directors to authorize the issuance of shares in the future that were designated and reserved for a different purpose (which concern could be addressed, for example, through the imposition of a covenant upon the corporation to maintain the appropriate number of shares to cover the potential conversion of shares due to convertible securities, options or warrants issued by the corporation). Finally, this opinion does not guaranty that the corporation will not in the future issue securities so as to cause the remaining authorized shares of the corporation to be insufficient to issue all of the reserved shares underlying the convertible securities or derivative securities as to which the reservation opinion relates.

> **Diligence Checklist – Corporation**. In order to provide the reservation of shares opinion, Opining Counsel should obtain an officer's certificate certifying that (i) such number of shares have been authorized, but remain unissued, by the Client, (ii) the board of directors has adopted a resolution to designate such authorized, but unissued shares, for the purposes described in the opinion, and (iii) such resolution of the board of directors has not been revoked or modified as of the date of such certificate.

D. Corporation – Issuances of Securities

The following opinions relate to the validity of the particular issuances of shares that are contemplated by the Transaction Documents.

> ***Recommended opinion:***
>
> **The [shares] have been duly authorized and [the shares] are validly issued, fully paid and nonassessable.**

1. **The Shares have been Duly Authorized.**

This opinion means that (a) the issuance of the shares has been authorized by all necessary corporate action in compliance with the FBCA and the articles of incorporation and bylaws of the corporation, and (b) the number of shares that have been issued (together with any additional shares proposed to be issued) are not in excess of the number of shares of the particular class or classes authorized by the articles of incorporation. This opinion does not mean that any previously issued and outstanding shares were properly issued and, in giving this opinion, Opining Counsel is not expected to take any steps to confirm whether any previously issued and outstanding shares were properly issued. See "Corporations – Securities Outstanding" above.

In determining the number of shares available for issuance, Opining Counsel may rely on the information contained in the corporation's financial statements, on a statement from the corporation's transfer agent or on a statement from the Client, unless Opining Counsel has Knowledge that the information relied upon is not correct.

The board of directors (or the stockholders if such power is reserved to them in the articles of incorporation) may authorize the issuance of stock for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. Before the corporation issues shares, the board of directors of the corporation (or the stockholders if such power is reserved to them) must determine that the consideration received or to be received for shares to be issued is adequate.

The opinion that the shares have been "duly authorized" does not address whether the issuance of the shares may violate or breach any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, this opinion does not address whether any fiduciary duty has been violated in connection with the issuance of the shares.

Diligence Checklist – Corporation. In order to provide the opinion set forth above, Opining Counsel should take the following actions:

- Assuming that Opining Counsel is also opining on the authorized capital of the corporation and has performed the diligence necessary to give that opinion (see above), Opining Counsel should review the articles of incorporation (as amended) to determine whether the right to authorize the issuance of stock is reserved to the stockholders.
- Opining Counsel should confirm that the issuance of the securities was duly authorized by the board of directors of the corporation, (or the stockholders, if the articles of incorporation reserve this power to the stockholders), in accordance with the FBCA and the corporation's articles of incorporation and bylaws.
- If any aspects of the issuance of the shares were delegated to a committee of the board of directors (or to senior executive officers), Opining Counsel should also confirm that the authority delegated to the committee (or senior executive officers) was permitted under the FBCA, and that the committee (or senior executive officers) properly acted within that authority. In that regard, Section 607.0825 of the FBCA provides that no committee of the board of directors of the corporation shall have the authority to authorize or approve the issuance or sale or contract for the sale of shares, or determine the designation and relative rights, preferences, and limitations of a voting group, except that the board of directors may authorize a committee (or senior executive officers) to do so within limits specifically proscribed by the board of directors. Opining Counsel also must verify that any actions taken by the committee (or senior executive officers) with respect to the issuance of the shares were authorized in accordance with the FBCA, the articles of incorporation and the bylaws.
- Opining Counsel should confirm through the receipt of a factual certificate from the Client that (i) in authorizing the issuance of the shares, the board of directors (or stockholders, committee or senior executive officers) acted at a properly called and held meeting (or by written consent, provided that taking such action by written consent is not prohibited by the articles of incorporation or bylaws) and (ii) the authorizing resolution received the requisite votes in accordance with the FBCA, the articles of incorporation and the bylaws. However, Opining Counsel is not obligated to independently verify these facts to render this Opinion and can rely solely on the certificate to counsel regarding these matters (unless it has Knowledge that the facts described in the certificate are inaccurate).
- Opining Counsel should also examine the authorizing resolution to confirm that the board (or stockholders and/or committee (or senior executive officers)) (a) authorized the issuance of the shares, (b) recited the consideration for which the shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the shares was adequate.

2. **The Shares have been Validly Issued.**

This opinion means that the shares have been issued in accordance with the FBCA, the corporation's articles of incorporation and bylaws and any resolution of the board of directors or shareholders (or committee or senior executive officers) of the corporation which authorizes such issuance. This Report assumes that the "validly issued" opinion may not be given by Opining Counsel unless the shares are (i) included in the authorized capital of the corporation, (ii) have been duly authorized, (iii) are fully paid and are nonassessable (see below), and (iv) comply with any applicable statutory preemptive rights with respect to the corporation.

The corporation may issue the number of shares of each class or series authorized by its articles of incorporation pursuant to Section 607.0603 of the FBCA and a corporation may also issue fractional shares pursuant to Section 607.0604 of the FBCA. Before the corporation issues shares, the board of directors (or stockholders, if the power to issue shares has been reserved to them in the articles of incorporation) must determine that the consideration received or to be received for shares to be issued is adequate pursuant to Section 607.0621(3) of the FBCA, which defines broadly the consideration for which shares may be issued. If the shares are authorized to be issued pursuant to a written subscription agreement, the shares will not be deemed to have been validly issued until the consideration for the issuance of such shares has been paid as required by the subscription agreement. Opining Counsel may confirm that payment was received by the corporation under such subscription agreement by obtaining an officer's certificate confirming such payment or by some other reasonable method.

Pursuant to Section 607.0625(1) of the FBCA, shares may but need not be represented by certificates, however, if the shares are represented by a certificate or certificates, then, at a minimum, each share certificate must state on its face the following information:

a. the name of the corporation and that the corporation is organized under the laws of the State of Florida;

b. the name of the person to whom the shares are issued; and

c. the number and class of shares and the designation of the series, if any, the certificates represents.

In addition, as required by Section 607.0625(3) of the FBCA, if the corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences and limitations determined of each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder a full statement of this information on request and without charge.

Finally, pursuant to Section 607.0625(4)(a) of the FBCA, each share certificate must be signed (either manually or in facsimile) by an officer or officers designated in the bylaws or designated by the board of directors.

An opinion that shares are validly issued subsumes within it an opinion that the certificates issued that represent the shares are in proper form (or that uncertificated securities have been properly issued). Notwithstanding, a separate opinion as to whether the certificates representing the shares being issued are in proper form is sometimes requested. See "Corporations – Stock Certificates in Proper Form."

Pursuant to Section 607.0626 of the FBCA, unless the articles of incorporation or the bylaws provide otherwise, the board of directors of the corporation may authorize the issuance of some or all of the shares without certificates. If the shares are not evidenced by certificates, then, within a reasonable time after the issue or transfer of the shares without certificates, the corporation shall send the shareholder a written statement of the information required by Section 607.0625(2) and (3) of the FBCA and, if applicable, Section 607.0627 of the FBCA (regarding restrictions on transfer of shares). However, the failure of the corporation to deliver the written statement described in Section 607.0626 of the FBCA after the shares without certificates are issued does not affect an opinion regarding whether the shares were validly issued. It is recommended (but not required) that Opining Counsel obtain a certificate from the Client confirming that they have complied or an undertaking that they will comply with their obligations under this statute.

The opinion that shares have been "validly issued" does not address whether the issuance of the shares may violate or breach any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of the shares.

3. **The Share are Fully Paid and Nonassessable.**

This opinion means that the corporation has received the required consideration, if any, for the shares and that the corporation cannot call for any additional consideration to be paid by the holder of the shares.

(a) **Fully Paid.** This opinion means that the consideration as specified by the board of directors or in a preincorporation subscription agreement and the requirements, if any, in the corporation's articles of incorporation and bylaws has been received in full. Pursuant to Section 607.0621(2) of the FBCA, the consideration may consist of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. So long as Opining Counsel does not have Knowledge to the contrary of facts that would make such reliance unreasonable under the circumstances, reliance on an officer's certificate stating that the corporation has received the consideration called for by the authorizing resolution, subscription agreement and/or the articles of incorporation and bylaws, as applicable, is appropriate.

The determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares and it is not the role of Opining Counsel to confirm compliance by the directors with their fiduciary obligations in determining the adequacy of consideration. Although Florida eliminated par value in 1990 as it relates to share issuances, some companies continue to use par value in order to minimize out-of-state taxes or fees. Unless the corporation's articles of incorporation provide otherwise, shares with par value may be issued for less than such stated value. Under Section 607.0623(1) of the FBCA, shares of a corporation's stock issued as dividends may be issued without consideration unless the articles of incorporation otherwise provide.

(b) **Nonassessable.** Nonassessable means that if the corporation has received the specified consideration it cannot call for any additional consideration. Under Section 607.0621(4) of the FBCA, consideration in the form of a promise to pay money or perform services is deemed received by the corporation at the time of the making of the promise, unless the agreement otherwise provides. Since the opinion is given under the FBCA, it does not address whether shares might be assessable under another statute. This is important because, for example, in contrast to corporations organized under the FBCA, shares of a Florida banking corporation organized under Chapter 658 of the Florida Statutes must have a specified par value and shares cannot be issued at a price less than par value. Similarly, this opinion does not mean that shareholders will not be subject to liability for receipt of an unlawful dividend or as a controlling shareholder or if the corporate veil is pierced for some reason.

Diligence Checklist – Corporation. In order to provide the opinion set forth above with respect to a corporation, Opining Counsel should take the following actions:

- Obtain a certified copy of the corporation's articles of incorporation, as amended, from the Department to verify compliance with any specified minimum amount or form of consideration.
- Review the corporation's bylaws to verify compliance with any specified minimum amount or form of consideration.
- Obtain all subscription agreements (whether pre-incorporation or post incorporation), if applicable, confirming consideration to be received by the corporation.
- Review resolutions of the board of directors, committee and/or the senior executive officers confirming the consideration to be received for the issuance of the shares and the adequacy thereof under the FBCA and the articles of incorporation and bylaws.
- Request an officer's certificate confirming receipt of consideration or confirming that no consideration for the shares remains unpaid.

E. Corporations – No Preemptive Rights

Recommended opinion:

There are no preemptive rights with respect to the [shares] under the Florida Business Corporation Act or the Client's Articles of Incorporation.

This opinion means that existing shareholders of a corporation do not have a statutory right to maintain their percentage ownership of the corporation by buying a proportional number of shares of any future issuance of shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued stock as necessary to maintain their proportional ownership interest in the corporation before the corporation sells the shares to persons outside of the shareholder group that holds the preemptive rights.

Prior to 1976, Florida's general business corporation statute mandated preemptive rights unless the articles of incorporation stated otherwise. On or after January 1, 1976, no statutory preemptive rights exist unless they are expressly provided for in the articles of incorporation. Thus, in 1976, Florida changed from a statutory "opt-out" state to a statutory "opt-in" state. The opt-in approach recognizes that preemptive rights may be inconvenient and severely impair a corporation's ability to raise capital through future equity issuances. Therefore, Florida corporations formed on or after January 1, 1976 do not have statutory preemptive rights unless specifically stated in their articles of incorporation. Florida corporations formed prior to January 1, 1976 continue to have preemptive rights unless their articles of incorporation specifically deny their existence.

Regardless of whether a corporation grants or denies preemptive rights in its articles of incorporation, a corporation may, by contract or otherwise, grant a shareholder the equivalent of preemptive rights or some other right to purchase shares from the corporation. An opinion regarding preemptive rights does not cover contractual preemptive rights. However, although such confirmation is discouraged, a factual confirmation that to the Knowledge of Opining Counsel, and based solely on a certificate from the Client, Opining Counsel is not aware of any contractual preemptive rights that have been granted to other shareholders of the corporation is sometimes requested and given.

Diligence Checklist – Corporation Incorporated On or After January 1, 1976.

- When issuing this opinion for a corporation formed on or after January 1, 1976, Opining Counsel should review the corporation's articles of incorporation, as amended, to ascertain if they grant preemptive rights to shareholders.
- If the articles of incorporation grant preemptive rights to shareholders, Opining Counsel should ascertain whether the share issuance in question falls within the grant described in the articles of incorporation.
- If the share issuance triggers the grant of preemptive rights under the articles of incorporation, Opining Counsel should determine if shareholders have waived their preemptive rights or whether the shareholders holding preemptive rights have already been properly given the opportunity to exercise such preemptive rights. Pursuant to Section 607.0630(2)(b) of the FBCA, "[a] shareholder may waive his or her preemptive right," and a waiver "evidenced by a writing is irrevocable even though it is not supported by consideration." If all shareholders with preemptive rights have not waived them, or if such preemptive rights have not been provided in accordance with the FBCA, the opinion should not be given.

Diligence Checklist – Corporation Incorporated Prior to 1976.

- When issuing the opinion for a corporation formed prior to 1976, the Opining Counsel should review the corporation's articles of incorporation to determine if they deny preemptive rights to shareholders. If they do not specifically provide that they deny preemptive rights, Opining Counsel should determine if any shareholders have waived their preemptive rights. Because current Section 607.0630(2)(b) of the FBCA, which statutorily provides for the waiver of preemptive rights, does not apply to corporations incorporated prior to January 1, 1976, a waiver must be noted on the shareholders' stock certificates to be effective. If all shareholders with statutory preemptive rights have not waived them, this opinion should not be given.

F. Corporations – Stock Certificates in Proper Form

Recommended opinion:

The stock certificate(s) representing the [shares] comply in all material respects with the Florida Business Corporation Act and the Client's Articles of Incorporation and bylaws.

This opinion means that, as of the date of the opinion, each stock certificate (i) includes on its face the name of the issuing corporation, that the corporation is organized under the laws of the State of Florida, the name of a person designated as the person to whom the shares are issued, the number and class of shares the stock certificate represents and the designation of the series, if any, the stock certificate represents, and (ii) is signed, either manually or by facsimile, by an officer or officers designated in the bylaws or designated in resolutions of the board (whether or not such person is still an officer when the certificate is issued) or by a person or persons who purport to be an officer or officers of the corporation. In addition, this opinion means that, as of the date of the opinion, each stock certificate either (i) includes on its face or back language relating to (a) any designations, relative rights, preferences, and limitations applicable to each class, and (b) any variations in rights, preferences, and limitations for each series (and the authority of the board to determine variations for future series), or (ii) if any such designations, relative rights, preferences, and/or limitations are applicable and/or any such variations in rights, preferences and/or limitations are applicable, states conspicuously on its face or back that the corporation will furnish the shareholder a full statement of the information required by Section 607.0625(3) of the FBCA upon request and without charge. Although a stock certificate may bear an actual or facsimile corporate seal, the opinion means that each stock certificate bears a corporate seal only if the articles of incorporation and/or the bylaws require each stock certificate to bear a corporate seal.

This opinion is not intended to address and should not be considered to address whether the stock certificates contain legends that may be required by contract or may be required or advisable under applicable federal or state securities laws (such as customary private placement legends). If the Transaction Documents require the stock certificates to contain legends and Opining Counsel is requested to opine that the stock certificates also comply with the specific requirements set forth in the Transactions Documents, Opining Counsel may so opine if such information is correct. However, such coverage should be expressly set forth in the opinion letter.

G. Outstanding Equity Securities

Sometimes when a corporation seeks to issue its shares in an initial public offering, underwriters and stock exchanges may request that Opining Counsel provide, in addition to the customary opinion that the shares to be issued in connection with such initial public offering has been duly authorized and issued, that *all equity securities that have ever been issued by the corporation* have been validly issued and are fully paid and nonassessable. Opining Counsel should resist providing this opinion, and the Committees believe that the value of this opinion will generally not justify the cost of providing such opinion in all but the most limited of circumstances.

OPINIONS WITH RESPECT TO COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE

A. Introduction

Effective January 1, 2002, Florida adopted a new version of Article 9 ("**Article 9**") of the Uniform Commercial Code (the "**Florida UCC**"). This revised version, which was based largely on the 1999 revisions to UCC Article 9 (the "**UCC**") promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, broadened the scope of the previous version of Article 9, covering, for the first time:

(a) sales of accounts (defined more broadly than under the previous version of Article 9);

(b) sales of payment intangibles and promissory notes;

(c) security interests in deposit accounts; and

(d) security interests in commercial tort claims.

Additionally, Article 9 as revised simplified the process for filing a financing statement to perfect security interests and made clarifications and changes to several other aspects of the law governing the filing and perfection of security interests.

Article 9 as revised contains detailed rules regarding the creation, scope, perfection, priority and enforcement of security interests, and opinions on secured transactions generally depend upon an understanding and correct application of these rules. This section provides guidance to Opining Counsel by:

(a) defining the opinion's scope and seeking to eliminate from the opinion unnecessary qualifications and limitations;

(b) recognizing the practical limits on what can be addressed in a typical opinion concerning security interests;

(c) providing the detailed reasoning, analysis, explanation and qualifications that carry over from one opinion to the next, so that the suggested form of opinion is concise and focused on the core opinions that Opinion Recipients seek; and

(d) providing a form of secured transaction opinion that can readily be incorporated into this Report's suggested opinion forms.

Article 9 contains complex rules that make rendering opinions involving Article 9 (and to the extent applicable, Article 8) a trap for the unwary. This Report recommends that Article 9 opinions be given only by practitioners who are thoroughly familiar with such rules.

There are three categories of opinions that are often given with respect to security interests. The first is a series of opinions regarding the creation and attachment of a security interest in the collateral described in an agreement granting the security interest. These opinions provide the Opinion Recipient with comfort that a security interest has been created and that such security interest has "attached" to the particular collateral described in the Security Document (and as to when such security interest will have been considered to be "attached"). The second category of opinions relates to the perfection of the security interest. This opinion provides that a security interest has been "perfected" with respect to particular collateral (and as to when such attached and perfected security interests will be considered to have been "perfected"). The third category of opinions deals with the priority of a granted security interest against the interests of other creditors of the debtor. The scope of and limitations on each of these opinions under Florida customary practice is described below.

B. Scope of UCC Opinions; Limitations

1. *The UCC Scope Limitation*. Opining Counsel should include appropriate limitations in the opinion letter on the scope of its security interest opinions under the UCC (the "**UCC Opinion Scope Limitation**"). In

particular, the scope of a UCC security interest opinion should be limited to security interests created under Article 9 of the UCC. In addition, Opining Counsel should take care to delineate the type of property addressed by the security interest opinions that it renders. By including an appropriate UCC Opinion Scope Limitation, Opining Counsel draws a line that recognizes the practical difficulty of analyzing all of the types of collateral for a secured transaction and all applicable law that might affect such secured transaction. Given this practical difficulty, it has become customary practice in Florida for Opining Counsel to include, and for an Opinion Recipient to accept, an appropriate UCC Opinion Scope Limitation. Such a UCC Opinion Scope Limitation can be expressed as follows:

> **Our opinions set forth in paragraphs _____ and _____ are limited to Article 9 [and, to the extent applicable, Article 8] of the Uniform Commercial Code as enacted in the State of Florida (the "Florida UCC"). We express no opinion with respect to (i) the right, title or interest of the Client in or to any property, (ii) except as expressly set forth in paragraph _____ above, the creation or perfection of any security interest or lien, (iii) the priority of any security interest or lien, (iv) under Article 9 of the Florida UCC, what other Florida law or law of another state governs the perfection or the effect of perfection or non-perfection of the security interest of the [Lender] in any particular item or items of the [Collateral], and (v) any [Collateral] not subject to Article 9 of the Florida UCC [or, to the extent applicable, Article 8 of the Florida UCC].**

2. *Remedies Opinion Does Not Include Any Security Interest Opinions*. Unless specifically set forth in the opinion itself, under Florida customary practice, a remedies opinion on the enforceability of security documents that include the grant of a security interest in identified assets (generally referred to as the "collateral") as security for a loan (collectively, the "**Security Documents**") does not express any judgment regarding the security interest granted in such agreement. See "The Remedies Opinion" for a discussion on the scope of the remedies opinion. The remedies opinion addresses the contractual enforceability of the agreement granting the security interest and does not deal with the effectiveness of the security interest. In contrast, a UCC security interest opinion addresses whether the secured party has effectively complied with the Florida UCC statutory requirements with respect to the creation, attachment and perfection of the security interest and, if a priority opinion is given, with respect to the rights of one creditor (i.e., the Opinion Recipient) against other creditors of the debtor.

   Notwithstanding this distinction, there is significant overlap in the building blocks for the remedies opinion and for UCC security interest opinions. For example, both the remedies opinion and the UCC security interest opinion require the support of predicate opinions regarding entity status, organization, entity power, authorization, and execution and delivery. Further, to give an opinion regarding the creation of a security interest, there must be an enforceable contract. As a result, although issuance of a remedies opinion regarding an agreement granting a security interest does not include an opinion with respect to the security interest granted therein, issuance of an opinion on the creation of a security interest included in a Security Document impliedly includes an opinion regarding the enforceability of the subject agreement, unless the opinion letter expressly provides otherwise.

3. *Bankruptcy and Equitable Principles Not Included*. UCC security interest opinions implicitly address the rights of a secured party holding a perfected security interest against a bankruptcy trustee under Section 544(a) of the United States Bankruptcy Code. The bankruptcy trustee inherits a hypothetical lien creditor's relative priority under the Florida UCC as of the case's commencement. Sections 679.3171 and 679.322 of the Florida UCC provide that a holder of a perfected security interest (but not most unperfected security interests) has a claim to the collateral that is superior to the claim of a judgment lien creditor who becomes a lien creditor after the security interest is perfected or certain other acts are taken. A trustee in bankruptcy has the power, under Bankruptcy Code Section 544(a), to avoid a security interest in personal property that is voidable as of the commencement of the case by a judgment lien creditor. Thus, the bankruptcy trustee may set aside under that section most unperfected

security interests, but not a perfected security interest. An opinion that addresses perfection under the Florida UCC provides the Opinion Recipient the basis it needs to conclude that its security interest in the collateral cannot be avoided by a bankruptcy trustee under Bankruptcy Code Section 544(a).

Except with respect to this one issue, a UCC security interest opinion is not an opinion on the effect of bankruptcy, fraudulent transfer or other insolvency laws and does not address the effect on the security interest of a bankruptcy filing and the United States Bankruptcy Code, including such matters as the effect of the automatic stay (Section 362), application of the security interest to proceeds of property acquired post-petition (Section 552), avoiding powers relating to preferential transfers and fraudulent transfers (Sections 547 and 548), a sale free and clear of liens under certain circumstances (Section 363), and cram down powers in a plan of reorganization (Section 1129(b)). Further, a UCC security interest opinion does not address the effect of equitable principles on the security interest. Under Florida customary practice, the inclusion of bankruptcy and equitable principles qualifications in a UCC security interest opinion is implicit, and Opining Counsel is therefore not required to include an express qualification related to these principles in the opinion letter, although many practitioners include such qualification in the opinion letter and such qualification is included in the forms of opinion letters that accompany this Report.

4. *A UCC Security Interest Opinion Does not Substitute for Either a "No Breach or Default Opinion" or a "No Violation of Law Opinion*." The standard opinion concerning no breach or default of an agreement and no violation of law are addressed separately. See "No Violation and No Breach or Default." A UCC security interest opinion does not address whether the debtor's grant of the security interest in the Security Document constitutes a violation of law or a contractual breach or default.

5. *Limited Opinions on the UCC of Other Jurisdictions*. Even if the debtor is located in Florida, another state's law will often govern attachment and perfection of a security interest if the choice of law provision in a Security Document specifies that the law of another state governs, or another state's law will govern perfection if the applicable Article 9 choice of law rules so indicate See "Common Elements of Opinions —Opinions Under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction" for a further discussion of opinions under the law of another jurisdiction. While it may be appropriate for Opining Counsel to render an opinion on another state's UCC, it is inappropriate for an Opinion Recipient to require it.

   The most common approach used by Opining Counsel rendering an opinion on another state's UCC, and the one recommended by this Report, is for Opining Counsel to expressly assume that creation and attachment of the security interest has occurred under the laws of the other state, and then proceed to give the perfection opinion under Florida law (if Florida law governs perfection). However, where there is a question as to whether or not a Florida court will respect the choice of law provisions in the Security Documents and instead apply Florida law to creation and attachment, then Opining Counsel may assume that Florida law governs the creation and attachment of the security interest. The following recommended opinion language contains this assumption:

> **We note that Section _____ of the [Security Agreement] provides that the [Security Agreement] and all issues arising thereunder shall be governed by the laws of the State of _____, [without regard to principles of conflicts of laws]. We express no opinion as to whether the provisions of such Section _____ are enforceable or as to the law that is applicable to the [Security Agreement] or the transactions contemplated thereby, including any security interest created pursuant to the [Security Agreement], and we express no opinion regarding the laws of the State of _____; rather, with your permission, we have assumed, solely for purposes of our opinions herein, that Florida law is applicable to the [Security Agreement] and the transactions contemplated thereby, including the creation or attachment of any security interest thereunder.**

Although this Report recommends against giving opinions on the laws of states in which Opining Counsel is not licensed to practice, in some circumstances Opining Counsel may be willing to issue the perfection opinion applying the laws of the specified state, specifically limiting Opining Counsel's review of such laws to the text of the UCC as it appears in the official statutory compilation or other recognized reporting service. See "Common Elements of Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction," which includes recommended opinion language limiting the scope of what was reviewed in providing this opinion. This limitation makes clear that Opining Counsel has not reviewed case law or otherwise conducted the same review that would be conducted by lawyers who regularly render opinions on the law of the state specified in the Security Document's choice of law provisions. This departure from the general policy of limiting opinions to Florida and federal law can be justified because Article 9 has been enacted in substantially similar form in all states.

6. *Property Not in Existence on the Date the Opinion is Delivered*. Even though after-acquired property is not in existence when an opinion under Article 9 is delivered, security interest opinions commonly are understood to address this property (opinions typically address all "collateral," which is typically defined broadly in the Security Document to include after-acquired property). Even though attachment is delayed, the creation, perfection and priority opinions are understood to address after-acquired collateral perfected solely by filing, because no further action is required by the secured party. However, an opinion should not be considered to address possessory after-acquired collateral, because the predicate for the "perfection opinion" and the "priority opinion," namely possession or control, does not exist on the date of the opinion and the opinion is rendered as of the date thereof. Further, priority dates from the date possession or control is achieved and therefore cannot be determined on the date of the opinion.

7. *Proceeds*. A perfection and priority opinion regarding collateral does not automatically extend to proceeds unless proceeds are after-acquired property included in the Article 9 collateral covered by the opinion. In most cases the collateral description will expressly include proceeds, although a security interest in proceeds often will not be perfected through the same means. The qualification that the security interest in proceeds is subject to Section 679.3151 of the Florida UCC (including the limitation that proceeds must be identifiable) should be expressly assumed in the opinion.

C. Article 9 Opinions Generally

1. *Florida Non-Uniform Modifications to Article 9*. As a preliminary matter, Opining Counsel should recognize that the Florida Legislature adopted numerous modifications to the uniform version of revised Article 9. As a result, Opining Counsel should review and understand the provisions of Article 9 as revised and any applicable departures from the text of uniform version of Article 9 when rendering an opinion under the Florida version of Article 9 as revised. For information about the non-uniform provisions of Article 9 as adopted in Florida effective January 1, 2002, see Report on the Florida Non-Uniform Modifications to Revised Article 9, as enacted in HB 579/Chapter 2001-198, Laws of Florida (published in June 2001 by the Business Law Section) and available at _____.

D. Creation and Attachment Opinions

1. *Creation of a Security Interest In Personal Property under Article 9 of the Florida UCC*. As previously discussed, the opinion on creation or attachment is a separate opinion and, if not explicitly stated, may not be inferred by the Opinion Recipient from the delivery of a remedies opinion. A secured party that wants to receive an opinion with respect to issues under Article 9 should expressly require it, and the absence of an express Article 9 opinion means that none was given. The recommended form of opinion for the creation of a security interest in personal property under Article 9 of the Florida UCC is as follows:

> **The [Security Agreement] is effective to create in favor of the [Secured Party], as security for the [Obligation(s)], a security interest (the "Article 9 Security Interest") in the [Collateral] described in the [Security Agreement] in which a security interest may be created under the Florida UCC (the "Article 9 Collateral").**

2. *Enforceability of Security Interests*. Section 679.2031 of the Florida UCC contains the requirements for the enforceability of a security interest. Florida UCC Section 679.2031(1) states that a security interest "attaches" to the collateral when it becomes enforceable, and Florida UCC Section 679.2031(2) provides that it is enforceable only if (a) value has been given, (b) the debtor has rights (or the power to transfer rights) in the collateral, and (c) one of the conditions of Florida UCC Section 679.2031(2)(c) is satisfied. The secured party does not need to sign the Security Document. Opining Counsel should consider each of these requirements in giving an opinion under Article 9.

   (a) *Value*. A security interest cannot attach unless the debtor has received value. "Value," as defined in Section 671.211 of the Florida UCC, includes not only consideration that would support a contract but also a commitment to extend credit (whether or not credit is extended), security for antecedent debts and other benefits. Unless expressly excluded in the opinion, a security interest opinion implicitly includes an assumption that value (whether in the form of a loan commitment, receipt of goods or otherwise) has been given, whether or not Opining Counsel is in a position to confirm the giving of such value (typically, Opining Counsel is in no better position than the parties themselves to make such a confirmation of factual circumstances). The better practice is to expressly assume in the opinion that value has been given, and the forms of legal opinions included in this Report expressly include this assumption.

   (b) *Rights in the Collateral*. A security interest cannot attach until the debtor has rights in, or the right to transfer rights in, the collateral. Unless expressly provided otherwise in the opinion, a security interest opinion implicitly includes the assumption that the debtor has rights in the collateral. The better practice is to expressly assume in the opinion that the debtor has rights in the collateral, and the forms of legal opinions included in this Report expressly include this assumption.

   (c) *Other Attachment Considerations*. In addition to the giving of value and establishment of the debtor's rights in the collateral, Opining Counsel must also confirm the existence of one of the following additional conditions in order to opine that the security interest has attached to the collateral: (a) the debtor has authenticated a Security Document that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned, (b) if the collateral is not a certificated security, it is in the possession of the secured party under Florida UCC Section 679.3131 pursuant to the debtor's Security Document, (c) if the collateral is a certificated security in registered form, it has been delivered (or is deemed to have been delivered) to the secured party within the meaning of Florida UCC Section 678.3011 pursuant to the debtor's Security Document (see "Article 8 Opinions" below), or (d) if the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, the secured party has control under Florida UCC Sections 679.1041, 679.1051, 679.1061 or 679.1071, as applicable, pursuant to the debtor's Security Document. An authenticated Security Document includes, inter alia, a written Security Document signed by the debtor. However, the phrase "pursuant to the debtor's Security Document" in clauses (b), (c) and (d) above does not require that the Security Document be in writing or be authenticated. See UCC Section 9-203, Official Comment 4. Accordingly, Opining Counsel should satisfy itself that the requirements of Florida UCC Section 679.2031(2)(c) have been satisfied when opining in the absence of a written security agreement (called an "authenticated record" in Article 9).

3. *Description of Collateral*. The Security Documents must sufficiently describe the collateral. Section 679.1081(1) of the Florida UCC provides that the description will be sufficient if it "reasonably identifies" the collateral, and Florida UCC Section 679.1081(2) provides examples of reasonable identification. It is important to note that Florida UCC Section 679.1081(3) states that super-generic descriptions of collateral contained in a S*ecurity Document* (as opposed to the description of the collateral in a *financing statement*, which is governed by Florida UCC Section 679.5041) such as "all assets" of the debtor, do not reasonably describe the collateral.

   Unless expressly provided otherwise in the opinion, a security interest opinion implicitly includes an assumption that the description of the collateral contained in the Security Document reasonably

identifies the collateral intended to be identified. The better practice is to expressly assume in the opinion that the description of the collateral contained in the Security Document reasonably identifies the collateral intended to be identified, and the forms of legal opinions included in this Report expressly include this assumption. In any event, the opinion addresses only whether the description is legally sufficient, not whether the description is factually correct. For example, if the collateral is described as a "three carat diamond," Opining Counsel is not rendering an opinion as to whether the collateral in question is an actual diamond or cubic zirconium or weighs at least three carats.

E. Perfection Opinions

1. *Perfection of a Security Interest In Personal Property under Article 9 of the Florida UCC*. A security interest in personal property may be perfected under Article 9 of the Florida UCC by the filing of a financing statement, by possession or delivery of the collateral, or by control. The opinion letter should be understood to express opinions as to perfection of security interests only to the extent expressly provided therein. For example, if the perfection is to be rendered only with respect to property of a type in which a security interest is perfected by filing, but the description in the Security Document and in the financing statement covers other property as well, it is not necessary to specifically identify those types of items or property for which the financing statement may be ineffective to perfect the security interest.

2. *Law Governing Perfection of Security Interest*. In order to determine the law governing the perfection of a security interest, Opining Counsel must first determine which law governs the Security Documents generally or make assumptions regarding those issues. This is because the state's laws that govern the Security Documents generally (i.e., the contractual choice of law) will be the laws that determine which state's Article 9 provisions will be consulted to determine the law governing the perfection of the security interest. In many cases, Opining Counsel will assume that this is the law generally covered by the opinion letter, particularly if Opining Counsel is not otherwise opining as to the enforceability of any choice of law provision contained in the Security Documents. In rendering a perfection opinion, Opining Counsel does not implicitly render a remedies opinion as to any provision of the applicable documents, including any choice of law provision contained therein.

   Often, in transactions in which perfection opinions of Florida counsel are requested, the law specified in the Security Documents' choice of law provision will be that of the State of Florida. In such a transaction (assuming that there is no reason that the parties' choice of Florida law will not be respected and the opinion letter does not provide otherwise), a Florida lawyer issuing a perfection opinion should apply Florida's mandatory choice of law provisions as set forth in Sections 679.3011 through 679.3061 of the Florida UCC to determine the law applicable to the perfection of the security interest.

   Once it is determined or assumed, as the case may be, which state's law governs the Security Documents generally, that state's law will determine which state's law determines perfection, the effect of perfection or non-perfection, and the priority of the Article 9 security interest. The analysis begins with Section 9-301 of the applicable version of the UCC (Florida UCC Section 679.3011). For most types of Article 9 filing collateral, Section 9-301(1) of the UCC (Florida UCC Section 679.3011(1)) provides that where a debtor is "located" in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of the Article 9 security interest.

3. *Perfection by Filing*. The recommended form of Opinion for the perfection of a security interest by the filing of a financing statement is as follows:

> **The financing statement in the form attached hereto (the "Financing Statement") is in acceptable form for filing with the Florida Secured Transactions Registry [specify any other applicable filing office] (the "Filing Office"). Upon the filing of the Financing Statement with the Filing Office, the security interest described in the Financing Statement shall be a perfected security interest in favor of [Secured Party] in such portion of the Article 9 Collateral (the "Article 9 Filing Collateral") in which, and only to the extent that, a security interest therein may be perfected by filing a financing statement under Article 9 of the Florida UCC [or the UCC of any other jurisdiction to which the opinion relates].**

This opinion language has important limiting factors. It applies only to security interests created under Article 9 of the Florida UCC (and, if so indicated, the UCC as in effect in the other state or states listed) by virtue of the creation and attachment opinion that are the building block opinions to the perfection opinion. In addition, it relates only to collateral in which a security interest may be perfected by the filing of a financing statement in the Filing Office, even if the type or types of collateral or the identity of the debtor requires the application of one or more laws other than the Florida UCC (or, if applicable, the UCC as in effect in the state or states listed) to determine perfection of the security interest. The creation of a security interest is a building block for, and is implicit in, this opinion language. If Opining Counsel is rendering an opinion as to perfection of the security interest but not opining as to the creation and attachment of the security interest (for example, where another state's law may be the law governing the Security Document), the perfection opinion should contain an express assumption that the security interest has been created and has attached to the collateral.

Opining Counsel should review the financing statement as part of its diligence with respect to this opinion to make sure that it complies as to form with requirements of Section 9-402 of the UCC (Section 679.516 of the Florida UCC). However, the financing statement should not be listed as a Transaction Document, because it is not, in and of itself, a legally binding agreement. It is the notice required to be filed to perfect a security interest under Article 9 of the UCC, but does not create the security interest in the collateral.

4. *After-Acquired Property*. If a Security Document grants a security interest in after-acquired property which is of a type in which an Article 9 security interest may be perfected by filing and the after-acquired property is described in the collateral section of the applicable financing statement, a perfection by filing opinion implicitly includes an opinion that upon the attachment of the secured party's Article 9 security interest in the after-acquired property, such Article 9 security interest will be perfected, subject, of course, to the limitations, assumptions and qualifications otherwise set forth in the opinion or inherently or implicitly applicable thereto.

   A commercial tort claim is defined in Section 679.1021(m) of the Florida UCC as a tort claim (i) with respect to which the claimant is an organization or (ii) if the claimant is an individual, the claim arises in the course of claimant's business and does not include damages for personal injury or death of an individual. Former Article 9 excluded all tort claims from its coverage, except to the extent they constituted "proceeds" of other collateral. Article 9 as revised specifically permits commercial tort claims as original collateral. However, unlike security interests in other property rights, such as general intangibles, Article 9 does not permit the grant of a security interest in after-acquired commercial tort claims. The claim must exist at the time the security interest is granted and must be described with specificity. Description by category (*e.g.*, "all existing and future commercial tort claims") or super-generic description (*e.g.*, "all assets of the debtor") will not suffice. (Section 679.1081(5)(a) of the Florida UCC). Since some commercial loan Security Documents include a category of commercial tort claims among the boilerplate collateral description, Opining Counsel should be careful to exclude all such claims from its attachment and perfection opinions, except to the extent existing claims are included in the collateral description with the specificity required by Article 9.

5. *Subsequent Changes in Facts Relating to Perfection*. Opining Counsel has no obligation to expressly qualify its opinions to exclude the possible effect of subsequent changes in facts, including lapse of time and any failure to file proper continuation statements, any additional filings or other actions that may be necessary in order to perfect or continue perfection of the secured party's security interest in proceeds of collateral, the change of the debtor's name, or jurisdiction of organization, a merger of the debtor with another entity, the conversion of the debtor into another type of entity, or the transfer of property constituting collateral to a person located in another jurisdiction. All of these qualifications are implicitly assumed in a security interest opinion under Florida customary practice, whether or not such qualifications are expressly set forth in the opinion.

6. *Effective Period of Financing Statement*. Financing statements are generally effective for five years, with certain exceptions, and must be renewed within a six month window prior to their termination in

order to prevent a lapse. Particular indications on certain financing statements are necessary to cause the effective period of the financing statement to be longer than the five-year period generally applicable. For example, in the case of a manufactured housing transaction, if the financing statement explicitly states that it is being filed in connection with a manufactured-home transaction, it will have an effective period of 30, rather than five, years. Although opinions as to the nature of the transaction or the type of debtor as they relate to longer periods of effectiveness for financing statements may be given along with the perfection opinion, those opinions are beyond the scope of the perfection opinion and are not deemed to be implicit. Accordingly, an opinion does not need to make a specific exception for the period of effectiveness of the financing statement.

7. *Location of Debtor*. An opinion on perfection by filing of a security interest is not deemed to include an opinion that the state of the debtor's location is the proper state in which to file, unless specifically stated in the opinion letter, and an express assumption or exception to that effect is not necessary. Opining Counsel is understood to be merely giving an opinion that, to the extent that the state where the filing is being made is the correct state, the security interest is perfected. However, it is appropriate for an Opinion Recipient to request, and for an Opining Counsel to give, an opinion as to the debtor's location under Florida law (even if Florida law interpreting the debtor's location points to the laws of another state) for matters of perfection, the effect of perfection or non-perfection, and priority of a security interest in collateral. If such an opinion is given, in most circumstances (other than those in which the applicable UCC provides that perfection issues are determined by law other than that of the state of the debtor's location), Opining Counsel must determine, or make an express assumption as to, the state of the debtor's location. The rules for determining the location of a debtor are set forth in Section 9-307 of the UCC (Florida UCC Section 679.3071).

   Section 9-307(e) of the UCC (Florida UCC Section 679.3071(5)) provides that a registered organization is located in the state under whose law it is organized. Section 9-102(a)(71) of the UCC (Florida UCC Section 679.1021(1)(qqq)) defines a "registered organization" as "an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized." Section 9-307(e) of the UCC and this definition will result in or lead to the conclusion that the debtor corporation, limited partnership or limited liability company is located in the state under whose laws it was organized. In order to reach such a conclusion, Opining Counsel must ascertain that the debtor has, in fact, been organized under the laws of its state of organization. Unless otherwise stated in the opinion letter or in certificates or other documents listed as having been reviewed by Opining Counsel, it is assumed, whether or not such an assumption is explicitly stated in the opinion letter, that the debtor is not incorporated or formed, as the case may be, in more than one state. Where Opining Counsel is not rendering an opinion as to the debtor's incorporation or formation, as the case may be, the state of the debtor's incorporation or formation should be stated in the opinion as a specific assumption.

   Section 9-307(b) of the UCC (Florida UCC Section 679.3071(2)) provides that an individual is located at the individual's principal residence; an organization that is not a registered organization (such as a general partnership) and that has only one place of business is located at that place of business; and an organization, other than a registered organization, with more than one place of business is located at its chief executive office. An opinion as to perfection of a security interest in the property of any of such types of debtor should not be deemed to implicitly include an opinion as to the location of such debtor; rather, it is an implicit assumption that the debtor is located in the applicable state. Nevertheless, because the location of the debtor is necessary information for the conclusion that a security interest is perfected by filing, Opining Counsel should state this assumption or its factual components explicitly. It is not unreasonable for an Opinion Recipient to ask that the perfection opinion not assume the conclusion of the debtor's location. However, under customary practice in Florida, if such an opinion is requested, the Opinion Recipient should be willing to accept the opinion based solely on Opining Counsel's reliance upon a certificate from the debtor as to the debtor's principal residence, sole place of business or chief executive office, as the case may be.

8. *Law Applicable to Perfection Opinion*. If the provisions of Section 679.3011(1) of the Florida UCC are applicable and no specific opinion on the location of the debtor or the choice of law provision in the Security Documents is provided, the Opinion Recipient should assume that the opinion on the issue of perfection is given under the laws of the state in which the financing statement is or is to be filed. It may be appropriate, however, for an Opinion Recipient to request, and for an Opining Counsel to render, an opinion as to the law applicable to perfection based on a determination or assumption, as the case may be, of the state of the debtor's location. However, Florida counsel may elect not to give opinions on this issue as it is an issue under laws of another jurisdiction. See "Common Elements of Opinions – Opinions Under Florida and Federal Law; Opinions Under the Law of Another Jurisdiction." Alternatively, Florida counsel may give an opinion on this issue under Florida laws. In any event, an opinion that the filing of a financing statement perfects a security interest in collateral is not an implicit opinion that the law of the state in which the financing statement is or is to be filed governs perfection; rather, no opinion on choice of law issues is deemed given unless specifically stated.

   Once it is determined or assumed which state's laws govern perfection, Opining Counsel should determine whether the financing statement and the filing thereof meet the requirements of those laws in order to perfect a security interest in the items or types of collateral described in the financing statement, to the extent such collateral is of a type that may be perfected by the filing of a financing statement. If a perfection by filing opinion is to be rendered before the financing statements have been filed and is not stated to be conditioned upon filing, the opinion should be based on an assumption that the financing statements will be duly filed.

9. *Perfection by Possession or Delivery*. Section 679.3131 of the Florida UCC permits perfection of a security interest in negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral and also provides that a security interest in certificated securities may be perfected by taking delivery under Section 678.3011. See "Article 8 Opinions" below for a discussion concerning perfection of a security interest in collateral which is subject to Article 8. A security interest in money can only be perfected by possession. Security interests in negotiable documents, goods, instruments, certificated securities, or tangible chattel paper may be perfected by either filing or possession.

   The recommended form of opinion for the perfection of a security interest by taking possession of the collateral is as follows:

   The security interest in the [describe the specific type of collateral] described in the [Security Agreement] will be perfected upon the [Secured Party's] taking and retaining possession of the collateral.

10. *Law Governing Perfection by Possession or Delivery*. When a security interest is to be perfected by possession or delivery, the law of the jurisdiction where the collateral is located governs such perfection. If an opinion is given regarding perfection of a security interest by means of the secured party's possession of the collateral, the opinion should include a specific assumption to the effect that the collateral as to which the perfection by possession opinion applies is located and delivered, within the meaning of Sections 679.3011 and 679.3051(1)(a) of the Florida UCC, in the State of Florida.

11. *Conditions Precedent to Perfection by Possession*. When perfection is achieved by possession, Opining Counsel should satisfy itself (and preferably expressly assume) that: (i) the relevant collateral is the type of collateral in which a security interest may be perfected by possession under Article 9 of the Florida UCC; (ii) the collateral is located in Florida; (iii) each item of collateral constituting an "instrument" is represented by only one original document, and (iv) the secured party (directly or through a third party) has taken and maintains exclusive "possession" of the collateral in a manner that satisfies the requirements of the Florida UCC. When a security interest is perfected by possession through a third-party (e.g., a bailee) that is not an agent of the secured party, the third-party generally

acknowledges in an authenticated record that it holds the collateral for the secured party's benefit, but is not required to do so under Section 679.3131(6) of the Florida UCC in order to achieve perfection. Perfection is achieved, however, when the bailee has issued a negotiable or nonnegotiable document covering goods, and the secured party has a perfected security interest in the document itself (e.g., by possession of the document). Note also that possession of the collateral by a third-party that is controlled by the debtor or closely connected with the debtor may not be effective, as the debtor may be deemed to still have possession. Unless such an assumption is unreasonable under the circumstances or known to be incorrect by Opining Counsel, the opinion is assumed to be subject to an inherent or implicit assumption that the third-party is not closely connected with or controlled by the debtor. In addition, Opining Counsel should expressly assume in the opinion that the acknowledgment has been properly authorized and authenticated by the bailee/third-party and that the bailee/third-party, in fact, has possession of the collateral and will retain possession of the collateral in the future.

12. *Perfection by Control, other than by Possession or Delivery*. Section 679.3141 of the Florida UCC permits a security interest in certain types of collateral, such as investment property, deposit accounts, letter-of-credit rights and electronic chattel paper, to be perfected by control of the collateral. If control of collateral is established by means of an agreement (such as an authenticated record described in Section 679.1041(1)(b) of the Florida UCC regarding a deposit account, an agreement described in Section 679.1061(2)(b) of the Florida UCC regarding a commodity contract, or an agreement described in Section 678.1061(3)(b) and 679.1061(4)(b) of the Florida UCC regarding an uncertificated security or a securities entitlement, respectively), the opinion may be stated as follows:

> **The security interest in the [describe the specific type of collateral] described in the [Security Agreement] will be perfected upon the execution and delivery of the [Control Agreement] by the [Debtor], the [Secured Party] and the [Depository Bank/ Commodities Intermediary/Securities Intermediary].**

In circumstances where control depends on the status of the secured party (for example, where the secured party is (i) the bank with which a deposit account is maintained or the bank's customer with respect to the deposit account, (ii) a securities intermediary with respect to a securities entitlement, or (iii) the commodities intermediary with respect to a commodities account), Florida counsel may give opinions as to the perfection of a security interest by means of such control, but they should base any such opinion on an assumption that the status giving rise to control has been established and that the retention of such collateral will continue in the future.

13. *Law Governing Perfection by Control*. For most security interests perfected by control, such as security interests in deposit accounts, letter-of-credit rights, and certain forms of investment property, perfection is generally governed by the local law of the jurisdiction of a third-party because it is the third-party that is the conduit through which the secured party exercises control. The definition of "jurisdiction" should be checked carefully, however (e.g., in the case of deposit accounts, "jurisdiction" does not mean jurisdiction in the entity organization sense). Exceptions to this general rule include perfection of a security interest in electronic chattel paper by control, which is governed by the law of the location of the debtor, and perfection of a security interest in a certificated security by possession, which is governed by the local law of the jurisdiction in which the certificated security is located.

14. *Types of Security Interests Required to be Perfected by Control*. Security interests in certain types of collateral, such as deposit accounts and letter-of-credit rights, can only be perfected by "control." Other means of perfection are not available.

15. *Requirements for Perfection by Control*. Opining Counsel must make a determination as to whether the method of control satisfies the requirements of the Florida UCC for the type of collateral that is the subject of the opinion. Certain methods of perfection by control require agreements with a third-party, such as the holder or issuer of the collateral. The control agreement must meet the requirements of the applicable statute. For example, in a deposit account control agreement the depository bank agrees to comply with the instructions originated by the secured party directing disposition of the funds in the

deposit account without further consent of the debtor. A control agreement is not necessary to perfect a security interest in a deposit account if the secured party is the bank with which the deposit account is maintained or if the secured party becomes the depository bank's customer with respect to the deposit account (See Section 679.1041; Official Comment 3 of the UCC). A control agreement is not necessary to perfect a security interest with respect to three kinds of investment property: (a) an uncertificated security where the "delivery" of the uncertificated security occurs when the secured party becomes the registered owner of the security; (b) a "security entitlement" (defined in Section 678.1021(1)(q) of the Florida UCC) where the secured party becomes the entitlement holder; and (c) a commodity contract where the secured party is the commodities intermediary with which the commodity contract is carried.

16. *Assumptions for Perfection by Control Opinions*. If an opinion is given regarding perfection of a security interest by means of the secured party's control of the collateral, the opinion should include the following assumptions, as applicable, depending on the type of collateral:

(a) *Depository Institution*. [Name of Depository Institution] (the "Depository Institution") is a "bank", within the meaning of Section 679.1021(1)(h), Florida Statutes, with which the deposit accounts described in [such paragraph] are maintained;

(b) *Deposit Accounts*. The account described in the [Control Agreement [and Security Agreement]] has been established with the Depository Institution, continues to exist and is properly described in the [Control Agreement [and Security Agreement]]. Such account is a "deposit account" within the meaning of Section 679.1021(1)(cc), Florida Statutes;

(c) *Securities Intermediary*. [Name of Securities Intermediary] (the "Securities Intermediary") is a "securities intermediary" as defined in Section 678.1021(1)(n), Florida Statutes;

(d) *Investment Accounts*. The [Investment Account] (as defined in the [Security Agreement]) is a "securities account" as defined in Section 678.501(1), Florida Statutes, has been established with the Securities Intermediary, continues to exist, and is properly described in the [Control Agreement [and Security Agreement]], and all property from time to time credited to the [Investment Account] is a "financial asset" as defined in 678.1021(1)(i), Florida Statutes; and/or

(e) [*Deposit Account*:] The "jurisdiction" (as defined in Section 679.3041, Florida Statutes) of the Depository Institution is the State of Florida. [Certificated Security:] The [Security Certificate] is and will remain located in the State of Florida. [Uncertificated Security:] The "issuer's jurisdiction" (as defined in Section 678.1101(4), Florida Statutes) of the [Issuer] is the State of Florida. [Investment Property:] [Investment Account held at a Securities Intermediary:] The securities intermediary's jurisdiction (as defined in Section 678.1101(5), Florida Statutes) of the [Securities Intermediary] as defined in the [Control Agreement] is the State of Florida. [Letter-of-Credit Rights:] The "issuer's jurisdiction" [or a "nominated person's" jurisdiction] (as defined in Section 679.3061, Florida Statutes) of the [Issuer/Nominated Person] is the State of Florida.

F. Opinions Regarding Priority

1. *Priority of Liens*. Article 9 ranks the rights of a secured party in collateral as against third parties. Opinions regarding that ranking, known as "priority opinions," have long been the subject of intense debate. Those opposed to giving priority opinions argue that they provide nothing beyond what the

Opinion Recipient learns from its review of the UCC Search Report. Proponents contend that priority opinions provide the Opinion Recipient with information necessary for a genuine understanding of its position as against other claimants to the collateral.

It is not customary practice in Florida for a Florida attorney to render a priority opinion, and those attorneys who give priority opinions typically do so only after including numerous qualifications and assumptions, which by their nature greatly reduce the value of the opinion and greatly increase the time and cost associated with issuing the opinion. As a result, an Opinion Recipient should generally not request, and an Opining Counsel should not be required to render, an opinion as to the priority of a security interest under Article 9.

Nevertheless, priority opinions are sometimes required by rating agencies and other governmental organizations. In all other circumstances they should be resisted.

If a priority opinion is given, it should be limited to the extent that the Opining Counsel can determine that the secured party's security interest is perfected by analysis of the underlying collateral and priority can be established by further factual analysis as discussed below. An opinion request that Opining Counsel list all potentially applicable exceptions to priority is inappropriate. This sort of "all laws priority opinion" or "UCC priority opinion" is extraordinarily difficult to give, even after extensive due diligence, and necessarily results in a lengthy opinion replete with many potential exceptions that are not relevant to the transaction. Rather, this Report recommends that Opining Counsel limit the scope of any priority opinion given to a "**Limited Filing Priority Opinion**."

(a) *Limitations Inherent to Limited Filing Priority Opinion*. A Limited Filing Priority Opinion related to a security interest that is perfected by the filing of a financing statement should be limited to a review of the public records, usually based on a report by a third party (a "**UCC Search Report**"), and to opinions that the UCC Search Report names the proper filing office and correct name of the debtor and lists financing statements covering the same collateral. Except for the need to identify previously filed financing statements indicating interests in the same collateral, no priority qualifications to the Limited Filing Priority Opinion are required because the opinion, by its terms, does not cover other competing interests. A Limited Filing Priority Opinion does not speak to the effect of security interests that may be or must be perfected by possession or by control, or by any other methods under Article 9 or other applicable law controlling priority, and a specific disclaimer as to such matters is not necessary.

A legal opinion is not intended to be, nor should it ever be construed as, an indemnity contract. As such, if an Opinion Recipient requires coverage beyond that afforded by the Limited Filing Priority Opinion recommended below, then the Opinion Recipient should look to UCC insurance policies or some other similar form of protection for such additional coverage.

If given, the recommended form of a Limited Filing Priority Opinion is as follows:

For purposes of this opinion, we have reviewed the UCC Search Report dated _____, 20__, based on a search conducted by _____ (the "UCC Search Report"), of UCC financing statements filed in the Filing Office naming as debtor the Debtor identified in the UCC Search Report and on file in the Filing Office through _____, 20__, at _____ *[a.][p.]*m. (the "Effective Date"). A copy of the UCC Search Report is attached.

The UCC Search Report sets forth the proper filing office and the proper name of the Debtor necessary to identify those [*secured parties*] who under the Florida UCC have, as of the Effective Date, financing statements on file with the Filing Office against the Debtor indicating any of the Article 9 Filing Collateral. [*Except for _____,][T][t]*he Search Report identifies no still-effective financing statement naming the Debtor as debtor and indicating any of the Article 9 Filing Collateral filed in the Filing Office, prior to the [*Effective Date*].

This opinion covers only the Article 9 Filing Collateral and does not address (i) the priority of any other [Collateral] or property referenced in any financing statement listed in the UCC Search Report, (ii) the priority of any security interest in fixtures, or (iii) the priority of any security interest that may be perfected by filing a financing statement in any filing office other than the Filing Office.

Although the recommended form of Limited Filing Priority Opinion set forth above excludes all collateral other than Article 9 Filing Collateral, Opining Counsel should be mindful that there are numerous types of liens that would take priority over liens properly perfected by the filing of a financing statement under Article 9 of the UCC, including, without limitation: (i) liens for the payment of federal, state or local taxes or charges which are given priority by operation of law, including, without limitation, under Section 6321 and Section 6323(c)(2) and (d) of the Internal Revenue Code; (ii) claims of the United States of America under the federal priority statutes (31 U.S.C. Section 3713 et seq.); (iii) liens in favor of the United States of America, any state or local governmental authority or any agency or instrumentality thereof, including, without limitation, liens arising under Title IV of ERISA; (v) the rights of a "lien creditor" as defined in Section 679.1021(zz), Florida Statutes, which is entitled to priority under Section 679.323(b), Florida Statutes; (vi) any other liens, claims or other interests that arise by operation of law and do not require any filing or possession in order to take priority over security interests perfected through the filing of a financing statement; (vii) a security interest which was perfected automatically upon attachment pursuant to Section 679.3091, Florida Statutes; (viii) a security interest temporarily perfected without filing or possession under Section 679.3121(5), (6) or (7), Florida Statutes; (ix) a security interest perfected by taking possession or the taking of delivery under Section 679.3131, Florida Statutes; (x) a security interest in deposit accounts, electronic chattel paper, investment property or letter of credit rights which is perfected by control under Section 679.3141, Florida Statutes.

(b) *Scope of the Limited Filing Priority Opinion*. No actual priority opinion is being given by the Limited Filing Priority Opinion recommended above. The Limited Filing Priority Opinion is suitable only if perfection is obtained by filing. The Limited Filing Priority Opinion relates back to the UCC Search Report effective date. Since Florida counsel are not insurers, it is inappropriate to request that Florida counsel provide coverage for the gap period between the effective date of the UCC Search Report and the filing date. Although not required, it is considered best practice to attach the UCC Search Report to the opinion so that the Opinion Recipient is advised as to the details of the UCC Search Report. See "Accuracy of UCC Search Report" below for a further discussion regarding the UCC Search Report.

(c) *Accuracy of UCC Search Report*. An opinion based on a UCC Search Report is only as good as the accuracy and completeness of the UCC Search Report. It is important to note that the search logic for each state's filing databases may differ. Opining Counsel should take care to describe the UCC Search Report in detail, including the name(s) of the debtor(s) searched, the records searched, the date of the UCC Search Report, the effective date of the UCC Search Report, and the name of the UCC service (reporting) company conducting the search (particularly if the UCC Search Report is not attached to the opinion). In most instances, it is advisable to order the UCC Search Report from a UCC service (reporting) company that routinely performs searches of this type and is familiar with the search logic in the state database being search. Under customary practice in Florida, Opining Counsel is not responsible for inaccuracies in a UCC Search Report prepared by a UCC service (reporting) company that routinely performs searches of this type, unless Opining Counsel has Knowledge that the UCC Search Report is incorrect.

Although it is not recommended, with the permission of the Opinion Recipient, Opining Counsel can perform its own search of the UCC records in the filing office. If this is the case, the opinion should reflect such practice in its description of the UCC Search Report and Opining Counsel will be responsible for inaccuracies in the results of the search.

When a Limited Filing Priority Opinion is given, Opining Counsel is confirming to the Opinion Recipient that:

(i) The UCC Search Report identifying the correct, current name of the debtor was obtained from the appropriate filing office. The opinion only covers the current name of the debtor, and Opining Counsel is not required to search prior names of the debtor unless expressly requested to do so by the Opinion Recipient. A security interest perfected by the filing of a financing statement filed against the current debtor under a former name of the debtor or filed against prior owners of the collateral could have priority over the filing that is the subject of the opinion, but would not be identified in the UCC Search Report and is not covered by the opinion (See Sections 679.325(1) and 679.5071 of the Florida UCC). If the debtor has changed the jurisdiction of its location within the four months preceding the effective date of the UCC Search Report, a possibility exists that another secured party would have a perfected security interest with priority based on a filing in the debtor's former jurisdiction (See Section 679.3161 of the Florida UCC). The opinion should not be understood to cover the possible existence of these other filings. Opining Counsel is advised to make appropriate disclosures if there is a concern that a search under only the debtor's current name would mislead the Opinion Recipient.

(ii) The UCC Search Report states that it shows financing statements on file in the filing office searched as of the effective date. The Opinion Recipient should then be in a position to determine whether the UCC Search Report has an acceptable date. As previously noted, the Limited Filing Priority Opinion does not cover the period between the effective date of the UCC search report and the date of the opinion.

(iii) Based solely on its review of the UCC Search Report, the Opining Counsel has determined that no other still-effective financing statement naming the debtor under its current name and covering the collateral remains on file in the Filing Office. Because the Filing Office must retain all financing statements and amendments (which includes termination statements and a release of collateral (see Section 679.512 of the Florida UCC) for at least one year following the date the financing statement would have lapsed in the absence of termination (see Sections 679.519(7) and 679.522(1) of the Florida UCC), the UCC Search Report will show financing statements and related releases, terminations statements and other amendments for at least six years after the original filing of the financing statement. Unless Opining Counsel has Knowledge to the contrary, Opining Counsel may assume, without so stating in the opinion, that the releases, termination statements, and other amendments contained in the UCC Search Report were authorized and therefore were validly filed.

(d) *UCC Priority Opinion based on Possession or Control*. Priority opinions with respect to instruments, chattel paper or certificated securities, in which a security interest is perfected by possession, delivery or control, also are of limited value, except in addressing the priority of a security interest perfected by possession, delivery or control over a security interest perfected solely by another method. Nevertheless, this Report recognizes that a priority opinion in this situation may sometimes be useful to an Opinion Recipient with respect to certain types of non-filing collateral that is central to the particular transaction that is the subject of the Transaction Documents. Under the UCC, a secured party that takes possession of an instrument and satisfies certain other requirements has priority over a secured party that has perfected its security interest solely by a method other than possession (See Section 679.330(4) of the Florida UCC). To obtain priority, the secured party with possession must give value and take possession of the instrument in good faith without the Knowledge that the grant of the security interest violates the rights of a prior secured party. Similar requirements may apply to other types of collateral. Opining Counsel should include an express qualification in the Opinion regarding the absence of the required Knowledge on the part of the Opinion Recipient in giving this opinion. See item (j) of the examples of limitations set forth below. An assumption regarding the Opinion Recipient's good faith is implicit in all opinions. See "Introductory Matters—The Golden Rule."

(e) *Limitations/Qualifications*. As described above, the UCC Opinion Scope Limitation limits the priority opinion's scope to the priority rules in the UCC. Even with this limitation, a UCC Priority Opinion still must note the priority exceptions that might apply under the UCC, which requires the Opining Counsel to recite a litany of exceptions that generally are understood only by persons practicing in the area. In the limited cases where a rating agency or other governmental agency requires Opining Counsel to render a UCC Priority Opinion, Opining Counsel should take great care to include in the opinion all of the exceptions related to priority applicable to the subject transaction. The following is a limited example of the types of limitations that may be appropriate to include, with limited benefit, into the Opinion:

We call to your attention the following:

(a) security interests in chattel paper, instruments, documents, securities, financial assets, and security entitlements are subject to the rights and claims of holders, purchasers and other parties as provided in Sections 679.322, 679.330, and 679.331, Florida Statutes;

(b) rights to money or funds contained in a deposit account are subject to the rights of the depository bank under Section 679.340, Florida Statutes and to the rights of transferees under Section 679.327, Florida Statutes;

(c) competing security interests in investment property are subject to the provisions of Section 679.328, Florida Statutes and competing interests in letters-of-credit as subject to the provisions of Section 679.329, Florida Statutes;

(d) security interests in goods that are fixtures and crops are subject to the provisions of Section 679.334, Florida Statutes;

(e) security interests in goods are subject to rights of holders of possessory liens under Section 679.333, Florida Statutes;

(f) competing security interests in goods covered by a certificate of title may be subject to the provisions of Section 679.337, Florida Statutes;

(g) security interests in collateral consisting of proceeds will be limited as provided in Section 679.322(3), Florida Statutes;

(h) security interests in goods that are installed in, attached or affixed to, any other goods may be subject to the provisions of Section 679.335, Florida Statutes, and may be subject to the provisions of Section 679.336, Florida Statutes to the extent that such goods form part of a larger product or mass;

(i) security interests in property transferred to the debtor that is subject to a security interest created by another person or entity is subject to the provisions of Section 679.325, Florida Statutes; and

(j) we express no opinion as to the Secured Party's rights in the [Collateral] to the extent that the Secured Party has Knowledge that its security interest in the [Collateral] violates the rights of another secured party.

The limited benefit of an opinion on the issues in the boilerplate exceptions, most of which will usually be inapplicable, typically does not justify the time, effort, and expense incurred in giving such opinion. Nevertheless, the Opinion Recipient reasonably could ask the Opining Counsel to address a specific priority issue that is of particular concern, whether or not the potentially competing claim arises under the UCC, provided the parties agree regarding who will bear the cost of the opinion.

G. Article 8 Opinions

1. *Perfection of Security Interests In Certificated Securities*. This section addresses a relatively straightforward pledge of a certificated security. Under Article 9 of the Florida UCC, a security interest in a certificated security may be perfected by filing, taking delivery of the certificated security or obtaining control of the certificated security. Perfection by filing is discussed above. "Delivery" occurs when a secured party acquires possession of the security certificate. A secured party has "control" of a certificated security if it is delivered to the secured party (i) in bearer form or (ii) in registered form, registered in the secured party's name or endorsed to the secured party or in blank by an effective endorsement (which includes a stock power endorsed in blank). A secured party who obtains control of a certificated security has priority over another secured party who has perfected only by filing or taking delivery. This section addresses only perfection of a security interest in a certificated security by obtaining control, and does not address uncertificated securities in any respect or perfection of interests in a certificated security by other methods. The following recommended opinion language may be used with respect to perfection of a certificated security by obtaining control:

The delivery to the [Secured Party] of the certificate(s) representing the [shares of stock] [membership interests] [other certificated securities] identified on Schedule A to the Pledge Agreement (the "Pledged Securities") [in bearer form or registered or endorsed in the name of the [Secured Party] or in blank by an effective endorsement], together with the provisions of the Pledge Agreement, create in favor of the [Secured Party] a perfected security interest in the Pledged Securities under the Florida UCC.

2. *Law Governing Perfection for Certificated Securities*. Under the Florida UCC, the perfection of a party's security interest in certificated securities will be governed by the local law of the jurisdiction in which the security certificates are located (other than perfection by filing, which is governed by the local law of the jurisdiction in which the applicable pledgor is located). The Florida UCC will only apply while the certificates are located in Florida, and the law governing issues of perfection and priority will change if the certificates are moved from one jurisdiction to another. Because of the difficulties of giving a forward-looking opinion based on possession, the recommended form of opinion set forth above speaks only as of the date of the opinion letter. Accordingly, Opining Counsel need not disclaim any implied forward-looking opinions regarding perfection or specifically assume that the secured party will maintain continuous possession of the Pledged Securities in the same location.

3. *What Constitutes a Security*. Opining Counsel should confirm that the Pledged Securities constitute "securities" under Article 8 of the Florida UCC. If the issuer is a corporation and the Pledged Securities are equity securities, this confirmation is straightforward. Under Florida UCC Section 678.1031(1), shares or similar equity interests issued by a corporation constitute "securities." However, the proper classification of certificated limited liability company membership interests or partnership interests frequently raises opinion issues. Section 678.1031(3) of the Florida UCC provides that an interest in a limited liability company or partnership is not a "security" unless (i) such interest is dealt in or traded on securities exchanges or in securities markets, (ii) such interest is an investment company security, or (iii) the issuer of such interest has "opted" to have such interests treated as "securities" governed by Article 8 of the Florida UCC. If none of the foregoing exceptions applies, then the interest in a limited liability company or partnership is a "general intangible" pursuant to Section 679.1021(1)(pp) of the Florida UCC and a security interest in such general intangible can only be perfected by filing. In that regard, the opinion letter need not expressly assume that a limited liability company or partnership that has not certificated its securities will not later "opt-in" under Article 8 to have the pledged interests treated as "securities".

4. *Control*. If the opinion omits the bracketed language above regarding the form of the Pledged Securities and accompanying endorsements, Opining Counsel should also confirm that the secured party has obtained "control" of the Pledged Securities by taking possession of them and any endorsements (including a stock power endorsed in blank) in the manner described in the bracketed language. Opining Counsel may confirm "delivery" by observation or obtaining a certificate from a third party.

5. *Delivery and Location of Securities*. If the opinion letter is limited to Florida law, Opining Counsel should confirm that the Pledged Securities are delivered to the secured party in the State of Florida and can assume, without stating so in the opinion, that the Pledged Securities will continue to be held in the State of Florida. As noted above, the Florida UCC governs perfection by possession only while the Pledged Securities are located in the State of Florida.

6. *Article 8 Protected Purchaser Opinion*. Article 8 of the Florida UCC provides that the special status of "protected purchaser" is available not only to owners of certificated securities, but also to a person who obtains a security interest in certificated securities. (See the definitions of "purchase" and "purchaser" in subsections 671.201(32) and (33), respectively, which include a secured party holding a security interest.) The secured party who qualifies as a "protected purchaser" is not subject to the usual Article 9 rules with respect to the relative priority of security interests. Pursuant to Section 678.3021 of the Florida UCC, a protected purchaser of a security has priority over any "adverse claim" with respect to the security, including claims that the grant of the security interest was wrongful or that another person is the owner or has a security or other interest in the security. The following recommended opinion language may be used with respect to a security interest in favor of a "protected purchaser" under Article 8 of the Florida UCC:

> **Assuming the [Secured Party] has taken (or will take) possession of the Pledged Securities without notice (actual or constructive), at or prior to the time of delivery of such Pledged Securities, of any adverse claims [and that each Pledged Security is either in bearer form or registered or endorsed in the name of the [Secured Party] or in blank by an effective endorsement], the [Secured Party] [acquired] [will acquire] its [security] interest in the Pledged Securities free of any adverse claim within the meaning of Florida UCC Section 678.1021(1)(a).**

To qualify as a "protected purchaser," the secured party must (i) obtain control of a certificated security by taking possession of a certificated security either in bearer form or registered or endorsed to it or in blank by an effective endorsement (which includes a stock power endorsed in blank), (ii) acquire its interest for value, and (iii) be without notice of any adverse claim at the time of purchase. The first element simply involves confirming the fact of possession of the Pledged Securities, together with necessary endorsements (which includes a stock power endorsed in blank), by observation or certificate from a third party. The value required by the second element is equivalent to the value required by the Article 9 opinion regarding the creation of a security interest. See "Creation and Attachment Opinions"

above. Absent an adverse claim revealed by an inspection of the certificate, Opining Counsel typically cannot verify notice (or the absence thereof) of adverse claims, and therefore should be permitted to make assumptions regarding these matters that are not contrary to his or her Knowledge.

An opinion that the secured party takes "free of any adverse claim" analyzes the secured party's rights at a particular point in time, the moment of transfer, and does not address claims that might arise in the future. Opining Counsel need not specifically state this in the opinion, and no opinion should be implied with respect to proceeds of, or distributions on, securities, or that the secured party will maintain continuous possession of the certificates in the same manner and in the same location. Any opinion regarding proceeds or distributions would need to be explicitly given, and should only be given subject to appropriate qualifications.

OPINIONS PARTICULAR TO REAL ESTATE TRANSACTIONS

This section of the Report discusses opinions that are often requested and given in connection with real estate transactions. A real estate transaction is a transaction that involves real property and any related personal property, including a transaction which involves the securing of an obligation by real property and any related personal property. Real property is property or rights and interests in property treated under Florida law as real property, including fixtures.

A. Requirements for Recording Instruments Affecting Real Estate

1. **General.**

In a real estate transaction, an opinion is often requested that the Transaction Documents relating to the real property are in a form suitable for recordation or filing, since recordation or filing of a deed or a mortgage are necessary to transfer title to real property or create an encumbrance on real property as security for a loan, respectively.

The following is the recommended opinion language:

The Transaction Documents to be recorded or filed are in a form suitable for recordation or filing.

The recommended opinion contains language to the effect that the Transaction Documents to be recorded or filed as part of the Transaction are in a form suitable for recordation or filing, which addresses the special requirements under Florida law applicable to transferring real estate or creating a mortgage on Florida real estate.

This opinion is often combined with the opinion regarding execution and delivery of the Transaction Documents. See "Execution and Delivery" for a discussion regarding the diligence required to determine whether the Transaction Documents have been executed and delivered. In particular, with respect to execution and delivery in the context of a Florida real estate transaction, some Florida cases hold, in connection with the delivery of a deed or mortgage, that the recordation of an instrument is equivalent to a formal delivery in the absence of any showing of fraud on the part of the delivering party. However, other Florida cases hold that the recordation of an instrument merely creates the "presumption" of delivery.

2. **Recording Format.**

To determine whether a document is in a form sufficient for recording, Opining Counsel should examine the document to ensure, at a minimum, that it is in compliance with the applicable legal requirements. Section 695.26 of the Florida Statutes mandates compliance with the following requirements as a condition precedent to the recordation of a document:

(a) The name of each person who executed the document must be legibly printed, typewritten or stamped on the document immediately beneath the signature of such person, and the post office address of each such person must be legibly printed, typewritten or stamped upon the document;

(b) The name and post office address of the natural person who prepared the document, or under whose supervision it was prepared, must be legibly printed, typewritten or stamped upon the document;

(c) The name of each witness to the document must be legibly printed, typewritten or stamped upon the document immediately beneath the signature of such witness;

(d) The name of the notary public or other officer taking the acknowledgment or proof must be legibly printed, typewritten or stamped upon the document immediately beneath the signature of such notary public or other officer;

(e) A three-inch square at the top right-hand corner of the first page and a one-inch by three-inch space at the top right-hand corner of each subsequent page of the document must be reserved for the exclusive use the clerk of the court; and

(f) The name and post office address of each grantee (if the document purports to transfer an interest in real property) must be legibly printed, typewritten or stamped upon the document.

It should be noted that Section 695.26, Florida Statutes, does not apply to a document executed before July 1, 1991, a decree, order, judgment or writ of any court, a document executed, acknowledged or proved outside of Florida, a will, a plat, or a document prepared or executed by any public officer other than a notary public. Furthermore, a recorded document that does not fully comply with the statute will not be invalidated.

3. **Acknowledgments and Proof.** Section 695.03 of the Florida Statutes requires the execution of any document concerning real property to be acknowledged by the party executing it or proved by a subscribing witness to it as a condition precedent to recording. That section is not applicable to financing statements to be filed with the Florida Secured Transactions Registry under Article 9 of the UCC. See "Opinions with Respect to Collateral Under the Uniform Commercial Code." Section 695.03(1), Florida Statutes, sets forth the requirements for acknowledgments or proofs made within the State of Florida, Section 695.03(2), Florida Statutes, sets forth the requirements for acknowledgments or proofs made within the United States, but outside of the State of Florida, and Section 695.03(3), Florida Statutes, sets forth the requirements for acknowledgments or proofs made in a foreign country. In addition, Section 695.031 of the Florida Statutes sets forth alternative methods for acknowledgments by members of the Armed Forces of the United States and their spouses. Finally, Section 695.25 of the Florida Statutes sets forth acceptable statutory short forms of acknowledgments.

4. **Witnesses.** Section 689.01 of the Florida Statutes requires that a document purporting to transfer a freehold interest in land or a term of years of more than one year be written and signed in the presence of two subscribing witnesses by the grantor or his lawfully authorized agent in order to be valid. Because a mortgage or lien is not considered an interest in real property, but merely an encumbrance, mortgages and liens do not require subscribing witnesses to be valid.

5. **Deed Form.** Section 689.02 of the Florida Statutes sets forth an acceptable form of warranty deed and requires that such deed include a blank space for the property appraiser's parcel identification number and the social security number(s) of the grantee(s). However, the statute further provides that the failure of a deed to comply with the foregoing requirements will not affect the validity of the conveyance or the recordability of the deed.

6. **Change of Control or Change of Ownership.** Historically, Section 201.022 of the Florida Statutes required the grantor, the grantee or an agent for the grantee to file with the clerk of the court a return stating the actual consideration paid for the transfer as a condition precedent to the recordation of a deed transferring an interest in real property. This was generally accomplished through the filing of a DR-219 Recording Form with the deed. However, the obligation to file a DR-219 form was repealed by the Florida legislature in 2008.

A new requirement was enacted by the Florida legislature in 2008, which is now contained in Section 193.1556 of the Florida Statutes. Section 193.1556, Florida Statutes, requires notification of the property appraiser when real property is transferred or when there is a change in control of, or majority ownership of, an entity that owns real property. This change of ownership or control might not involve the recording of a deed and this provision was enacted so that property appraisers would be in a position to consider assessments on real property transferred through a change of ownership or control (where no deed was filed). The Florida Department of Revenue ("**DOR**") has recently promulgated Form DR-430 to report such changes of ownership or control where a deed is not filed. The Form DR-430 must be filed with the property appraiser in the county where the real property is located. The

failure of the grantee or the grantee's agent to comply with the new requirement will not impair the validity of a recorded deed. However, parties that violate the statute will be subject to payment of an amount equal to the taxes avoided as a result of such failure, plus 15% interest, plus a penalty of 50% of the taxes avoided.

7. **Balloon Mortgages.** Section 697.05 of the Florida Statutes requires the inclusion of a legend on certain balloon mortgages, as more particularly described in the statute. The failure of a mortgagee to comply with the statute automatically extends the maturity date of the mortgage, as provided in the statute.

8. **Conveyances by Corporations.** Section 689.01 of the Florida Statutes provides that a corporation may convey real property in the same manner as other persons or entities (that is, signed in the presence of two subscribing witnesses). In connection with conveyances of real property by a corporation, a title company may require the recordation of a corporate resolution in the public records evidencing the corporation's authority to convey the real property. Alternatively, a corporation may convey real property in accordance with Section 692.01 of the Florida Statutes, which permits any corporation to execute documents conveying, mortgaging or affecting interests in real property by documents sealed with the corporate seal and signed in the name of the corporation by its president, chief executive officer or any vice president. In such case, the documents do not need to be witnessed, and in the absence of fraud by the grantee, the documents will be deemed to be valid whether or not the officer was authorized to execute the document. Under the statute, it is not necessary for title purposes to record the corporate resolution if the requirements of Section 692.01 of the Florida Statutes are followed.

   Notwithstanding, compliance with Section 692.01, Florida Statutes, is an estoppel device which can be relied upon by third parties with no knowledge to the contrary. However, this statute should not be relied upon by Opining Counsel in rendering an opinion that a transaction has been authorized by all necessary corporate action. To give an opinion regarding authorization, Opining Counsel needs to review, among other matters, the corporate resolutions. See "Authorization of the Transaction." Opining Counsel should also confirm (preferably by receipt of a certificate from the corporate secretary or other authorized officer of the corporation) that the person executing the document is, in fact, the president, the chief executive officer or a vice president of the corporation, and that the person executing the document has been properly authorized to execute and deliver the document on behalf of the corporation. See "Execution and Delivery."

The foregoing list of issues with respect to requirements for recording instruments affecting real estate is not all-inclusive. Further guidance may be obtained by reference to the FUND TITLE NOTES issued by Attorney's Title Insurance Fund, Inc., as periodically updated, and the UNIFORM TITLE STANDARDS issued by the RPPTL Section, as periodically updated.

B. Title and Priority

In most real estate transactions, the Opinion Recipient relies on a title insurance commitment to determine the status of title to the real property and the priority of any lien encumbering the real property. With respect to personal property, no evidence of title is obtained, although UCC search reports may be obtained by the Opinion Recipient in an effort to determine the existence and priority of other security interests encumbering the debtor's personal property. Therefore, unless Opining Counsel has made an independent investigation and evaluation of title by reviewing an abstract of title to the real property, Opining Counsel should not render or be required to render any opinion as to title or lien priority.

The recommended form of the language to add to the opinion to make this clear is as follows:

> **No opinion is expressed with respect to the status of title to the [Real Property,] or with respect to the relative priority of any liens or security interests created by the [Transaction Documents]. We have assumed that as to matters of title and priority the Company has good title to the [Real Property] and that with respect to the [Real Property] the Opinion Recipient is relying upon a commitment for title insurance issued by a title insurer licensed to transact business in Florida.**

However, on the rare occasions where an Opinion Recipient insists on such an opinion or such an opinion is required to satisfy a governmental agency requirement (for example, an opinion required for platting), the opinion should be carefully crafted to avoid unexpected liability. In this regard, Opining Counsel should expressly limit due diligence to a review of the abstract of title or title commitment. Opining Counsel also should specifically assume the accuracy of the title information relied upon in rendering the opinion. In such situations, the following opinion language is recommended:

> **Based solely upon our examination of [the abstract of title] [commitment for title insurance] dated _____, prepared by _____ ("Title Report"), and assuming the accuracy of the information contained therein, it is our opinion that (i) as of the date of the title report, fee simple title to the [Real Property] was vested in _____, subject to the following comments, exceptions and encumbrances: [list exceptions from title report]; and (if required) (ii) _____ should sign the plat as the owner of the [Real Property], and _____, as the holder of a [mortgage, easement, etc.] affecting the [Real Property], should join in the execution of the plat.**

C. Creation of a Mortgage Lien

Florida counsel are often asked to render opinions that a mortgage creates a valid lien against the subject real property, and that once the mortgage is recorded, constructive notice will be provided. Because the Florida Statutes do not expressly recognize the concept of "perfection" in connection with liens on real property, but instead speak in terms of "constructive notice," it is the better practice to use "constructive notice" in Florida real estate opinions. However, under Florida customary practice an opinion that the filing of a mortgage will "perfect" a lien on Florida real property has the same meaning as an opinion that the filing of the mortgage will provide constructive notice of the lien against the real property.

The recommended opinion language is as follows:

> **The [Mortgage] is in form sufficient to create a valid lien in favor of the [Lender] in the [Real Property]. Upon the proper recording of the [Mortgage] in the Public Records of _____ County, Florida, the Mortgage will provide constructive notice of the lien against the [Real Property].**

In rendering an opinion about the creation of a mortgage lien, Opining Counsel should, at a minimum, review the mortgage and confirm that (a) the mortgage: (i) contains appropriate granting language to create a lien against the real property (including fixtures), (ii) properly describes the obligations secured by the mortgage, and (iii) properly describes the collateral securing the loan, and (b) value or consideration has been given to the Client in exchange for the granting of the lien. Regarding the issue of value or consideration and whether or not expressly set forth in the opinion letter, a mortgage creation opinion implicitly includes an assumption that value (whether in the form of receipt of funds or otherwise) has been given, and the forms of legal opinions that accompany this Report expressly include this assumption.

Opining Counsel should be aware that for the purposes of this opinion, the term "real property" is defined to include fixtures. In addition to perfecting a mortgage lien against fixtures under applicable real property law, a

recorded mortgage may also operate as a financing statement filed as a fixture filing under the UCC if it meets the requirements set forth in Section 9-502(3) of the UCC (Section 679.5021(3) of the Florida UCC). Opining Counsel should also be aware that security interest in fixtures may also be perfected by the filing of a financing statement filed as a "fixture filing" in the local real property records or a financing statement not filed as a "fixture filing" in the jurisdiction where the debtor is located, although under a non-uniform provision of the Florida UCC, the centrally filed security interest in fixtures would be junior to a filing recorded in the local real property records. See Sections 679.3171(6) and 679.334(4) of the Florida UCC. If the Opinion Recipient requests an opinion regarding perfection of a security interest in fixtures under the UCC (in contrast or in addition to the opinion regarding the mortgage lien), Opining Counsel should consider the matters discussed in "Opinions with Respect to Collateral under the Uniform Commercial Code," which deals with opinions under the UCC.

In addition, Opining Counsel usually should decline to give an opinion that any particular property constitutes a fixture for the reason that under Florida law, the classification of any particular property as a fixture depends primarily on the intention of the parties.

An opinion that recordation of a mortgage will provide constructive notice as to the lien against the real property is not an opinion regarding the priority of that lien. See "Title and Priority" above.

D. Taxation

1. **Documentary Stamps and Intangible Taxes.** The Opinion Recipient (especially if its counsel is a non-Florida attorney) will sometimes request an opinion that the correct amount of the documentary stamp tax under Chapter 201 of the Florida Statutes, and the intangible personal property tax under Chapter 199 of the Florida Statutes, has been paid. The recommended opinion language with respect to the proper amount of documentary stamp and intangible taxes is as follows:

> **Based on the $_____ principal amount of the [Loan], the correct amount of Florida documentary stamp tax payable upon recordation of the [Mortgage] is $_____ and the correct amount of Florida non-recurring intangible personal property tax payable upon recordation of the [Mortgage] is $_____.**

Determination of the amount of documentary stamp and intangible taxes due in connection with a real estate transaction generally does not involve a legal interpretation of state tax laws; instead, determination of those taxes normally is made on the basis of a simple calculation. For this reason, the general assumptions that are implicitly included in opinions of Florida counsel include an assumption that all "documentary stamps, taxes and fees" imposed upon the execution, filing or recording of documents have been paid. See "Common Elements of Opinions – Assumptions." However, if the Opinion Recipient is not familiar with these Florida taxes, the Opinion Recipient might require an opinion regarding the correct amount of taxes required to be paid. In the case of a new mortgage loan that does not also involve apportionment for collateral located in other states, the first sample opinion language set forth above may suffice to set forth the simple calculation of these taxes.

On the other hand, when documentary stamp tax and intangible tax liability is not easily calculated, Opining Counsel might be required to analyze the appropriate statutes and regulations and opine as to proper calculation of documentary stamp and intangible taxes. There are several scenarios under Florida law where the documentary stamp tax or intangible tax is not calculated simply from the face amount of the mortgage. For example, in some cases the intangible tax may be apportioned based upon the value of Florida real property in relation to the value of all collateral, or both taxes might be apportioned to account for real property or other collateral located in other states. In other cases, there may be a limitation of recovery under the mortgage which could limit the applicability of taxes. In addition, the documentary stamp tax might or might not be payable in a real estate secured transaction involving a renewal, extension or modification of an existing loan. In such cases, it is customary (and it is required by regulation for multi-state apportionment transactions) to set forth the tax calculation in the recorded mortgage, usually in a notice to the county recorder on the first page of the document.

The sample opinion language set forth below can be used in connection with such transactions. It presumes that Opining Counsel has participated in preparing the notice clause and that the notice recites any facts necessary for the calculation of the taxes, such as the values of collateral, any relevant previous tax payments, and whether any relevant previously taxed documents were made by the same obligors.

The "Notice to Recorder" provision on the first page of the Mortgage sets forth the correct amount of Florida documentary stamp tax and Florida non-recurring intangible personal property tax payable upon recordation of the Mortgage, assuming the accuracy of the factual matters set forth in the Notice to Recorder.

In order to give the opinion above, Opining Counsel should, (i) review the appropriate statutes, (ii) review all applicable rules promulgated by the DOR, and (iii) review applicable case law construing the statutes and rules. In transactions where the calculation of taxes is not clear-cut, Opining Counsel may wish to seek written advice from the DOR as an additional basis for the Opinion. Written advice in the form of a "Letter of Technical Advice" does not require disclosure of the taxpayer's identity to the DOR, but it is not binding on the DOR; in contrast, a "Technical Assistance Advisement" is binding on the DOR but requires disclosure of the taxpayer's identity and takes longer for the DOR to issue.

When such written advice from the DOR is obtained, the opinion regarding mortgage taxes should be qualified by adding the following language:

Our opinion regarding mortgage taxes is based upon a [non-binding letter of technical advice/binding technical assistance advisement] issued by the Florida Department of Revenue dated _____, a copy of which is attached hereto.

If the position of the DOR differs from the applicable statutes and rules, the distinction should be pointed out to the Opinion Recipient, with Opining Counsel giving no opinion as to which position might prevail.

Further, effective on July 1, 2009, Section 201.02, Florida Statutes, has been modified to provide that in the event that owners of real property transfer the property to an entity that they also own for less than full consideration, the entity will be treated as a conduit for three years and the sale of an interest in the conduit entity during such three-year period will be subject to tax based on the consideration paid for such interest. The documentary stamp tax statute was also modified to treat the conversion or merger of a trust into which real estate has been placed into an entity as a conveyance of real estate for documentary stamp tax purposes. These changes effectively limit the Florida Supreme Court's decision in Crescent Miami Center, LLC vs. Florida Department of Revenue, 903 So. 2nd, 913 (Florida 2005) to the facts of that case (no documentary stamp taxes will be due on a transfer of unencumbered real estate to an entity owned by the same owners as the real estate for no consideration), and make clear that it is the intent of the Florida legislature to impose documentary stamp taxes on virtually all "two-step" transfers that occur in the future.

2. **Income Taxes.** Under typical circumstances, Opining Counsel is not in a position to know all of the Opinion Recipient's activities in Florida or the extent to which certain activities of the Opinion Recipient might expose the Opinion Recipient to state income taxes. Accordingly, Opining Counsel should not be asked to opine as to whether the Opinion Recipient will, as a result of a real estate transaction, be exposed to any state tax based upon or related to the Opinion Recipient's income. It is customary practice in Florida to exclude from the scope of opinions matters related to taxation, unless such matters are expressly included in the opinion letter. See "Common Elements of Opinions – Limitations of Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law."

However, while not required, in a real estate transaction where an opinion on documentary stamp tax and the intangible personal property tax is being given, Opining Counsel might want to reiterate this exclusion specifically by using the following recommended language:

We specifically exclude any opinion as to the applicability or effect of any [other] federal or state laws, rules or regulations relating to taxation, including, but not limited to, income taxes, sales taxes, or franchise fees or taxes.

E. Tax Parcels

Because title insurance endorsements concerning tax lots are not available in Florida, an Opinion Recipient may request the Opining Counsel to opine that the tax parcel number or folio number assigned to the mortgaged property (i) includes all of the intended parcels, and (ii) excludes any other parcels.

Because certain estates in real property are not separately assessed for ad valorem taxes in Florida (e.g., easements, leaseholds, etc.), the sample opinion language set forth below pertains only to fee simple interests in order to avoid inadvertently opining with respect to other real estate interests that might be part of the mortgaged property but that would be included in the tax parcel numbers of their respective servient estates. In addition, the foregoing sample opinion language should not be used in a real estate secured transaction that involves a so-called "split" or "cut-out" parcel, and the Opinion Recipient should be advised that a separate tax folio number or parcel number can be obtained for the mortgaged property by application to the county property appraiser.

The recommended form of opinion is as follows:

The real estate tax parcel number(s) or folio number(s) set forth in [the Mortgage, or other Transaction Document that specifies the number(s)] for the [Real Property] include(s) all of the Company's fee simple interest in the [Real Property] and do(es) not include any fee simple interests other than the [Real Property].

The due diligence necessary for a tax parcel opinion is straightforward: the Opining Counsel should obtain a copy of the legal description assigned by the county property appraiser to the particular tax parcel or folio number, and then compare it to the legal description being used in the real estate secured transaction. If the legal description is simple enough (e.g., whole lots in a subdivision plat, or a government survey description), then the comparison may be within the competence of the Opining Counsel and not require the assistance of a professional land surveyor. On the other hand, if the legal descriptions from the various sources differ and Opining Counsel is unable to reconcile the differences, Opining Counsel should ask a professional land surveyor to compare the county property appraiser's description against the mortgage description and to certify that the two descriptions are the same real property.

The legal description appearing on the Client's ad valorem tax bill is usually abbreviated, may be incomplete, and should not be relied on for purposes of a tax parcel opinion. In many Florida counties, the county property appraiser maintains an on-line service from which the appraiser's full legal description can be obtained, along with the recording information for the vesting instrument used by the appraiser to derive the legal description. However, the on-line services maintained by some county appraisers specifically disclaim the reliability of information obtained from that source, and if there is any discrepancy between the legal descriptions obtained from the service, the title company, the vesting instrument or the mortgage documents, Opining Counsel should obtain a hard copy of the legal description from the county appraiser to determine the reason for the discrepancy. For example, if a portion of the property has recently been taken for a public right-of-way, or if portions of a parent tract have recently been cut out and sold to others, then the vesting instrument and/or the county appraiser's description might still reflect a larger tract than that being mortgaged in the real estate secured transaction.

F. Zoning and Land Use

It is not uncommon for an Opinion Recipient to request an opinion from Opining Counsel as to the zoning and land use classifications of the real property and the status of any required land use or development certificates or permits (such as certificates of occupancy or subdivision plat approvals or requirements). As a general matter, this opinion should be limited to the existing zoning and land use classifications and should be based upon a certificate issued by the appropriate local government official. The certificate will either be binding on the governmental body issuing the certificate or will be non-binding. Usually however, such certificates are non-binding, and the opinion should specifically indicate whether the certificate is binding or non-binding.

The recommended opinion language is as follows:

> **The land use classification of the [Real Property] as presently set forth in the comprehensive plan of _____ is _____. The present zoning classification of the [Real Property] is _____ under the applicable zoning ordinances of _____. The uses presently allowed under such classifications include [insert present or proposed use of the Real Property]. In rendering these opinions, we have relied solely upon our review of a [non-binding/binding] [letter/certificate] issued by _____, dated _____, a copy of which is attached hereto.**

Opinions respecting land use, zoning and permitting are based upon complex code, regulation and ordinance requirements and their interpretation. Such opinions do not lend themselves to statements of factual and legal components. Therefore, Opining Counsel when asked for such an opinion should create specific questions to be directed to the governmental official that respond to the request of the Opinion Recipient. It is recommended that Opining Counsel's letter to the governmental official include (at a minimum) the following: (i) the legal description of the real property, (ii) the name and address of the current owner, (iii) a request for the current land use and zoning designation of the real property, (iv) a request for a copy of the land use and zoning ordinances affecting the real property, (v) a statement, with particularity, of the current and continuing use or the intended use of the real property, (vi) whether the land use designation and zoning classification currently on the real property are compatible under the existing ordinances, (vii) whether the current and continuing use or the intended use of the real property is compatible with the current land use and zoning codes, (viii) whether there is any special exception or variance attached to the real property, (ix) whether there exist any code violations attached to the real property, and (x) whether there are any pending changes to the land use and zoning code which would affect the current use and continuing use or the intended use of the real property. This list is not exhaustive and should be tailored to the exact criteria required under the circumstances of the opinion.

Where an opinion is requested with respect to the required permits associated with the use of the real property, obtaining a certificate of an engineer or other profession to support the opinion will generally be appropriate.

G. Environmental Opinions

Modern lending practice and regulation and the practice in the representation of a purchaser of real estate require that the Opinion Recipient obtain confirmation that the real property is not contaminated with environmentally hazardous substances and that otherwise the real property is in compliance with applicable environmental laws. The Opinion Recipient should obtain and rely upon the report of a Phase I and/or Phase II environmental audit or investigation of the real property prepared by an environmental consultant or engineer. Typically, it is beyond the scope of expertise of Opining Counsel to comment in an opinion letter on the findings and conclusions of an environmental professional, and it is inappropriate for the Opinion Recipient to request an opinion from Opining Counsel regarding environmental matters.

The Opinion Recipient also might require evidence that all necessary permits and approvals from environmental regulatory agencies (for example, the Environmental Protection Agency and Florida Department of Environmental Protection) have been or will be issued. The Opinion Recipient should rely solely upon a certificate from the consultant or engineer that obtained or will obtain the permits, which certificate should include a list of all required permits and the status of each permit.

Florida is a state where an "environmental endorsement" (ALTA 8.1) is available for both residential and commercial property for mortgagee policies. The endorsement insures the insured against loss or damage sustained by reason of the lack of priority of the lien of the insured mortgage over:

(i) any environmental protection lien which, at date of the policy, is recorded in those records established under state statutes at the date of the policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or filed in the records of the clerk of the United States District Court for the District in which the real property is located, except as set forth, if at all, in Schedule B (the schedule of exceptions) of the policy; or

(ii) any environmental protection lien provided for by any state statute in effect at the date of the policy, except environmental protection liens provided for by the following state statute(s): (excluded statutes are inserted here)

Unless specifically included in the scope of the opinion letter, under Florida customary practice federal and state environmental laws and regulations are excluded from the scope of an opinion of Florida counsel. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law."

USURY OPINIONS

A. Overview of Florida Usury Law

In general, "usury" is the charging or collecting of interest by a lender at a rate exceeding that allowed by applicable law. Section 687.02, Florida Statutes, provides that all contracts for the payment of interest upon any loan in excess of 18% per annum, simple interest, are usurious; however, if the loan exceeds $500,000, then the maximum lawful rate is 25% per annum, simple interest, as described in Section 687.071, Florida Statutes. Section 687.03, Florida Statutes, states that the reserving, charging, or taking of such interest by a lender constitutes usury and is unlawful. The penalty for willful violation of Section 687.03, Florida Statutes, as stated in Section 687.04, Florida Statutes, is forfeiture of the entire interest payable under the loan, and if interest has actually been taken, reserved, or paid, the lender must forfeit to the party from whom the interest has been taken, reserved, or paid, double such amount of interest, except if (1) the taker of such interest is a bona fide endorsee or transferee of negotiable paper on which the usurious nature of the interest is not apparent on its face; or (2) prior to the institution of an action for usury by a borrower, the lender notifies the borrower of the usurious nature of the loan and refunds the full amount of any overcharge taken, plus interest on such overcharge at the maximum allowable rate. In addition, a loan providing for an interest rate of greater than 25% per annum, simple interest, unless such interest is otherwise allowable by law, is deemed to be criminally usurious under Section 687.071, Florida Statutes, and the penalties for willfully and knowingly committing criminal usury include prescribed criminal penalties and with the forfeiture of both the entire principal and accrued interest of the loan. Unlike the laws in certain other states (such as New York), there are no exemptions from the Florida usury statutes for corporate borrowers or for commercial transactions.

Florida courts have established four elements that are necessary to substantiate a claim of usury in a transaction. The party seeking to establish usury must prove: (1) a loan, either express or implied; (2) an understanding between the lender and the borrower that the money must be repaid; (3) a greater rate of interest than is allowed by law; and (4) corrupt intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned. See Dixon v. Sharp, 276 So. 2d 817, 819 (Fla. 1973).

A transaction subject to usury need not always be structured in the form of a loan. It can take other forms as well. The Florida usury statutes specifically include loans, advances of money, lines of credit, forbearances to enforce the collection of debt, and other obligations to pay interest. In determining whether a transaction constitutes an obligation to pay interest within the purview of the usury statutes, courts will look to the substance of a transaction, including the intent and understanding of the parties, rather than its form. See Oregrund Ltd. Partnership v. Sheive, 873 So. 2d 451 (Fla. 5th DCA 2004). In Oregrund, the court found that a transaction structured as a sale of real property coupled with an option to repurchase in the future at a greatly inflated price was usurious. Other types of transactions which might, depending on their terms, be subject to the usury statutes include purchases of chattel paper, leases of real or personal property, time-price sales, and equity investments or joint ventures.

With regard to the "corrupt intent" requirement of usury, the Florida Supreme Court stated in the Dixon case that to work a forfeiture under the statute, the lender must knowingly and willfully charge more than the amount of interest allowed. Dixon, 276 So. 2d at 819. "[U]sury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than the law permits, but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent." Id. Moreover, "the question of intent is to be gathered from the circumstances surrounding the entire transaction." Id. The Court added, "If a mere mathematical computation is determinative of intent then the words "intent" and "willfully and knowingly" have no force or effect and might just as well be deleted from the statute."

The usurious nature of a contract is determined at the date of its inception. See Coral Gables First National Bank vs. Constructors of Florida, Inc., 119 So. 2d 741 (Fla. App. 3 Dist 1960). The court stated that "[T]he general rule followed in this state is that the usurious character of a contract must be determined as of the date of

its inception, and if usurious at that time, no subsequent transactions will purge it." Id at 746. The court went on to state that "When such contracts are renewed by a new or substituted contract, usury follows and becomes part of the later contract, making it vulnerable in like manner to the original contract." However, the court stated that if a usurious contract is abandoned and a new one is entered into "free from the vice of the old," the usurious character of the original contract will not follow into the new contract.

Traditional usury computations consist of first determining what constitutes "interest" in the transaction, then comparing the interest taken or charged to the "principal" in the transaction, and finally "annualizing" the calculation to derive the stated and effective rates of interest, which are then compared to the requirements of the usury statutes. Under Section 687.03(3), Florida Statutes, calculations of usury should be determined upon the assumption that the debts will be paid according to their agreed-upon terms, whether or not the loans are prepaid or collected by court action prior to maturity.

"Interest" is the compensation paid by the borrower to or for the benefit of the lender for the use of money lent by the lender, and may include either money or other tangible or intangible property. However, compensation for the use of money lent need not necessarily be labeled "interest" under the loan documents in order to be relevant for usury analysis. Loan fees, commissions, discounts or other fees that are actually concealed compensation to the lender for the use of the funds, rather than payment for legitimate services rendered or actual expenses incurred, may constitute interest for usury calculation purposes. See, e.g., Barnett Bank of West Orlando v. Abramowitz, 419 So. 2d 627 (Fla. 1982) and North American Mortgage Investors v. Cape San Blas Joint Venture, 378 So. 2d 287 (Fla. 1979).

In addition, items such as stock options or warrants, additional real or personal property, partnership interests, equity interests in projects, and the like taken by a lender in connection with a loan could be deemed to be additional interest. See for example, Jersey Palm-Gross v. Paper, 658 So. 2d 531 (Fla. 1995), where the lender required a 15% equity interest in the borrower's investment partnership as additional compensation. For loans that exceed $500,000, the usury statutes at Section 687.03(4), Florida Statutes, specifically exempt from interest the value of property charged, reserved or taken as an advance or forbearance, the value of which "substantially depends on the success of the venture in which are used the proceeds of that loan" (for example, an equity participation or "kicker" in a commercial mortgage loan). An example of the application of this exemption can be found in Bailey v. Harrington, 462 So. 2d 861 (Fla. App. 3 Dist., 1985), which involved a profit participation provision which entitled the lender to share in 43% of the profits, if any, from the construction project which the loan financed, but which would provide no return at all to the lender if the project realized no profits. In that case the profit participation was not deemed to be interest. As a result, the provision was deemed to the court to be inapplicable as relates to the usury statutes, because no profits were realized. The statutory exemption did not protect the transaction in the Jersey Palm-Gross case from a usury finding because in that case the Court found that the value of the partnership interest was quantifiable at closing, and was not merely a speculative hope for profit.

Certain legitimate expenses incurred by a lender in processing a loan may be charged to a borrower and reimbursed to the lender without having them be deemed to be interest for the purpose of making the usury computation. Under applicable case law, the amounts to cover expenses such as attorney's fees, title insurance premiums, taxes, appraisal fees, and other costs of the transaction are not deemed to be interest for purposes of the usury calculation. See, e.g., Mindlin v. Davis, 74 So. 2d 789 (Fla. 1954). Similarly, if a "loan commitment fee" represents consideration for the right to secure a loan by the prospective borrower rather than additional compensation for use of the funds (albeit sometimes a fine distinction), it will not be deemed to be interest for purposes of the usury analysis. See St. Petersburg Bank and Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1982).

"Principal" for the purposes of the usury computations can mean either of two things: (i) under Section 687.03(1), Florida Statutes, the amount to use in the computations is "the actual principal sum received;" and (ii) under Section 687.03(3), Florida Statutes, if interest has been taken in advance the interest is deemed to be "spread" over the stated term of the loan and the amount of principal to use in the computations is the "stated amount of the loan." Under a Section 687.03(1) analysis, the actual principal sum received could be the amount

of money a lender actually delivers to a borrower at the time of a loan closing, Wilson v. Connor, 142 So. 606 (Fla. 1932), but it should also take into account amounts paid by the lender for the direct or indirect benefit of the borrower. Rebman v. Flagship First National Bank of Highlands County, 472 So. 2d 1360 (Fla. 2d DCA 1985). Elements of interest, such as commitment fees, were held in earlier cases to reduce principal for purposes of the usury calculations because they effectively reduced the amount of the loan available to the borrower, but do not now reduce principal because of the applicability of Section 687.03(3), Florida Statutes. Nevertheless, the concept of "actual principal sum received" may remain viable in circumstances where interest is not required to be spread. If, for example, a compensating balance or interest reserve were required by a lender in connection with a loan rather than being permitted at the option of the borrower, that balance or reserve could reduce principal for usury calculations. See discussion in Rebman, supra. In circumstances governed by Section 687.03(3), however, where interest is "spread," the statute requires the amount of principal used in the calculations to be the "stated amount of the loan," contrary to prior case law. The Court in St. Petersburg Bank and Trust Co. v. Hamm, supra, held that there was no ambiguity in the language of Section 687.03(3), that its plain meaning was clear, and that the "stated amount of the loan" should not be interpreted to mean the "actual principal sum received." The Court held that an initial loan charge paid at the outset of the loan did not reduce principal for the purposes of the usury calculations. It is generally recognized that the calculation methods of Section 687.03(3) apply when a loan involves interest taken in advance or as a forbearance. It is not clear from the statutory language whether they apply as well to interest taken at other times as well, and not just at the initiation of the loan or forbearance period. The language is somewhat contorted, and reads "Any payment or property charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest" must be spread over the term of the loan, but yet the subsequent language in the subsection regarding calculation methods consistently refers to "advances" and "forbearances" only. See discussion in Sailboat Apartment Corp. v. Chase Manhattan Mortgage and Realty Trust, 363 So. 2d 564 (3d DCA 1978) which concludes that only advances and forbearances are meant to be covered by the statute.

Under Section 687.03(3), Florida Statutes, all sums of interest that are required to be spread are to be valued as of the date received and then spread over the stated term of the loan for the purpose of determining the effective rate of interest. The spreading should be calculated by first computing the advance or forbearance as a percentage of the total stated amount of the loan, and then dividing such amount by the number of years, or fractions thereof, of the loan according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate is then to be added to the stated annual percentage rate of interest in the loan to produce the effective rate of interest for the usury calculations.

Although it is common for a so-called "usury savings clause" to be included in most promissory notes and other commercial loan documents, the Florida Supreme Court has held that such clauses are not a sure cure for usury in a transaction. Because usury is largely a matter of intent, determined by the existence of a corrupt purpose in the lender's mind to get more than legal interest for the money loaned, a savings clause is merely one factor to be considered in the overall determination of whether the lender intended to charge a usurious interest rate. See Jersey Palm-Gross, supra. Thus, if there is a finding of intent to take usurious interest based on the facts of a given case, the savings clause cannot be counted upon as a panacea that will purge usury from a transaction and protect the lender from forfeiture of interest or other penalties.

Exemptions from the usury limitations exist under the Florida usury statutes themselves, as well as under other Florida and federal statutes. As noted above, Section 687.03(3) contains an exemption for equity kickers for loans in excess of $500,000. The "parity statute," Section 687.12, Florida Statutes, permits certain types of lenders that are otherwise authorized to make particular kinds of loans to charge interest at rates permitted to other types of lenders on such loans. Section 655.56(1), Florida Statutes, exempts from the Florida usury laws any interest, premiums or fines paid to a financial institution lender on a loan that is secured by a first lien on real property or on savings accounts (to the extent of the withdrawal value thereof). Section 658.491, Florida Statutes, permits banks making collateralized commercial loans secured by accounts, contract rights, or other receivables to charge and collect audit charges which are not subject to the Florida usury statutes, and Section 658.49, Florida Statutes, authorizes banks to make certain additional charges not subject to the Florida usury laws for loans not exceeding $50,000.

Sections 665.074 and 667.011, Florida Statutes, exempt from the Florida usury laws all reasonable expenses incurred by Florida savings associations and Florida savings banks in connection with the making of real estate loans, and authorizes the savings associations and banks to charge lump sum "reasonable charges," part or all of which can be retained by the associations and banks. Alternate interest rate structures are provided for lenders licensed under the Florida Consumer Finance Act at Section 516.001, et seq., the Motor Vehicle Sales Finance Act at Section 520.01, et seq., the Retail Installment Sales Act at Section 520.30 et seq., the Home Improvement Sales and Finance Act at Section 520.60 et seq., and the Florida Pawnbroking Act at Section 539.001, et seq., all of the Florida Statutes. Additionally, certain federal laws dealing with interest rates preempt Florida usury laws in certain circumstances, including, for example, the National Bank Act (12 U.S.C. §85) and the Depository Institutions Deregulation and Monetary Control Act of 1980 (Pub. L. No. 96-221, 94 Stat. 132).

B. Legal Opinions of Florida Counsel Relating To Usury

In a transaction involving the contracting of a debt between debtor and creditor, an opinion that the Transaction Documents creating the debt are valid and binding obligations of the Client includes, by implication, an opinion that the loan is not usurious, unless such element of the opinion is expressly excluded by the opinion. In order to permit the Opining Counsel to avoid doing an analysis of the transaction and actual computation of the interest, principal, and rate components, this Report recommends that the general exceptions of the opinion letter include an exception for usury. In the case where a limited usury opinion is given, as discussed below, the exception would be "usury, except as specifically provided in opinion paragraph ____ hereof."

It is not unusual for an Opinion Recipient to request a specific opinion on usury under Florida law, especially if the Opinion Recipient is located outside of Florida, because the determination of whether usury exists in a transaction can be complex and because the Opinion Recipient may face severe penalties, civil and criminal, if usury taints the Transaction Documents. In such event, the following standard formulation of the usury opinion should be used:

> **The [Transaction Documents] do not and will not violate applicable Florida usury laws provided that the [Opinion Recipient] has not and does not reserve, charge, take, or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of [eighteen/twenty-five percent (18/25%)] per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days, as applicable) and the actual number of days elapsed.**

This opinion language places the burden on the Opining Recipient to assess whether its loan may be usurious. Often, counsel for the Opinion Recipient will be comfortable with doing this analysis, because it is already advising its Client, the lender, regarding this issue.

However, in some cases, an Opinion Recipient may request an opinion that the Opining Counsel make the determination that, under the particular facts and circumstances, the Transaction is not usurious. Although such opinion requests are discouraged, in the cases where such opinion is rendered, the following language should be used:

> **The interest rate applicable to the obligations of the Borrower under the Transaction Documents does not violate the usury laws of the State of Florida. This opinion assumes that the Opinion Recipient has not and will not charge or receive, directly or indirectly, any fees, charges, benefits, or other compensation in connection with such obligations, except as expressly set forth in the Transaction Documents.**

This opinion should not be given unless Opining Counsel has conducted a careful and thorough review and analysis of the Transaction, the Transaction Documents, the nature of the Opinion Recipient, and applicable usury laws as discussed above.

The language of the proposed opinion addresses only the compensation expressly described in the Transaction Documents and not other amounts that could be deemed to be interest in connection with the Transaction. In that regard, Opining Counsel may assume, without explicitly stating, and it is implicit in a usury opinion under Florida customary practice, that the Opinion Recipient will not receive, directly or indirectly, any fees, charges, benefits or other compensation, except as set forth in the Transaction Documents, but that the better practice is for Opining Counsel to explicitly make such assumption (in the manner set forth above).

Opining Counsel should also carefully consider the appropriateness of this second form of opinion in situations where assumptions as to valuations with respect to non-monetary compensation in the nature of interest would otherwise be necessary (such as where a lender receives a warrant to acquire an interest in the borrower or the right to some form of equity return). Assumptions as to valuation may or may not have an impact upon the rights and obligations of the transaction parties vis-à-vis other parties. Further, to the extent that monetary compensation is not expressly deemed interest but may otherwise be deemed in the nature of interest is required to be paid under the Transaction Documents, it may be appropriate for this second form of opinion to contain assumptions regarding the inclusion or exclusion of such compensation as interest.

CHOICE OF LAW OPINIONS

(TO COME)

SPECIAL ISSUES TO CONSIDER WHEN ACTING AS LOCAL COUNSEL

(TO COME)

OPINIONS OUTSIDE THE SCOPE OF THIS REPORT

A. Federal Securities Law Opinions

In Transactions involving federal securities law, it is likely that a third-party legal opinion will be required at the closing of a Transaction. The types of circumstances under which opinions on securities law issues may be requested include the following:

- public offerings of debt and equity securities that are registered with the Securities and Exchange Commission ("**SEC**") under the Securities Act of 1933, as amended (the "**Securities Act**"), including initial public offerings, secondary offerings by issuers whose securities are already registered under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), whether in a shelf registration or otherwise, and secondary offerings in the public market by selling stockholders;
- private offerings of debt and equity securities, including private placements that are exempt from registration pursuant to Regulation D under the Securities Act, Section 3(a)(9) under the Securities Act, or otherwise, and transfers of securities under Rule 144 under the Securities Act; and
- opinions as to whether a particular investment being sold is a "security" under the Securities Act.

Securities law opinions may be issued to, among others, underwriters, placement agents, purchasers, transfer agents, securities exchanges and rating agencies.

The issuance of opinions in connection with federal securities law matters is primarily an issue under Federal law, although in some circumstances there may be state "blue sky" issues as well. Opinions in connection with securities law issues are specialized opinions that should only be rendered by counsel that determines itself to be competent to render such opinions. Further, the Committees believe that securities law opinions are primarily an issue of national practice, and that while a few state bar association reports have previously commented on federal and state securities law opinions in their reports, customary practice with respect to securities law opinions has primarily been developed by the Securities Law Opinions Subcommittee of the ABA Business Law Section Federal Regulation of Securities Law Committee (the "**ABA Securities Law Opinions Committee**").

Florida lawyers who render legal opinions in connection with transactions under Federal securities laws should look to the reports promulgated by the ABA Securities Law Opinions Committee to determine customary practice. The most recent reports that reflect customary practice with respect to securities matters are as follows:

1. "Negative Assurance in Securities Offerings (2008 Revision)," which was issued by the ABA Securities Law Opinions Committee in 2008; and
2. "No Registration Opinions," which was issued by the ABA Securities Law Opinions Committee in 2007.

B. Cross-Border Opinions

Delivery of third party closing opinions is becoming increasingly frequent in cross-border transactions (transactions between parties in the United States and parties outside the United States). From the standpoint of U.S. counsel (including Florida counsel), a cross-border transaction might require the issuance of a closing opinion letter to a foreign Opinion Recipient. The customary practice of this Report applies to all opinions issued by Florida Opining Counsel, wherever the Opinion Recipient is located. However, issuances of opinions to foreign Opinion Recipients raises issues that are more complex because of, among other reasons, differences in legal principles in various foreign jurisdictions, differences in education and practice, language barriers (even when documents are in English or are translated to English) and the absence in many foreign jurisdictions of written guidance and experience in the giving and receiving of third-party closing opinions. This can lead to misunderstandings as to what an opinion means and as to how the opinion might be interpreted.

Opinions issued in a cross-border transaction are beyond the scope of this Report. The Committees are aware that the ABA Committee is currently working on a report focusing on closing opinions by U.S. counsel to non-U.S. Opinion Recipients. This report, when issued, is expected to clarify how U.S. customary practice applies in the context of outbound opinions, provide guidance on opinions that are frequently requested in cross-border practice and explain why some opinion requests by non-U.S. Opinion Recipients are inappropriate in light of U.S. customary practice.

C. Intellectual Property Opinions

IP lawyers often render legal opinions regarding intellectual property ("IP") issues. Sometimes these opinions provide comfort to a third-party opinion recipient (for example, an opinion given on IP issues in the context of a merger). Further, IP lawyers often render legal opinions to their Clients on such issues whether something is patentable, whether a patent infringes on another patent and on freedom to operate. In such cases, the opinions are usually reasoned opinions reflecting a careful analysis of the facts and law under the circumstances.

The Committees have determined not to include in this Report a discussion of issues relating to IP opinions. The Committees believe that IP opinions are specialized and should only be given by lawyers who believe themselves to be competent to render such opinions.

D. Tax Opinions

Tax opinions are often issued to third parties in connection with commercial transactions. These opinions often relate to how a particular entity will be taxed (for example, as a pass-through entity) and whether income earned by the entity will be characterized as income subject to capital gains rates compared to ordinary income rates. Tax opinions may also relate to whether the particular Transaction that is the subject of the opinion will be a taxable transaction.

Like opinions rendered in connection with federal securities laws, the issuance of opinions in connection with tax matters is inherently a national practice and is outside the scope of this Report. Guidance on tax opinions has been issued by the Tax Section of the American Bar Association. The Internal Revenue Service has also issued guidance, under Circular 230, with respect to opinions regarding the taxability of certain transactions the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.

E. True Sale, Substantive Consolidation and Other Insolvency Related Opinions

In the context of structured finance transactions, opinions are often requested as to whether the transaction is a true sale under federal bankruptcy law and as to whether special purpose entities established to participate in these transactions will be substantively consolidated with an operating entity that is participating in the transaction under federal bankruptcy laws. Further, bankruptcy laws opinions on such issues as fraudulent conveyance are also given.

The Committees have determined that opinions in this specialized area of practice are beyond the scope of this Report. Florida lawyers who determine that they are competent to render these opinions should carefully review the guidance that has been published regarding these types of opinions, including: (i) the "Special Report by the Tribar Opinion Committee: Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions," that was published in 1991, and (ii) the "Special Report on the Preparation of Substantive Consolidation Opinions" that was published in February 2009 by the Committee on Structured Finance and the Committee on Bankruptcy and Corporation Reorganization of The Association of the Bar of the City of New York.

F. Municipal Bond Opinions

The Committees believe that municipal bond opinions are a specialized area of practice and that opinions on municipal bond issues are outside the scope of this Report. Florida counsel that issues opinions on municipal bond issues should refer to the publications of the National Association of Bond Lawyers for guidance regarding the customary practice with respect to opinions on municipal bond issues.

Appendix "A"

DEFINITIONS

The following terms are defined in the Report. Where appropriate, reference is made in the defined term to the section of the Report where such term is defined so that the context of the term can be considered.

"**1991 Report**" means the "Report on Standards for Opinions of Florida Counsel" of the Business Section Committee promulgated in 1991.

"**1998 Secured Transactions Opinion Report**" means the report entitled: "Opinions on Secured Transactions under the Uniform Commercial Code" promulgated by the Business Section Committee in 1998.

"**ABA Guidelines**" means the Guidelines for the Preparation of Closing Opinions issued in 2002 by the Committee on Legal Opinions of the ABA Section of Business Law.

"**ACREL**" means the American College of Real Estate Lawyers.

"**Applicable Laws**" means the laws that a Florida lawyer exercising customary professional diligence would reasonably expect to be applicable to the Client, the Transaction Documents or the Transaction to which the opinion relates, including laws relating to the Client if the Client is in a regulated business, but excluding the Excluded Laws.

"**Article 9**" means Chapter 679 of the Florida Statutes adopted by the Florida legislature in 2001. Article 9 as revised became effective on January 1, 2002. Article 9 as revised was modeled after the Uniform Revised Article 9 adopted in 1999, although there are some differences. See "Opinions with Respect to Collateral under the Uniform Commercial Code."

"**BOD**" or "**Board of Directors**" means the Board of Directors of the Client. See "Common Elements of Opinions – Role of Counsel and Relationship with Client."

"**Business Law Section**" means the Business Law Section of The Florida Bar.

"**Business Section Committee**" means the Legal Opinion Standards Committee of the Business Law Section.

"**California Business Law Section**" means the Business Law Section of the State Bar of California.

"**California Remedies Report**" means the "Report on Third-Party Remedies Opinion" that was issued in 2004 by the California Business Law.

"**Chapter**" means a particular chapter of the Florida Statutes.

"**Client**" is the person or entity for whom a third-party legal opinion is rendered. See "Introductory Matters – Purpose and Goal of this Report."

"**Committees**" collectively means the Business Section Committee and the RPPTL Section Committee.

"**Department**" means the Florida Department of State, Division of Corporations.

"**DOR**" means the Florida Department of Revenue.

"**Excluded Laws**" means the specialized laws enumerated in "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" that are excluded from opinions of Florida counsel unless the opinion letter expressly includes one or more of such laws within the scope of the opinion.

"**FBCA**" means the Florida Business Corporation Act (Chapter 607, Florida Statutes).

"**FLLCA**" means the Florida Limited Liability Company Act (Chapter 608, Florida Statutes).

"**FRULPA**" means the Florida Revised Uniform Limited Partnership Act of 2005 (Chapter 620.1101 et. seq.).

"**FRUPA**" means the Florida Revised Uniform Partnership Act of 1995 (Chapter 620.8101 et seq.).

"**FS**" or "**Florida Statutes**" means Florida Statutes.

"**Fictitious Name Act**" means Florida's Fictitious Name Act which is contained in Section 865.09, Florida Statutes.

"**Florida UCC**" means the Florida Uniform Commercial Code, that is Chapters 670 through 680 of the Florida Statutes.

"**GP**" means a general partnership.

"**Known**" or "**Knowledge**" means the conscious awareness of the lawyers in the Primary Lawyer Group of factual matters that such lawyers recognize as being relevant to the opinion or confirmation so qualified. See "Common Elements of Opinions – Knowledge."

"**LLC**" means a limited liability company.

"**LLLP**" means a limited liability limited partnership.

"**LP**" means a limited partnership.

"**LLP**" means a limited liability partnership.

"**LSC**" means local or specialist counsel. See "Common Elements of Opinions – Opinions of Local or Specialist Counsel."

"**NCCUSL**" means the National Conference of Commissioners on Uniform State Laws.

"**Opining Counsel**" means the lawyer rendering the opinion on behalf of the Client. See "Introductory Matters – Purpose and Goal of this Report."

"**Opinion**" is a third-party legal opinion letter delivered by counsel for one party to another party that is not the Client of the attorney rendering the opinion. See "Introductory Matters – Purpose and Goal of this Report."

"**Opinion Recipient**" is the third party to whom the opinion is delivered. It is generally the other party to a Transaction with the Client. See "Introductory Matters – Purpose and Goal of this Report."

"**Organizational Documents**" means the organizational documents of Florida entities that are set forth in "Entity Status and Organization – Organizational Documents."

"**Primary Lawyer Group**" means the lawyers currently in the Opining Counsel's firm that (i) sign the opinion letter, or (ii) are actively involved in the negotiation of and documentation of the Transaction and the Transaction Documents. See "Common Elements of Opinions – Knowledge."

"**Prior Florida Reports**" means collectively the 1991 Report, RPPTL Report No. 1, the 1998 Secured Transactions Report and RPPTL Report No. 2.

"**POC**" means the primary Opining Counsel with respect to the Transaction. See "Common Elements of Opinions – Opinions of Local or Specialist Counsel."

"**Qualifications**" means the qualifications to the remedies opinion. See "The Remedies Opinion – Overview of the Remedies Opinion."

"**Real Estate Report**" means the "Inclusive Real Estate Secured Transactions Report" that was issued in 1999 by ACREL and the ABA Section of Real Property Probate and Trust Law.

"**Recipient's Counsel**" means the lawyer representing the Opinion Recipient in the Transaction. See "Introductory Matters – Purpose and Goal of this Report."

"**Restatement**" means the Restatement of the Law (Third) of the law Governing Lawyers. See "Introductory Matters – Purpose of Third-Party Legal Opinions."

"**RPC**" means the Rules of Professional Conduct of The Florida Bar. See "Introductory Matters – Ethical and Professional Issues."

"**RPPTL Report No. 1**" means the report entitled; "Opinions in Real Estate Transactions, including Loan Transactions" that was promulgated in 1996 by the RPPTL Section Committee.

"**RPPTL Report No. 2**" means the report entitled; "Opinions in Real Estate Transactions, including Loan Transactions" that was promulgated in 2004 by the RPPTL Section Committee.

"**RPPTL Section**" means the Real Property, Probate and Trust Law Section of The Florida Bar.

"**RPPTL Section Committee**" means the Legal Opinions Committee of the RPPTL Section.

"**SEC**" is the U.S. Securities and Exchange Commission. See "Introductory Matters – Ethical and Professional Issues."

"**State**" means the State of Florida.

"**Transaction**" is the commercial transaction to which an opinion relates. It may be a debt or equity financing, a real estate purchase, an acquisition of stock or assets or any other type of commercial transaction. See "Introductory Matters – Purpose and Goal of this Report."

"**Transaction Documents**" means the agreements between the parties as to which the opinions are being given. See "Common Elements of Opinions – Transaction Documents."

"**TriBar Opinion Committee**" means the committee consisting of the following bar associations functioning as a single committee: (i) the Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers Association, (ii) the Corporation Law Committee of the Association of the Bar of the City of New York, and (iii) the Special Committee on Legal Opinions of the Business Law Section of the New York State Bar Association.

"**TriBar Report**" means the "Third-Party Closing Opinion" report that was issued in 1998 by the TriBar Opinion Committee.

"**UCC**" means the Uniform Commercial Code.

"**UCC Search Report**" means the report of UCC financing statements filed in the specified filing office naming the Client as debtor. In Florida, the filing office is the Florida Secured Transaction Registry.

"**Uniform Article 9**" means Article 9 as adopted in 1999.

Appendix B

STATUTORY CROSS REFERENCES

(TO COME)

Appendix C

COMMITTEE MEMBERS

(TO COME)

Appendix D

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or thirdparty legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients.

Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

By providing content to abbreviated opinion language, customary practice permits the omission from an opinion letter of descriptions of the procedures that the opinion giver has performed and of many definitions, assumptions, limitations, and exceptions. Thus, it reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion letter of some but not all of these matters does not exclude others customarily understood to apply. A departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's Restatement (*Third*) *of the Law Governing Lawyers*** states:

> In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

The *Restatement* also refers to customary practice as an element in determining the "meaning of the opinion letter."

The *Restatement* identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the *Restatement* the "professional community whose practices and standards are relevant" in making that determination is that of "lawyers undertaking similar matters." That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

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* The "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions," was published by the American Bar Association Section of Business Law in *The Business Lawyer 63:4*, pp. 1277-1279. It is reprinted with the permission of the American Bar Association. The Customary Practice Statement has been adopted as of November __, 2009 by 28 bar associations or sections of bar associations, including the Business Law Section and the RPPTL Section.

** The references to the *Restatement* in this statement are to Sections 51, 52, and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 51, Comment e; Section 52, Comment *b*, Comment *e*, Illustration 2; and Section 95, Reporter's *Note* to Comment *b*, Reporter's *Note* to Comment *c*. The *Restatement* sometimes refers to "custom and practice." The *Restatement* uses the phrases "custom and practice" and "customary practice" to mean the same thing.

The *Restatement* treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

FORMS

Opinion in a lending transaction (secured non-real estate)

(To Come)

Opinion in a lending transaction (real estate)

(To Come)

Opinion in a commercial transaction

(To Come)

Opinion with respect to share issuances

(To Come)

Certificate to Counsel

(To Come)

MEMORANDUM

TO: Members of the Executive Council of the Business Law Section of The Florida Bar

FROM: Philip B. Schwartz, Chair
Legal Opinion Standards Committee

DATE: September 2, 2009

SUBJECT: Report on Standards for Third-Party Legal Opinions of Florida Counsel

As everyone is aware, the Section's Legal Opinion Standards Committee (the "Committee"), in collaboration with the Legal Opinions Committee of the Real Property, Probate and Trust Law Section (the "RPPTL Section Committee"), has been actively working on its "Report on Standards for Third-Party Legal Opinions of Florida Counsel" (the "Report"). A draft of the Report (draft dated September 2, 2009) is attached for your review.

The Report is intended to reflect customary third-party legal opinion practices in Florida as they exist today. It updates and consolidates in a single integrated report all of the legal opinion standards that have been published in the past by our Section and by the RPPTL Section. It covers a broad range of third party legal opinion topics, including: (a) discussions on each of the "building block" opinions that are predicate opinions to the remedies opinion, (entity status and organization, authorization to transact business, entity power (and authority), authorization of the transaction, execution and delivery, no violation and no breach or default, and no required governmental consents or approvals); (b) a discussion on the meaning of the remedies opinion from a Florida point of view, including the qualifications to the remedies opinion that are appropriate to include in opinions rendered by Florida counsel; (c) a discussion on the no-litigation confirmation; (d) discussions regarding opinions on several substantive areas of commercial practice where opinions are often given, including opinions with respect to securities, opinions with respect to collateral under the Uniform Commercial Code and opinions with respect to real estate transactions; (e) discussions regarding opinions under Florida law on usury and on choice-of-law provisions, and (f) discussions on matters that are common to all third-party legal opinions rendered by Florida counsel and on matters to consider when Florida counsel is acting as local counsel.

The Report, when completed, will also contain several forms of opinions that can be used by Florida counsel in their opinion giving practices. The forms will key off of the various sections of the Report, which interpret the words in the form opinions and provide guidance regarding the diligence that should be completed to render the particular opinions. In this regard, it is expected

that when the final version of the Report is disseminated, an on-line electronic version of the Report will be made available that will include hyperlinks from various sections of the forms into the applicable sections of the Report where the customary practice regarding such opinions and the diligence required to give such opinions is described.

While the attached draft of the Report is substantially complete, several sections (including the forms of opinions) are not yet included. Further, several of the Report sections contained in the attached draft of the Report are still being actively discussed and modified by the Committee and by the RPPTL Section Committee. However, in order to allow Executive Council members the opportunity to begin their review of the Report and to give Council members the opportunity to study the draft and comment upon it before it is finalized, we are providing Council members with a copy of the draft Report as it exists today. In that regard, please feel free to provide me at your convenience with any comments you may have regarding the draft Report.

At next Monday's Executive Council meeting, I plan on walking everyone through the highlights of the draft Report. However, no votes regarding the draft Report will be sought at Monday's meeting. Rather, it is anticipated that the final version of the Report will be submitted to the Executive Council for consideration and approval at the November 2009 meeting of the Executive Council.

Finally, a personal request. The Report remains a work-in-progress. I am concerned that the Report not circulate outside the Executive Council, the members of our Committee, the members of the RPPTL Section Committee and the members of the Executive Council of the RPPTL Section, until the Report is completed and approved. My concern is that until the Report is finalized, there are likely to be changes thereto, and I do not want partially completed drafts of the Report to be misconstrued as final reflections of customary practice in our state. I appreciate in advance everyone's adherence to my request not to circulate the draft Report outside the Executive Council at this time.

I look forward to seeing everyone at the Retreat. If you have any questions please feel free to give me a call.

Only the Westlaw citation is currently available.

United States Bankruptcy Court, M.D. Florida,
Ft. Myers Division.
In re Sarah E. BAKER, Debtor.
No. 9:08-bk-11158-ALP.

Jan. 29, 2009.

Background: Chapter 7 trustee objected to exemption claimed by debtor in profit-sharing plan.

Holding: The Bankruptcy Court, Alexander L. Paskay, J., held that debtor's interest in profit-sharing plan was not exempt under Florida statute.
Objection sustained.

West Headnotes

Exemptions 163 0

163 Exemptions
Chapter 7 debtor's interest in profit-sharing plan was not exempt under Florida exemption for any money or other assets payable to owner, participant, or beneficiary from, or any interest of any owner, participant, or beneficiary in, certain tax-exempt retirement and profit-sharing plans when debtor was only participant who shared in benefits and protection of plan. 26 U.S.C.A. § 401(a); West's F.S.A. § 222.21(2)(a)(1).
Holly Bower, Phoenix Law PA, Fort Myers, FL, for Debtor.

ORDER ON TRUSTEE'S OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION

(Doc. No. 12)

ALEXANDER L. PASKAY, Bankruptcy Judge.

***1** THE MATTER before this Court is an Objection filed by the Chapter 7 Trustee to the claims of exemption filed by Sarah E. Baker (the Debtor), who is seeking relief under Chapter 7 of the Bankruptcy Code (Code). Although the Debtor claimed several items as exempt on her Schedule C, the only item in dispute relates to the Debtor's claim of exemption with respect to her interest in a Keogh plan. The Debtor's claim of exemption in her Fidelity Investment-Keogh plan is based on Section 222.21(2)(a)(1) of the Florida Statutes. It is the Debtor's contention that a close reading of the section that she relies upon, leaves no doubt that the literal reading of Fla. Stat. § 222.21(2)(a)(1) permits but one conclusion, that is, that the Keogh plan under consideration is exempt pursuant to Section 222.21(2)(a)(1) of the Fla. Stat.

Section 222.21(2)(a)(1) of the Fla. Stat., provides in pertinent part:

222.21 Exemption of pension money and certain tax-exempt funds or accounts from legal processes

...

(2)(a) ... any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary or participant if the fund or account is:

1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

Fla. Stat. § 222.21(2)(a)(1).

In addition to the foregoing, the Debtor contends that Section 222.21(2)(a)(1) of the Fla. Stat., specifically exempts retirement plans "that have been preapproved by the Internal Revenue Service as exempt from taxation" pursuant to Section 401(a) of the In-

ternal Revenue Code.

Section 401(a) of the Internal Revenue Code, provides in pertinent part:

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section-

...

(c) Definitions and rules relating to self-employed individuals and owner-employees.-For purposes of this section-

(1) Self-employed individual treated as employee.

(A) In general.-The term "employee" includes, for any taxable year, an individual who is a self-employed individual for such taxable year.

(B) Self-employed individual-The term "self-employed individual" means, with respect to any taxable year, an individual who has earned income (as defined in paragraph (2)) for such taxable year. To the extent provided in regulations prescribed by the Secretary, such term also includes, for any taxable year-

***2 (i)** an individual who would be a self-employed individual within the meaning of the preceding sentence but for the fact that the trade or business carried on by such individual did not have net profits for the taxable year, and

(ii) an individual who has been a self-employed individual within the meaning of the preceding sentence for any prior taxable year.

26 U.S.C. §§ 401(a), 401(c).

The Debtor contends that the Keogh plan is a cash or deferred arrangement "Prototype Standardized Profit Sharing Plan," that received various letters from the Department of the Treasury, Internal Revenue Service indicating that, "the amendments to the form of the plan ... does not in and of itself adversely affect the plan's acceptability under section 401 of the Internal Revenue Code."

In support of the Debtor's claim of exemption, the Debtor has provided this Court with four letters from the Department of the Treasury, Internal Revenue Service. However, the Debtor's Keogh plan appears to be a profit sharing plan in which the Debtor is the only participant. Therefore, the issue of whether or not a self-employed person would qualify to be a participant is answered in the affirmative provided that he or she is not the only participant who shares in the benefits and the protection of the Keogh plan.

The issue was considered by the Supreme Court in the case of *In re Yates*, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed.2d 40 (2004). The question presented to the court was whether the working owner of a business qualified as a "participant" in an ERISA pension plan sponsored by his corporation. The Supreme Court, Justice Gensburg, held "[i]f the plan covers one or more employees other than the business owner and his or her spouse, the working owner could participate on equal terms with other participants. *Id.* at 6. The court rejected the position taken by the lower courts, "that a business owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation."*Id.*

In the case of *In re Banderas*, 236 B.R. 837 (Bankr.M.D.Fla.1998), this Court considered the debtor's claim of exemption in his interest in a profit-sharing plan. The Court noted that "[t]he purpose of establishing requirements to qualify profit sharing plans for a tax exemption is to insure that profit sharing plans are operated for the welfare of *employees* in general."(citing *McClintock-Trunkey Co. v. C.I.R.*, 217 F.2d 329 (9th Cir.1954).*Id.* at 841 (emphasis added).

Section 401(a) of The Internal Revenue Code of 1986, as amended, provides the requirements for qualification: "a trust created ... for the exclusive benefit of his *employees*... shall constitute a qualified trust under this section," so long as it meets the re-

quirements outlined in Subsection 401(a) (emphasis added).

In the case of *In re Sutton*, 272 B.R. 802 (Bankr.M.D.Fla.2002), this Court held that the "debtor's interest in his Keogh plan was not exempt under Florida exemption statute permitting individual debtors to exempt, in addition to other exemptions allowed under state law, any property listed in specified subsection of the Bankruptcy Code." *Id.* at 807.In *Sutton* this Court held that the debtor was the sole owner and operator of a real estate firm and the Keogh plan did not qualify under the applicable provisions of the Internal Revenue Code.

***3** In the case *Hebert v. Fliegel*, 813 F.2d 999 (9th Cir.1987), a self-employed physician claimed exemption in his Keogh plan pursuant to Oregon statute. The court held that the qualified Keogh plan of a self-employed physician was not exempt from creditors' claims under Oregon Law since the state exemption does not apply to pensions created by an individual for his or her own benefit.

This Court is not unmindful of the decision by the Bankruptcy Court in the Southern District of Florida in the case of *In re Suarez*, 127 B.R. 73(Bankr.S.D.Fla.1991). The court in Suarez considered the debtors claimed exemptions in an IRA retirement accounts and Keogh accounts and held that: 1) the ERISA did not conflict with Florida statutes; 2) ERISA qualified as "other federal law" that would support exemption of funds in Keogh account from a bankruptcy estate, although Florida opted-out of the federal exemptions; and 3) the application of Florida statutes providing exemptions from creditors' claims was not unconstitutional as a result of ex-post facto, retroactive impairment with the debtor's contract with the lender. Unlike the question presented to this Court, the matter in *Suarez*, not only dealt with Fla. Stat. § 222.21, but also dealt with the issue of the debtors amending their petition to claim the I.R.A. and Keogh accounts exempt under Fla. Stat. § 222.201, which makes the property exempt pursuant to 11 U.S.C. § 522(d)(10)(E). In *Suarez* the debtor died on December 14, 1990, leaving debtor, Eladia F. Suarez, as the surviving spouse and beneficiary. Mrs. Suarez' sole source of support was her social security income and the funds which were being held in an IRA and Keogh accounts. The court considered the legislative history of the " 'fresh start' envisioned by Congress" and cited House Report 8200.

House Report 8200 provides in pertinent part:

> The historical purpose of ( ) exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. (This) purpose has not changed....

H.R.Rep. No. 595, 95th Cong., 1st Sess. 126 (1977) reprinted in 1978 U.S.Code Cong. & Ad.News, 5787, 5963, 6087.

Based on the foregoing, this Court is satisfied that the present issue presented to this Court is governed by the Section 222.21 of the Florida Statutes. The Court notes that Florida Legislatures did not contemplate exempt funds in a Keogh plan when the claimant is the sole shareholder and sole "participant" in the Keogh plan involved. Be that as it may, this Court is satisfied that the Objection of the Trustee should be sustained and the funds in the Keogh plan are property of the estate and subject to administration by the Trustee.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Trustee's Objection to Debtor's Claim of Exemption with respect to the Keogh plan (Doc. No. 12) be, and the same is hereby sustained. It is further

***4** ORDERED, ADJUDGED AND DECREED that the Debtor, Sarah E. Baker, is directed to turnover to the Trustee the Keogh plan in the amount of $49,347.45 for administration by the Trustee.

Bkrtcy.M.D.Fla.,2009.
In re Baker
--- B.R. ----, 2009 WL 749031 (Bkrtcy.M.D.Fla.)

END OF DOCUMENT

RPPTL 2009-2010 CLE Calendar				
DATE	*EVENT*	*Course #*	*CITY*	*HOTEL*
Oct. 8 -9, 2009	*Real Property* Seminar **RESPA & Regulatory Compliance** (Eleanor Taft)	**0885**	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Oct. 23, 2009	*Probate* Seminar **Guardianship Law** (Alexandra Rieman & Debra Boje)	**0936**	Tampa	Airport Marriott
Nov. 5-6, 2009	*Real Property* Seminar **Landlord and Tenant** (Neil Shoter)	**0944**	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
Nov. 12-13, 2009	*Probate* Seminar **Trust Law** (John Moran)	**0955**	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Dec.11, 2009	*Probate* Seminar **Estate Planning** (Rick Gans)	**0966**	Tampa	Airport Marriott
Jan. 29, 2010	*Real Property* Seminar **Environmental and Land Use** (Jay Mussman & Nancy Stuparich)	**0969**	Tampa	Airport Marriott
Feb. 10-11, 2010	*Probate* Seminar **Trust and Estate Symposium** (Bill Hennessey)	**0989**	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
Feb. 19, 2009	*Real Property Seminar* **Litigation Seminar** (Guy Norris and Eugene Shuey)	**1063**	Tampa	Airport Marriott
March 4-5, 2010	*Real Property* Seminar **Land Trusts** (Katherine Frazier)	**1014**	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
March 25-26, 2010	*Probate* Seminar **Probate Law**	**1003**	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
April 8-10, 2010	**3rd Annual Construction Law Institute** (Lee Weintraub)	**1010**	Orlando	Omni Resort Champions Gate
April 8-10, 2010	**Construction Law Certification Review Course**	**1011**	Orlando	Omni Resort Champions Gate
April 15, 2010	*Real Property* Seminar **Condo Law** (with property insurance speaker included) Steve Mezer	**0995**	Tampa	Airport Marriott
April 16, 2010	*Real Property Seminar* **Condo Law** (Rob Freedman)	**1065**	Tampa	Airport Marriott
April 23-24, 2010	*Probate Seminar* **Wills, Trusts & Estates Certification Review** (Deborah Russell and Anne Buzby)	**1039**	Orlando	Hyatt Regency Airport
April 23-24, 2010	*Real Property Seminar* **Advanced Real Estate Law Certification Review** (Ted Conner)	**1040**	Orlando	Hyatt Regency Airport
May 28, 2010	*Convention Seminar* **Real Estate, Probate and Trust Law**	**1042**	Tampa	Marriott Waterside
June 17-20, 2010	**RPPTL Attorney/Trust Officer Liaison Conference** (Seth Marmor)	**1035**	Naples	Ritz Carlton Golf Resort

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RICHARD A. ROBERTSON, Appellant, v. KEVIN J. DEEB and RBC WEALTH MANAGEMENT, a Division of RBC CAPITAL MARKETS CORPORATION, Appellees.	)	Case No. 2D08-6428

Opinion filed August 14, 2009.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Pinellas County; J. Thomas McGrady, Judge.

James A. Byrne, St. Petersburg, for Appellant.

Teresa A. Deeb of Deeb & Durkin, P.A., St. Petersburg, for Appellee Kevin J. Deeb.

No appearance for Appellee RBC Wealth Management.

SILBERMAN, Judge.

Richard A. Robertson appeals an order denying his claim of exemption from garnishment with respect to an inherited IRA. We affirm based on our determination that inherited IRAs are not entitled to the exemption set forth in section

222.21(2)(a), Florida Statutes (2008), because that section is limited to the original "fund or account."

Kevin J. Deeb sued Robertson on a promissory note and obtained a judgment against him in excess of $188,000. Deeb thereafter obtained and served a writ of garnishment to RBC Wealth Management, a division of RBC Capital Markets Corporation. In response, RBC identified an account titled "Richard A[.] Robertson Beneficiary, Harold Robertson Decedent RBC Capital Markets Custodial IRA" that contained $75,372 in cash and securities. Robertson filed a claim of exemption and argued that the IRA, which he had inherited from his father, was exempt from garnishment pursuant to section 222.21(2)(a).

At the hearing on Robertson's claim of exemption, Robertson relied on a letter and a fact sheet from RBC informing Robertson of his rights to his father's IRA as a beneficiary. The fact sheet stated that, upon his father's death, Robertson had two options. His first option was transferring the account into an inherited IRA, which would require him to accept annual minimum distributions but allow him to take discretionary payouts without penalty. His second option was accepting distributions pursuant to the "five year death rule," which would allow him to take discretionary payouts from his father's account as long as he exhausted the funds within five years of his father's death. Robertson elected to transfer the account into an inherited IRA.[1]

[1]Because Robertson chose to transfer his father's account into an inherited IRA, our opinion today deals solely with the applicability of section 222.21(2)(a) to this type of IRA account. Any reference we make in our opinion to an "inherited IRA" is meant to refer to the type of account created by Robertson in this case.

Section 222.21(2)(a) renders "money or other assets payable to an owner, a participant or a beneficiary" exempt from garnishment if it is in a fund or account that is maintained as an IRA pursuant to a plan or governing instrument that is exempt from taxation under certain provisions of the Internal Revenue Code. The trial court found that section 222.21(2)(a) does not apply to an inherited IRA and denied the claim of exemption. The court reasoned that at the time of his father's death, the account became Robertson's property and no longer qualified for the same exemptions from taxation. The court concluded, "It is not an IRA. It is not like an IRA in terms of taxing and penalty for early withdrawal and things of that nature, so I don't think that's what [the legislature] meant."

On appeal, Robertson argues that the court erred in determining that section 222.21(2)(a) does not apply because he is a "beneficiary" of the "fund or account" that qualified as an IRA when his father was alive. Deeb argues that the trial court's ruling should be affirmed because IRAs lose their tax exempt status under section 222.21(2)(a) upon the death of the original owner.

We review this question of law regarding the interpretation of section 222.21(2)(a) de novo. See BellSouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003). We conclude that section 222.21(2)(a) does not apply to inherited IRAs because the plain language of that section references only the original "fund or account" and the tax consequences of inherited IRAs render them completely separate funds or accounts.

The applicable portion of section 222.21(2)(a) provides as follows:

> (2)(a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or

> a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:
>
> 1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;
>
> 2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

(Emphasis added and footnotes omitted.) Thus, the plain language of section 222.21(2)(a) reflects the legislature's intent to exempt a "fund or account" that is maintained as an IRA in accordance with a plan or governing instrument that is exempt from taxation under certain provisions of the Code. While section 222.21(2)(a) provides for exemption from "all claims of creditors of the . . . beneficiary," it does not exempt the money or assets at issue unless they are maintained in one particular "fund or account." Thus, the plain language of section 222.21(2)(a) does not exempt inherited IRAs, such as the one Robertson established in this case, which are separate funds or accounts that are created when the original fund or account passes to a beneficiary upon the death of the participant.

Furthermore, the "fund or account" that is exempt from garnishment under section 222.21(2)(a) is identified by its tax exempt status. However, when IRAs are distributed upon the death of the owner and become inherited IRAs their tax exempt status changes dramatically. IRAs are generally exempt from income taxes until distributions are taken, and owners may roll over IRAs without incurring any tax penalties. I.R.C. § 408(d)(1), (d)(3), (e) (2007). Furthermore, IRA owners are not required to take distributions, and they incur a ten percent penalty for early withdrawal. I.R.C. §§ 72(q) (2008), 408(d)(1). While inherited IRAs are also exempt from income taxes until distributions are taken, beneficiaries of inherited IRAs are required to take distributions which are exempt from the early withdrawal penalty. I.R.C. §§ 72(q)(2)(B); 401(a)(9) (2008); 408(a)(6), (d)(1). Additionally, inherited IRAs are not entitled to rollover treatment. See I.R.C. § 408(d)(1), (d)(3)(C). Thus, the tax exempt status of inherited IRAs is inconsistent with that of original IRAs.

This inconsistency has been recognized by a number of federal bankruptcy courts that have concluded that inherited IRAs are not exempt from creditors under similar statutory schemes. See In re Taylor, No. 05-93559, 2006 WL 1275400, at *2 (Bankr. C.D. Ill. May 9, 2006) (not reported in B.R.); In re Kirchen, 344 B.R. 908, 914 (Bankr. E.D. Wis. 2006); In re Greenfield, 289 B.R. 146, 150 (Bankr. S.D. Cal. 2003); In re Sims, 241 B.R. 467, 470 (Bankr. N.D. Okla. 1999). In Sims, for example, a beneficiary who had inherited an IRA filed for protection under Chapter 7 of the United States Bankruptcy Code in bankruptcy court. 241 B.R. at 468. The beneficiary claimed his inherited IRA was exempt, and the trustee and a creditor objected. The bankruptcy court interpreted an exemption provision in the Oklahoma statutes that exempted "*any*

interest in a retirement plan or arrangement qualified for tax exemption purposes under present or future Acts of Congress . . . only to the extent that contributions by or on behalf of a participant were not subject to federal income taxation to such participant at the time of such contributions." Id. at n.2.

The bankruptcy court concluded that the beneficiary's interest in the IRA did not qualify for exemption under that statute because the original IRA's tax exempt character changed completely when it became classified as an inherited IRA. Id. at 470. The court explained that, unlike original IRAs, inherited IRAs are not vehicles to defer taxation on income in order to preserve money for retirement. Instead, inherited IRAs are liquid assets that the beneficiary may access at any time without penalty and that the beneficiary must take as income without regard to retirement needs. Id. The court concluded, "The purpose of the . . . Legislature in exempting individual retirement accounts is to allow debtors to preserve assets which have been earmarked for retirement in the ordinary course of the debtor's affairs. Such a purpose would not be served by upholding [the beneficiary's] request to keep his interest in the IRA as exempt." Id. at 471.

We find this reasoning persuasive and equally applicable to section 222.21(2)(a). Because the plain language of section 222.21(2)(a) references only the original "fund or account" and the tax consequences of inherited IRAs like the one in this case render them a completely separate "fund or account," such inherited IRAs are not exempt under that section. Accordingly, we affirm the order denying Robertson's claim of exemption from garnishment in this case.

Affirmed.

DAVIS and WALLACE, JJ., Concur.