



The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Tequisha Y. Myles, Chair
Consumer Protection Law Committee

850/561-5600
www.FLORIDABAR.org

Agenda

Consumer Protection Law Committee
Hilton at Lake Buena Vista, Lanai Meeting Room
Thursday, Jan. 22, 2015, 10 a.m.

To call in, dial 1-888-376-5050. Then enter code 6452365715# Leader PIN 46255#

I. Call to order, roll call (Attachment 1, committee roster)

II. Approval Dec. 18, 2014, Minutes (Attachment 2)

III. Subcommittee Reports

— **CLE:** Update about applying for the Presidential Showcase (Attachment 3, Presidential Showcase application)

— **Legislative:** Letter to lawmakers (Attachment 4)

— **Outreach and Social Media:** Memo regarding pamphlet video project (Attachment 5)

— **Judicial Outreach:** Report from Mary Ann Etzler about Bench manual (Attachment 6)

— Pamphlets:

- Report from Lesly Longa. (Attachment, 7, Florida Bar consumer pamphlets and tips)
- Credit Report Disputes proposed pamphlet (Attachment 8)

— Consumer Protection Lawyer of the Year

Nomination form for 2015 can be filled out online and submitted directly by email (Attachment 9)

IV. Consumer Protection Week

March 1-7. Looking for ideas for a project either through social media, launching the judicial manual (if it is ready), something geared to law students, etc.

V. Upcoming meetings

June, Annual Convention (June 24-27), Boca Raton Resort & Club, Boca Raton

Conference calls will be held on the third Thursday of the month at 11:30 a.m.

- | | |
|------------|------------|
| ▪ Feb. 19 | ▪ April 16 |
| ▪ March 19 | ▪ May 21 |

Standing Committees
Consumer Protection Law
2014 – 2015

Staff Contact [Zannah Lyle](#)

Tequisha Yvette **Myles**, Chair

Jared Michael **Lee**, Vice Chair

Sasha McAlpine **Sampaio**, Vice Chair

Adam Glenn **Rabinowitz**, Board Liaison

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Shaunda Therese **Hill**

Gregory Allen **Jackson, Jr.**

Mary McPherson **Lewis**

Jacob Joseph **Linhart**

Lesly Carmen **Longa**

Dionne L **Meyers**

Ryan Garrett **Moore**

Robert William **Murphy**

Jennifer D **Newton**

Devona Alicia Reynolds **Perez**

Anita Clark **Pryor**

Craig Evan **Rothburd**

Steven A **Salzer**

Sean Michael **Shaw**

Brendan A **Sweeney**

Alice Maria **Vickers**

Tiffany Richelle **Wax**

David A **Weintraub**

Michael Andrew **Ziegler**



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Minutes
Consumer Protection Law Committee
Dec. 18, 2014 11:30 a.m.
Conference Call

Attending: Tequisha Myles, chair; William Armistead, Diana Arteaga, Laura Boeckman, James Bryan, Robert Clements, Wilhelmina Curtis, Samantha Duke, Courtney Durham, Mary Ann Etzler, Mona Fandal, James Giardina, Mercedes Hale, Greg Jackson, Mary Lewis, Ryan Moore, Robert Murphy, Jennifer Newton, Craig Rothburd, Alice Vickers, David Weintraub and Michael Ziegler

Excused: Jared Lee, vice chair; Sasha Sampaio, vice chair; Delton Chen, Jacob Linhart, Lesly Longa, Anita Pryor, Steven Salzer

Guest: Chuck Geitner

Staff: Zannah Lyle

I. Call to order and roll call

Twenty-two attending; seven excused; 10 unexcused; one guest.

II. Minutes

Minutes of the Nov. 20, 2014, conference call unanimously approved.

III. Subcommittee reports:

– CLE

Subcommittee Vice Chair Craig Rothburd reported that the topic of the committee's CLE will be impact litigation.

Jared Lee has lined up all the speakers except Attorney General Pam Bondi, who the committee is seeking. They may not find out about whether Bondi can participate until later.

The subcommittee is planning to submit an application for the seminar to be considered for presidential showcase. Laura Boeckman is putting together the showcase application and the staff liaison will send her copies of past applications.

The subcommittee has not yet found a sponsor for the lunch (approximately \$5,000 when it was last held at Boca). This CLE is planned for Saturday, and will run all day through lunch, with a luncheon speaker.

– Legislative

Subcommittee Co-Chair Robert Clements circulated the revised legislative letter before the meeting. If any members have suggestions for changes they should let him know. The goal is to have the letter go out under Chair Tequisha Myles' name in the next couple of weeks.

– Social Media/Outreach

Sasha Sampaio, who heads the outreach subcommittee, was excused from the call. As for action by the Board of Governors Communications Committee on the committee's YouTube video proposal, no action has been taken. The liaison said the chair of Board Communication's Committee would be getting in touch with Myles.

Myles said she would like to have the videos ready in time for national Consumer Protection Week in March.

– Judicial Outreach

Mary Ann Etzler said a draft of the Bench Manual on Consumer Topics is completed with additional changes. She will be scheduling a call for the last week of the month for the subcommittee to discuss the changes before the finished manual is sent to the committee for final approval.

– Pamphlets

Lesly Longa was excused from the call. The staff liaison reported that the committee has been making progress in updating. Handbook for Jurors was ready to go but is being reviewed again in light of a recent Supreme Court opinion about jury instructions. Power of Attorney and Probate both have been updated.

Myles asked that the proposed pamphlet on Credit Reporting be re-circulated for committee review with a vote scheduled for the January meeting.

– Consumer Protection Lawyer of the Year

Mary Lewis reported that the subcommittee will meet early in the year to come up with a plan to increase the number of nominees above the six received last year. Nominations will be opened up in March with a mid-April deadline to be turned in.

IV. New Business

Myles congratulated Bob Murphy and Craig Rothburd for an outstanding job with the NCLC Conference held in Tampa in November. Conference, which she attended, was a great success.

V. Next meetings:

- **Jan. 22:** At **10 a.m.**, Hilton at Lake Buena Vista in Orlando.
- **Feb. 19** – 11:30 a.m. conference call
- **March 19** – 11:30 a.m. conference call

- **April 16** – 11:30 a.m. conference call
- **May 21** – 11:30 a.m. conference call
- **June**, Annual Convention (June 24-27)
Boca Raton & Club, Boca Raton

VI. Adjourned

11: 45 a.m.



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MEMORANDUM

TO: Kathy Tucker, director of Meetings
FROM: Laura Boeckman, CLE Co-Chair, Robert Murphy, CLE Co-Chair, Craig Rothburd, CLE Co-Chair, Tequisha Myles, Chair Consumer Protection Law Committee
RE: Application for the Presidential Showcase/ 2015 Annual Convention
DATE: Jan. 6, 2015

Consumer Protection Law Committee
Annual Florida Bar Convention
Boca Raton Resort & Club, Boca Raton
June 24 -27, 2015

**“Making a Big Impact in Consumer Protection:
Analyzing Consumer Impact Cases”
Saturday, June 27, 2015
9 a.m. to 5 p.m.**

Sometimes it is not enough to help only one person when many have been injured by a company's practices. Impact cases can allow consumer advocates to help many people in one lawsuit and also change the way companies do business to further protect future consumers.

This year, the CPLC is focusing on impact cases and how consumer attorneys can bring or defend against them. The CLE will:

- Look at cases brought by the Consumer Protection Division of the Attorney General's Office, impact cases brought by legal aid organizations, qui tams and class actions.

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- Cover recent consumer law updates, how to collect and defend against attorney's fees and analyze ethical issues involved in trying and settling consumer impact cases.
- Include a judicial panel to provide the perspective from both the state and federal bench on consumer impact cases.

Fifteen speakers have confirmed their interest and willingness to participate in the CLE. These speakers include three judges and many of the leading consumer advocates in the state of Florida.

Participants will garner knowledge from the most successful veterans in the field of Florida consumer law. Over the past 10 years, the Consumer Protection Law Committee has provided training to consumer attorneys on a wide variety of consumer protection topics, and the CPLC strives again this year to provide this same level of quality programming as it has consistently done in the past. The agenda for the program is anticipated to include:

LECTURE PROGRAM

| TIME | LENGTH | TOPIC |
|-----------------|------------|--|
| 9 – 9:50 a.m. | 50 minutes | <p style="text-align: center;">Attorney General Litigation</p> <p>Speakers: AG Consumer Protection Assistant Attorneys General and possibly an appearance by Attorney General Pam Bondi</p> |
| 10 - 10:50 a.m. | 50 minutes | <p style="text-align: center;">Legal Services Impact Cases</p> <p>Lynn Drysdale – Jacksonville Area Legal Aid Marty Lawyer – Bay Area Legal Services Sharron Casserta – Jacksonville Area Legal Aid Jeffrey Hearne – Legal Services of Greater Miami</p> |
| 11 – 11:30 a.m. | 30 minutes | <p style="text-align: center;">Qui Tam Cases</p> <p>John Yanchunis and James Young (Morgan & Morgan)</p> |

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|-----------------------|------------|---|
| 11:30 – 12:30 a.m. | 60 minutes | <p style="text-align: center;">Class Actions</p> <p>Janet Varnell (Varnell & Warwick) Robert Murphy (Law Offices of Robert Murphy) Mark Fistos (Farmer, Jaffe, Weissing) <i>tentative</i> Dan Clark Scott Jeeves (Jeeves Law Group)</p> |
| 12:30 – 2 p.m. | 90 minutes | <p style="text-align: center;">Lunch with the Judges</p> <p>(Attendees will enjoy lunch while listening to a Q&A with state judges; the committee is working on a sponsor for the lunch)</p> <p>Judge Paul Byron (Middle District of Florida) Judge Chris Nash (13th Judicial Circuit) Judge James Wolf (1st DCA)</p> |
| 2 – 2:30 p.m. | 30 minutes | <p style="text-align: center;">Consumer Law Updates</p> <p>Craig Rothburd (Craig E. Rothburd, P.A)</p> |
| 2:30 – 3:20 p.m. | 50 minutes | <p>Ethics of Settling Consumer Impact Cases</p> <p>Speakers will include a small subset of speakers from previous sessions</p> |
| 3:30 – 4:20 p.m. | 50 minutes | <p>Attorney's Fees (including ethical issues)</p> <p>James Kowalski – Jacksonville Area Legal Aid Robert Murphy (Law Offices of Robert Murphy) Craig Rothburd (Craig E. Rothburd, P.A)</p> |
| 4:30 – 5 p.m. | 30 minutes | Q&A |

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SPEAKERS

Judge Paul G. Byron was sworn in as a U.S. District Judge for the Middle District of Florida on June 27, 2014. Born in Queens, N.Y. in 1959, Judge Byron served four years in the U.S. Army Judge Advocate General's Corps; worked 12 years at the Department of Justice; spent two years at the International Criminal Tribunal for the Former Yugoslavia; and worked 10 years in private practice as a civil trial lawyer between 1986 and 2014.

Sharon Caserta is an Equal Justice Works Fellow who joined Jacksonville Area Legal Aid in 2006. She manages the Deaf/Hard of Hearing Legal Advocacy Program, which focuses primarily on accessibility issues pursuant to the American with Disabilities Act, employment discrimination and public assistance. She graduated cum laude from the Florida Coastal School of Law in 2005 and is a member of The Florida Bar. Her legal intern experience includes the Jacksonville Public Defender's Office and a federal clerkship for U.S. District Court, Middle District of Florida. She has been a professional American Sign Language interpreter since 1983, and holds a number of certificates from the Registry of Interpreters for the Deaf including the Specialist Certificate Legal.

J. Daniel Clark is a Florida native and a graduate of Jesuit High School in Tampa, Florida. He earned his Bachelor's of Arts degree from Duke University, where he was an honorable mention All-Atlantic Coast Conference athlete. He received his J.D. with honors from Stetson University College of Law, where he was a member of the Stetson Law Review and Stetson Trial Team, and a federal judicial intern for the Honorable Elizabeth A. Kovachevich, chief judge, Middle District of Florida. Clark is admitted to practice in Florida, the U.S. District Courts and the U.S. Court of Appeals, Eleventh Circuit. He is also a member of the Florida Justice Association (Eagle Member), American Association for Justice, The National Association of Consumer Advocates (2003- present), Tampa Bay Trial Lawyers Association and Tampa Bay Inn of Court (Barrister). At the Hillsborough County Bar Association, he served as chair of the Trial & Litigation Section in 2011-12, and he has been an executive board member since 2003. Clark is a member of the Million Dollar Advocates Forum, having been recognized as having demonstrated exceptional skill, experience and excellence in advocacy by achieving a trial verdict or settlement of one million dollars or more.

Lynn Drysdale is a consumer protection attorney who has been with Jacksonville Area Legal Aid Inc. for more than 20 years. Drysdale represents consumers in individual and class action cases and engages in state legislative advocacy relating to foreclosure, debt collection, pay day loans, spot delivery motor vehicle sales, military pension loans and other consumer issues. She teaches foreclosure defense litigation around the state and is an adjunct consumer law professor at the University of Florida, College of Law and Florida



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Coastal School of Law. Drysdale has twice been a presenter at Federal Trade Commission workshops in Washington, D.C., relating to debt collection and has testified twice before the Senate Banking, Housing and Urban Development Committee relating to lending practices affecting military service members and their families. She has also testified before the Federal Reserve Board regarding the Home Ownership Equity Protection Act. She graduated from the University of Florida College Of Law. Drysdale is a past chair of The Florida Bar Consumer Protection Law Committee.

Mark Fistos concentrates his practice on complex civil litigation in state and federal courts. He has litigated class action and consumer cases in various state and federal jurisdictions for more than 20 years. He has published and presented several article and training materials for The Florida Bar on consumer fraud and deceptive trade practice issues. He has been published in the journal of the Florida Justice Association. He has also been a regular presenter for the Florida Justice Association on various topics, including insurance law and e-discovery. After receiving his M.A. and law degrees from Florida State University, he began his legal career as an assistant attorney general in the Florida Attorney General's Economic Crimes Litigation Unit in Tallahassee. There, he prosecuted numerous cases involving consumer fraud, unfair methods of competition, the Racketeer Influenced and Corrupt Organizations (RICO) Act, deceptive trade practices and whistleblowers against defendants ranging from large telecommunications companies, and marketing enterprises to corporate-owned funeral providers. He was a primary drafter of the major amendments to the Little FTC Act in 1993 (appearing in Chapter 93-38, Laws of Florida), commonly referred to as the Florida Deceptive and Unfair Trade Practices Act, F.S. Chapter 501, part II. As a Florida class action and trade practice lawyer, he has litigated state and federal class cases and Qui Tam cases involving national computer manufacturers, utilities, banks and data mining companies, among others.

Jeffrey M. Hearne is the advocacy director of the Tenants' Rights Project at Legal Services of Greater Miami, Inc., where he has worked since graduating from law school in 2001. His practice focuses primarily on federally subsidized housing and eviction defense. He directly supervises eight attorneys who specialize in landlord-tenant matters. In 2009, he became the director of the Tenants' Rights Clinic at the University of Miami School of Law. Through the Clinic, he teaches landlord-tenant law and supervises law students who represent tenants in eviction proceedings. He is currently the co-chair of the Florida Legal Services Housing Umbrella Group and he is a member of the National Association of Consumer Advocates and the Housing Justice Network. Hearne also serves as the First Vice President and Legal Panel Chair of the Miami Chapter of the American Civil Liberties Union (ACLU). In 2011, the Daily Business Review named him the Most Effective Public Interest Lawyer by the Daily Business Review and in 2012, he was named one of the 40 under 40 Outstanding Lawyers of Miami Dade County. He is admitted to practice in Florida, as well as the U.S. District Courts for the Southern and Middle Districts of Florida. He is a graduate of the University of Texas (J.D. 2001, B.A., Plan II, 1998).

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James A. Kowalski Jr. was named the executive director of Jacksonville Area Legal Aid in December 2012. Before taking the post at JALA, he was an AV-rated (Preeminent) civil trial attorney based in Jacksonville, specializing in consumer protection litigation, including wrongful foreclosure and consumer fraud, complex personal injury, wrongful death and premises liability litigation. Kowalski is licensed to practice law in Florida and California and has lived and worked in the Jacksonville area since moving to Florida from Northern California in 1989, after graduating from the University of California, Berkeley, and the University of San Francisco School of Law. Kowalski served in the State Attorney's Office from 1989 to 1996 working in the Public Corruption Unit and as a trial attorney in the Special Assault/Sex Crimes and Repeat Offender Court divisions. After leaving the State Attorney's Office, he specialized in litigation and handled matters involving consumer protection. He has tried more than 60 jury trials to verdict. He is a recipient of The Florida Bar President's Pro Bono Service Award in 2009 and 2011, for service rendered in the Fourth and Seventh Judicial Circuits. In December 2010, Kowalski testified before the U.S. House of Representatives Committee on the Judiciary on the topic of "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis." He also testified before the Florida Senate Committee on Banking and Insurance in 2010, and testified at length before the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases in 2009.

C. Martin "Marty" Lawyer III is the most experienced attorney at Bay Area Legal Services. He received his undergraduate degree from Brown University in 1963 and his law degree from Vanderbilt University in 1970. Lawyer has provided representation in every conceivable type of civil legal case and has appeared in federal and state courts and administrative agencies at all levels. Substantively, he specializes in housing law. Functionally, Lawyer is a trial and appellate attorney. He was lead counsel in the national landmark case of *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008).

Robert W. Murphy is in private practice in Fort Lauderdale focusing on consumer class action litigation. He presently serves as an adjunct professor of law at the University of Florida College of Law in Gainesville. A frequent lecturer at state and national seminars and conferences, Murphy has also been lead counsel in a wide variety of consumer class actions. In 2009, he was lead counsel in a nationwide class action that provided more than \$50 million in relief to more than 8,000 consumers whose vehicles had been wrongfully repossessed.



To date, he has obtained class action benefits estimated to be in excess of \$500 million with significant *cy pres* awards to consumer and legal aid organizations. Murphy has authored and contributed to many articles and papers on consumer litigation issues, including a recent treatise published by the National Consumer Law Center on debt collection. In April 2011, the Federal Trade Commission designated him a panel member for the Fair Debt Collection Practices Act Symposium in Washington, D.C., which addressed the rising abuses in the consumer debt collection industry. Murphy

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attended the U.S. Military Academy and received his B.A. cum laude from Wake Forest University in 1984 and his J.D. from the University of Florida College of Law in 1987. He is a past chair of The Florida Bar Consumer Protection Law Committee.

Judge Chris Nash was appointed to the Hillsborough County Court in May 2013. He was assigned to County Civil Division H and Civil Traffic Division N. He has experience with civil, criminal, traffic, juvenile, domestic violence and probate dockets. He has also covered circuit court dockets and jury trials. From 2000 to 2004, he practiced with Akerman Senterfitt. Nash received his bachelor's, master of business administration and law degrees from the University of Florida.

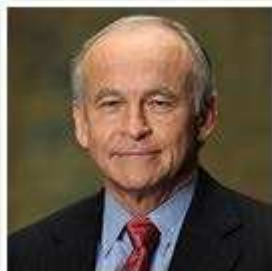
Craig Rothburd has been a practicing attorney in the Tampa Bay area since 1995 focusing his practice on complex business, corporate, commercial and health care matters. He is a Tampa native with strong roots in the community. In addition to his firm's ongoing complex business litigation practice, in 2000, Rothburd became involved in a number of consumer-based cases and since that time has devoted a considerable amount of his practice on consumer law and litigation, with a special focus on class action litigation. A large portion of his corporate practice is devoted to representing health care providers, their groups and practices with legal issues, including but not limited to contracting and compliance.



Janet Varnell is a partner at Varnell & Warwick, P.A. in The Villages. She represents consumers and businesses in class actions and other complex litigation against some of the largest titans of industry throughout the United States. Varnell is a frequent speaker for a host of organizations on consumer law topics. She serves on the Board of Public Justice, the nation's preeminent public interest law firm, and is the former co-chair of the National Association of Consumer Advocates. She is a past chair of The Florida Bar Consumer Protection Law Committee.

Judge James R. "Jim" Wolf serves on Florida's First District Court of Appeal. He was appointed to this position in 1990 and his current term expires on Jan. 3, 2017. Judge Wolf graduated from Rutgers University in 1972. He went on to receive his law degree from the University of Miami in 1975. He also earned a master's degree (LL.M.) from the University of Virginia in 2001. He is currently an adjunct professor at Florida State University Law School and a member of the Florida Judicial Qualifications Commission. Before his appointment as judge, Wolf worked as general counsel for the Florida League of Cities; was a member of the law firm Caldwell, Pacetti, Barrow & Salisbury; worked as the code enforcement board attorney for West Palm Beach and Boynton Beach; served as the city attorney for Jupiter Inlet Colony; worked as the West Palm Beach assistant city attorney; and was an assistant state attorney for the 15th Florida Judicial Circuit.

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John A. Yanchunis is a lawyer with Morgan & Morgan Complex Litigation Group, where he leads the law firm's consumer class action litigation and whistleblower/ qui tam claims sections. He was co-lead counsel in the successful prosecution of the two largest class action cases in the United States, *Fresco vs. Automotive Directions Inc.*, and *Fresco vs. R.L. Polk*, and has served as lead, co-lead or class counsel in numerous other consumer class actions. He also served as lead counsel representing the insurance regulators of the state of Florida during their investigations of the insurance industry. These investigations led to significant changes in the way insurance is sold in Florida, and also led to the recovery of millions of dollars for Florida insureds. Yanchunis has received an "AV" rating from Martindale Hubbell. He holds a Bachelor of Arts degree from the University of Florida. He graduated in 1980 from South Texas College of Law with his J.D. degree, magna cum laude. After graduation he served as a law clerk for two years with the Honorable Carl O. Bue, U.S. District Judge, Southern District of Florida. He is a member of The Florida Bar and The Texas Bar. Yanchunis has been a member of the Board of Governors of The Florida Bar, and a member of the boards of The Florida Board of Bar Examiners (presently an emeritus member) and The Florida Bar Foundation. He is a past chair of The Florida Bar Consumer Protection Law Committee.

James Young joined Morgan & Morgan after a successful career as special counsel to the Florida Attorney General's office. He is part of the firm's complex litigation unit focusing on qui tam whistleblower cases nationwide. Young has broad experience and is nationally known in the areas of consumer protection, health fraud and pharmaceutical litigation. He has served in leadership positions in numerous multistate Attorney General investigations including starting and co-leading the largest consumer protection drug settlement to date, *In Re Risperdal*. He was appointed co-lead of the government plaintiffs group in the *Vioxx* Multi-District Litigation and served as lead of several litigation subcommittees. In addition to his responsibilities as an attorney, Young is a regular contributor to the Morgan & Morgan Complex Litigation Group's whistleblower blog.



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Tequisha Yvette Myles, Chair
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, 2015

Dear (Legislator):

Re: Information and Amicus on Consumer Law Issues

How might your decisions as a lawmaker today affect Florida consumers?

The Florida Bar Consumer Protection Committee can help you answer that question.

For more than 35 years, this standing committee of The Florida Bar has helped to educate the public and attorneys. Its mission as stated on The Florida Bar website is "to educate consumers and Bar members about consumer protection laws and current issues through such means as public outreach events, public service messages, CLE programs, consumer publications, non-partisan technical assistance memoranda on proposed legislation, and providing expert resources to The Florida Bar, the Judiciary, and the Legislature."

The Consumer Protection Law Committee is a trusted resource for expert, unbiased, nonpartisan analysis to the courts and the Legislature on some of the most critical issues Floridians deal with in their daily lives. The committee is available to provide analysis on all consumer issues, some examples are debt collection, foreclosures, unfair and deceptive trade practices, auto sales, high cost loans, identity theft and tenant rights. The committee's analysis can help legislators understand current and proposed legislation and its effect on consumers.

Please take a moment and consider whether your endeavors as a member of the Florida Legislature might benefit from this free and available resource. If you or the committee you serve on would like to request an analysis on an issue likely to affect Florida consumers, please contact me at tmyles@legalaidpbc.org.

I hope the Consumer Protection Law Committee can be of service to you.

Sincerely,
Tequisha Yvette Myles, Chair

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The Florida Bar Consumer Protection Committee

From: Francine A Walker [mailto:fwalker@flabar.org]
Sent: Monday, December 22, 2014 4:23 PM
To: Susannah Lyle
Cc: John M. Stewart; rthompson@mateerharbert.com
Subject: Request from the BOG Communications Committee to the Consumer Protection Law Committee
Importance: High

The Board of Governors approved a recommendation by the Communications Committee to produce 100 video Q&A segments for the website and the Bar's YouTube channel (to be placed in a consumer information playlist) on topics based on the information presented in the consumer pamphlets. A budget was also approved to use THELAW.TV for production with the same format as the videos the company produces for its lawyer clients -- see examples: <http://thelaw.tv/videos/examples/> . The videos will be promoted extensively by The Florida Bar including on social media and the website, in news releases, via the Speakers Bureau, voluntary bar associations and Bar publications.

The maximum time limit for each video is two minutes. The videos will be recorded by members of the Bar's Citizens Advisory Committee and Bar staff. We will shoot all of these on Jan. 28.

The Consumer Protection Law Committee is being asked to select and draft the questions and answers. The citizens advisory committee members and Bar staff members will not have a teleprompter so they will need simple answers that can be memorized or paraphrased. The closing slates for all of the videos will refer the viewers to floridabar.org/consumerinfo for more information on the topic and others.

This project was recommended by Bar President Greg Coleman and will be the source for adding more video to the website and in social media. Another series will also be produced about Florida Bar programs and services. The Communications Committee concurred with President Coleman that this is a effective and efficient way to increase information available by video.

In order to provide time for the citizens advisory and staff members to prepare for the tapings, the recommendations by the CPLC are needed by Friday, Jan. 16, at the close of the day, or sooner if possible. You as the committee's staff liaison should assist them in composing the messages. Other PI staff can assist if needed.

Please advise the committee leadership on this project as soon as possible and let me know if they have any questions. Thank you.

THE FLORIDA BAR'S CONSUMER PROTECTION LAW COMMITTEE

PRESENTS ITS:

BENCH/BAR MANUAL ON CONSUMER LAW

Prepared by:

Mary Ann Etzler
co-chair

Elizabeth Starr
co-chair

Jared Lee

**Michael
Zeigler**

Steven Fahlgren

Craig Rothburd

Delton Chen

Alice Vickers

Shaunda Hill

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I. INTRODUCTION

The Consumer Protection Committee of The Florida Bar has undertaken the preparation of this Bench Manual as an aid and resource to Florida judges who deal with consumer protection issues, but potentially on an infrequent basis. It has been designed to highlight particular types of consumer protection cases and provide a framework for common or frequent legal issues that arise in disputes of these matters. It is our goal to add additional topics each year, to update the prior topics as case law is reported, and to solicit feedback from the judiciary that will enable this committee to continue improving this resource from year to year.

II. NECESSARY & PROPER DEFENDANTS

A. The owner of the fee simple title – only indispensable party defendant to a foreclosure action. *English v. Bankers Trust Co. of Calif., N.A.*, 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005). Foreclosure is void if titleholder omitted. *Id.* If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names. *Countrywide Home Loans v. Kim*, 898 So. 2d 250 (Fla. 2005).

- Indispensable parties defined – necessary parties so essential to a suit that no final decision can be rendered without their joinder. *Sudhoff v. Federal Nat’l. Mortgage Assn’.*, 942 So. 2d 425, 427 (Fla. 5th DCA 2006).

B. Failure to join other necessary parties – they remain in the same position as they were in prior to foreclosure. *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005).

C. Omitted party – only remedies are to compel redemption or the re-foreclosure in a suit de novo, *Id.*; *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 2d 690, 693 (Fla. 1930).

III. JUDGMENT LIENS

A. Section 55.10(1), *Fla. Stat.* (2012) applies to judgment liens.

(1) Requirements: (1) must contain address of the party in the judgment or in an accompanying affidavit; and (2) a certified copy of judgment lien must be recorded in the official records of the county.

(2) Judgment liens recorded after July 1, 1994 retain their judgment lien status for a period of 10 years from recording. A judgment lien is renewable by recording a certified copy of the judgment containing a current address prior to the expiration of the judgment lien. § 55.10(2), Fla. Stat. (2010).

IV. SERVICE OF PROCESS

A. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.070, Fla. R. of Civ. P. (2010) and Chapters 48 and 49 of the Florida Statutes.

B. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.070(j), Fla. R. Civ. P. (2010). Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

1. Personal Service

- Section 48.031(1), Fla. Stat. (2010) requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 48.27, Fla. Stat. (2010).

a. Ineffective service – leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is defective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 819 So. 2d 906, 907 (Fla. 4th DCA 2002). Evidence that person resides at a different address from service address is ineffective service. *Alvarez v. State Farm Mut. Ins. Co.*, 635 So. 2d 131 (Fla. 3d DCA 1994).

b. Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2. Substitute service authorized by Section 48.031(2), Fla. Stat. (2010). Substitute service may be made upon the spouse of a person to be served, if the cause of action is not an adversary proceeding between the spouse and the person to be served, and if the spouse resides with the person to be served.

a. Statutes governing service of process are strictly construed. *General de Seguros, S.A., v. Consol. Prop. & Cas. Ins. Co.*, 776 So. 2d 990, 991 (Fla. 3d DCA

2001), (reversed with directions to vacate default judgment and quash service of process since substituted service was not perfected).

b. Use of private couriers or Federal Express held invalid. *Id.*; *FNMA v. Fandino*, 751 So. 2d 752, 753 (Fla. 3d DCA 2000), (trial courts voiding of judgment affirmed based on plaintiff's failure to strictly comply with substitute service of process which employed Fedex).

c. Evading service of process – defined by statute as concealment of whereabouts. § 48.161(1), Fla. Stat. (2010); *Bodden v. Young*, 422 So. 2d 1055 (Fla. 4th DCA 1982).

(1) The Florida case that illustrates concealment is *Luckey v. Smathers & Thompson*, 343 So. 2d 53 (Fla. 3d DCA 1977). In *Luckey*, the defendant had “for the purpose of avoiding all legal matters, secreted himself from the world and lived in isolation in a high security apartment refusing to answer the telephone or even to open his mail.” *Id.* at 54. The Third District Court of Appeal affirmed the trial court’s decision denying defendant’s motion to vacate the writ of execution and levy of sale based on a record of genuine attempts to serve the defendant. The Third District Court further opined that “there is no rule of law which requires that the officers of the court be able to breach the self-imposed isolation in order to inform the defendant that a suit has been filed against him.” *Id.*

(2) Effective proof of evading service must demonstrate plaintiff’s attempts in light of the facts of the case (despite process server’s 13 unsuccessful attempts at service, evasion was not proved based on evidence that the property was occupied and defendant’s vehicle parked there.) *Wise v. Warner*, 932 So. 2d 591, 592 (Fla. 5th DCA 2006). Working whose place of employment was known to the sheriff was not concealing herself or avoiding process, sheriff only attempted service at the residence during work hours. *Styles v. United Fid. & Guaranty Co.*, 423 So. 2d 604 (Fla. 3d DCA 1982).

(3) Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and if the process server takes reasonable steps to call the deliver to the attention of the person to be served. *Olin Corp. v. Haney*, 245 So. 2d 669 (Fla. 4th DCA 1971).

3. **Service on a corporation** – may be served on the registered agent, officer or director. Section 48.081(2)(b), Fla. Stat. (2010) – if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agency, officer or director in accordance with § 48.031, Fla. Stat. (2010).

4. **Constructive Service by Publication**

a. Section 49.011(1), *Fla. Stat.* (2010) identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions.

b. Sections 49.021-40.041, *Fla. Stat.* govern constructive service or service by publication. Constructive service statutes are strictly construed against the party seeking to obtain service. *Levenson v. McCarty*, 877 So. 2d 818, 819 (Fla. 4th DCA 2004).

c. Service of publication – only available when personal service cannot be made. *Godsell v. United Guaranty Residential Insurance*, 923 So. 2d 1209, 1212 (Fla. 5th DCA 2006), (service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a skip trace in Florida and made no diligent search and inquiry to locate Canadian address); *Gross v. Fidelity Fed. Sav. Bank of Fla.*, 579 So. 2d 846, 847 (Fla. 4th DCA 1991), (appellate court reversed and remanded to quash service of process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service).

(1) Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute. *Dor Cha, Inc. v. Hollingsworth*, 8786 So. 2d 678, 679 (Fla. 4th DCA 2004), (default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual).

(2) Condition precedent to service by publication – Section 49.041, *Fla. Stat.* (2010), requires that the plaintiff file a sworn statement that shows (1) a diligent search and inquiry has been made to discover the name and residence of such person, (2) whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and (3) the status of the defendant's residence, whether unknown or in another state or country. Section 49.051, *Fla. Stat.* (2010) applies to service by publication on a corporation.

(3) Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement. Pursuant to § 49.09, *Fla. Stat.* (2010), the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice.

- Notice – published once each week for two consecutive weeks, with proof of publication filed upon final publication. § 49.10(1)(c)(2), *Fla. Stat.* (2010).

(4) Affidavit of diligent search – need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts. *Floyd v.*

FNMA, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998), (final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property). However:

- Better practice is to file an affidavit of diligent search that contains all details of the search. *Demars v. Vill. Of Sandalwood Lakes Homeowners Ass'n.*, 625 So. 2d 1219, 1222 (Fla. 4th DCA 1993), (plaintiff's attorney failed to conduct diligent search and inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence).

5. Diligent Search Requirements

Form 1.924, *Fla. R. Civ. P.* (2010) contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

- (1) Inquiry as to occupants in possession of the subject property;
- (2) Inquiry of neighbors;
- (3) Public records search of criminal/civil actions;
- (4) Telephone listings;
- (5) Tax collector records;
- (6) Utility Co. records;
- (7) Last known employer;
- (8) U.S. Post Office;
- (9) Local police department, correctional department;
- (10) Local hospitals;
- (11) Armed forces of the U.S.;
- (12) Department of Highway Safety & Motor Vehicles;
- (13) School board enrollment verification, if defendant has children;
- (14) An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;
- (15) Voter registration records.

The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service of process is disputed, the trial court has the duty of determining: (1) if the affidavit of diligent search is legally sufficient; and (2) whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009).

A. Diligent search test – whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances. *Shepherd v. Deutsche Bank Trust Co. Am.s*, 922 So. 2d

340, 343 (Fla. 5th DCA 2006), (reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England). Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the Defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *De Vico v. Chase Manhattan Bank*, 823 So. 2d 175, 176 (Fla. 3d DCA 2002). Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A. V. V. v. Village of Pinecrest*, 990 So. 2d 1135, 1139 (Fla. 3d DCA 2008).

B. Defective service of process – judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin v. Barnett Bank of Southwest Fla.*, 647 So. 2d 211, 213 (Fla. 2d DCA 1994).

(a) Judgment rendered void – when defective service of process amounts to no notice of the proceedings. *Shepherd*, 922 So. 2d at 345. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id.*

(b) Judgment rendered voidable – irregular or defective service actually gives notice of the proceedings. *Id.*

C. Limitations of constructive service – only confers in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property.

- No basis for deficiency judgment – constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter v. Kingsley Bank*, 587 So. 2d 567, 569 (Fla. 1st DCA 1991)(deficiency judgment cannot be obtained absent personal service of process).

6. Service of Process Outside the State of Florida and in Foreign Countries

a. Section 48.194(1), *Fla. Stat.* (2010) – authorizes service of process in the same manner as service within the state, by an officer in the state where the person is being served. Section states that service of process outside the United States may be required to conform to the provisions of the Hague Convention of 1969 concerning service abroad of judicial and extrajudicial documents in civil or commercial matters.

b. The Hague Convention creates appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the addressee in sufficient time. *Koechli v. BIP Int'l.*, 861 So. 2d 501, 502 (Fla. 5th DCA 2003).

(1) Procedure – process sent to a designated central authority, checked for compliance, served under foreign nation’s law, and certificate prepared which documents the place and date of service or an explanation as to lack of service. *Id.* (Return by the central authority of a foreign nation of completed certificate of service was prima facie evidence that the authority of service on a defendant in that country was made in compliance with the Hague Convention and with the law of that foreign nation.)

(2) Compliance issues – see *Diz v. Hellman Int’l. Nat’l. Forwarders*, 611 So. 2d 18 (Fla. 3d DCA 1992), (plaintiff provided a faulty address to the Spanish authorities and the trial judge entered a default judgment, which appellate court reversed).

c. Service by registered mail – authorized by Section 48.194(2), *Fla. Stat.* (2010). Permits service by registered mail to nonresidents where the address of the person to be served is known.

- Section 48.192(2)(b), *Fla. Stat.* (2010), provides that plaintiff must file an affidavit which sets forth the nature of the process, the date on which the process was mailed by registered mail, the name and address on the envelope containing the process that was mailed, the fact that the process was mailed by registered mail and was accepted or refused by endorsement or stamp. The return envelope from the attempt to mail process should be attached to the affidavit.

V. SUBSTITUTION OF PARTIES

A. Substitution is not mandatory; the action may proceed in the name of the original party. However, to substitute a new party based on a transfer of interest requires a court order. *Tinsley v. Mangonia Residence 1, Ltd.*, 937 So. 2d 178, 179 (Fla. 4th DCA 2006), Rule 1.260, *Fla. R. Civ. P.*

B. Order of substitution must precede an adjudication of rights of parties, including default. *Floyd v. Wallace*, 339 So. 2d 653 (Fla. 1976); *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001), (error to enter judgment without a real party against whom judgment could be entered).

C. When substitution is permitted, plaintiff must show the identity of the new party’s interest and the circumstances.

VI. ENTRY OF DEFAULT

A. Without proof of service demonstrating adherence to due process requirements, the plaintiff is not entitled to entry of default or a default final judgment.

- **Failure to effectuate service** – places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default. *Armet S.N.C. di Ferronato Giovanni & Co. v. Hornsby*, 744 So. 2d 1119, 1121 (Fla. 1st DCA 1999); *Tetley v. Lett*, 462 So. 2d 1126 (Fla. 4th DCA 1984).

B. **Legal effect of default** – admission of every cause of action that is sufficiently well-pled to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought. *Fiera.Com, Inc. v. Digicast New Media Group, Inc.*, 837 So. 2d 451, 452 (Fla. 3d DCA 2003). Default terminates the defending party's right to further defend, except to contest the amount of unliquidated damages. *Donohue v. Brightman*, 939 So. 2d 1162, 1164 (Fla. 4th DCA 2006).

C. **Plaintiff is entitled to entry of default** if the defendant fails to file or serve any paper 20 days after service of process. Rule 1.040(a)(1), Fla. R. Civ. P. (2010).

1. State of Florida has 40 days in which to file or serve any paper in accordance with Section 48.121, Fla. Stat. (2008).

2. United States of America has 60 days to file under the provisions of 28 U.S.C.A. § 2410(b); Rule 12(a)(3), Fed. R. Civ. P.

D. Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)

1. Codified in 50 App. U. S. C. A. § 521 – tolls proceedings during the period of time that the defendant is in military service.

2. Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service. *Conroy v. Aniskoff*, 507 U.S. 511, 512 (1993). Service member with notice of the foreclosure action may obtain a stay of the proceedings for a period of 9 months. 50 App. U. S. C. A. § 521(d) was superseded by the Housing and Economic Recovery Act of 2008, § 2203, which expires on 12/31/10. Upon expiration, the original 90 day period will re-take effect.

3. Determination of military status – to obtain default, plaintiff must file an affidavit stating:

- (a) defendant is not in military service; or
- (b) plaintiff is unable to determine if the defendant is in the military service. 50 App. U. S. C. A. § 521(b)(1).

E. Plaintiff is required to serve the defendant with notice of the application for default. Failure to notice defendant's attorney entry of subsequent default is invalid; rendering resulting judgment void. *U.S. Bank Nat'l. Ass'n. v. Lloyd*, 981 So. 2d 633, 634 (Fla. 2d DCA 2008).

F. Non-military Affidavit required – must be based on personal knowledge, attest to the fact that inquiry was made of the Armed Forces, and affiant must state that the defendant is not in the armed forces. *The Fla. Bar Re: Approval of Forms*, 621 So. 2d 1025, 1034 (Fla. 1993). Affidavits based on information and belief are not in compliance.

- Non-military affidavit is valid for one year.

VII. SUMMARY FINAL JUDGMENT

A. Legal Standard – No genuine issue of material fact and movant is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

B. Burden of Proof – The plaintiff bears the burden of proof to establish nonexistence of disputed issues of material fact. *Delandro v. Am. 's. Mortgage Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966).

C. Content of Motion for Summary Judgment – plaintiff should allege:

1. execution of contract/note/mortgage, etc.;
2. plaintiff's status as owner/holder (or representative);
3. date of breach/default;
4. notice of breach/default and/or demand for damages/ acceleration, etc.;
5. identify amount due and owing and all documents supporting same;
6. relief sought; and
7. refute/address all affirmative defenses, if any.

D. Filing of the Motion – at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), *Fla. R. Civ. P.* (2010). The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least twenty (20) days before the summary judgment hearing. Rule 1.510(c), *Fla. R. Civ. P.* (2010); *Verizzo v. Bank of New York*, 2010 WL 711862 (Fla. 2 DCA Mar. 3, 2010); *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 800, 801 (Fla. 4th DCA 1989).

1. Opposition materials and evidence supporting denial of a motion for summary judgment must be identified. Rule 1.510(c), *Fla. R. Civ. P.* (2010). Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or

delivered no later than 5:00 p.m., two (2) business days prior to the day of the hearing on the summary judgment.

2. The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.*, 21 So. 3d 907, 908 (Fla. 3d DCA 2009).

3. Filing of cross motions is subject to the 20-day notice period. *Wizikowski v. Hillsborough County*, 651 So. 2d 1223 (Fla. 2d DCA 1995).

E. Requirement for Motion for Summary Judgment – due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco v. Kinas*, 936 So. 2d 31, 32 (Fla. 3d DCA 2006).

F. Affidavits in Support of Summary Judgment

Affidavits in support of the motion must be made based on personal knowledge, set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

1. **Affidavit of Indebtedness** – must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit itemizes:

- a. property address,
- b. amount owed & how calculated
- c. interest (calculated from default up until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *THFN Realty Co. v. Kirkman/Conroy, Ltd.*, 546 So. 2d 1158 (Fla. 5th DCA 1989), (best practice is to include per diem interest),
- d. late charges (pre-acceleration only), *Fowler v. First Fed. Sav. & Loan Ass'n*, 643 So. 2d 30, 33 (Fla. 1st DCA 1994),
- e. prepayment penalties – unavailable in foreclosure actions, *Fla. Nat'l Bank v. Bankatlantic*, 589 So. 2d 255, 259 (Fla. 1991), unless specifically authorized in note in the event of acceleration and foreclosure, *Feinstein v. Ashplant*, 961 So. 2d 1074 (Fla. 4th DCA 2007),
- f. property inspections and appraisals,
- g. expert inspections and/or reports
- h. hazard insurance premiums and taxes.

2. **Affidavit of Costs** – this affidavit details:

- (a) the filing fee,
- (b) service of process, and

(c) abstracting costs.

3. **Affidavit of Attorney's Time** – refers to the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Florida Supreme Court endorsed the lodestar method. *Bell v. U. S. B. Acquisition Co.*, 734 So. 2d 403, 406 (Fla. 1999). The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved. *Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). With regard to contested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id.*

4. **Affidavit as to Reasonableness of Attorneys' Fee** – Affidavit of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as to reasonable and customary in the circuit. Affiant should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4-1.5(b)(1) Rules Regulating the Florida Bar. Of these relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence. *Palmetto Federal Savings and Loan Association v. Day*, 512 So. 2d 332 (Fla. 3d DCA 1987).

a. Where there is a default judgment and the promissory note, contract, mortgage, or other written agreement contains a provision for an award of attorney fees, Section 702.065(2), *Fla. Stat.* (2010) provides that "it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed at the time of the filing of the complaint." *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *Id.* This statutory provision confirms that "such fees constitute liquidated damages in any proceeding to enforce the note or mortgage." *Id.*

b. The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonzalez*, 648 So. 2d 291, 292 (Fla. 3d DCA 1995). "An award of attorneys' fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved." *Stack v. Homeside Lending, Inc.*, 976 So. 2d 618, 620 (Fla. 2d DCA 2008).

G. Summary Judgment Hearing

1. Plaintiff must file the original note and mortgage at or before the summary judgment hearing (if case involves a mortgage foreclosure). Since the promissory note is

negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 2001). Copies are sufficient with the exception that the note must be reestablished. *Id.* Best practice is for judge to cancel the signed note upon entry of summary judgment.

2. Failure to produce note can preclude entry of summary judgment. *Nat'l. Loan Investors, L. P. v. Joymar Assoc.*, 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

H. Final Judgment

1. Section 45.031, *Fla. Stat.* (2010) governs the contents of the final judgment. Final Judgment Form 1.996, *Fla. R. Civ. P.* (2010) is used in foreclosures.

2. Amounts due – plaintiff's recovery is limited to items pled in complaint or affidavit or based on a contract/note/mortgage provision.

3. Court may award costs agreed at inception of contractual relationship; costs must be reasonable. *Nemours Found. V. Gauldin*, 601 So. 2d 574, 576 (Fla. 5th DCA 1992), (assessed costs consistent with mortgage provision rather than prevailing party statute); *Maw v. Abinales*, 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985), (award of costs governed by mortgage provision).

I. Attorney fees –

1. must be pled or are waived. *Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991).

2. Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *Wallace v. Gage*, 150 So. 799, 800 (Fla. 1933).

3. Claim to attorney fees is based on contractual or statutory language.

VIII. AFFIRMATIVE DEFENSES

A. Genuine existence of material fact precludes entry of summary judgment. *Manassas Investments Inc. v. O'Hanrahan*, 817 So. 2d 1080 (Fla. 2d DCA 2002).

B. Legal sufficiency of defenses – Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona*, 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982). “Affirmative defenses do not simply deny the facts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim.” *Wiggins v. Protmay*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983). Plaintiff must either factually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

C. Affirmative defenses commonly raised:

1. Payment – where defendants alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment. *Morroni v. Household Fin. Corp. III*, 903 So. 2d 311, 312 (Fla. 2d DCA 2005). Equally, if an affidavit of indebtedness is inconclusive (for example, includes a credit for unapplied funds without explanation), and the borrower alleges a defense of inaccurate accounting, then summary judgment should be denied. *Kanu v. Pointe Bank*, 861 So. 2d 498 (Fla. 4th DCA 2003). However, summary judgment will be defeated if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender's conduct, contributed to the failure to pay. *Campbell v. Werner*, 232 So. 2d 252, 256 (Fla. 3d DCA 1970); *Lieberbaum v. Surfcomber Hotel Corp.*, 122 So. 2d 28, 29 (Fla. 3d DCA 1960), (Court dismissed foreclosure complaint where plaintiffs knew that some excusable oversight was the cause for non-payment, said payment having been refused and subsequently deposited by defendants into the court registry).

2. Failure to comply with conditions precedent – such as Plaintiff's failure to send a Notice of Default/breach letter (in case of mortgage, promissory note, insurance policy, etc.). Failure to receive payoff information does not preclude summary judgment. *Walker v. Midland Mortgage Co.*, 935 So. 2d 519, 520 (Fla. 3d DCA 2006).

3. Estoppel is usually based on: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Harris v. Nat'l. Recovery Agency*, 819 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. City of Winter Haven*, 870 So. 2d 52, 55 (Fla. 2d DCA 2003), (defendant defeated city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines for noncompliance with property code if homeowner hired a licensed contractor to make repairs.).

4. Waiver – the knowing and intentional relinquishment of an existing right. *Taylor v. Kenco Chem. & Mfg. Co.*, 465 So. 2d 581, 588 (Fla. 1st DCA 1985). When properly pled, affirmative defenses that sound in waiver (and estoppel) present genuine issues of material fact which are inappropriate for summary judgment. *Schiebe v. Bank of Am.*, 822 So. 2d 575 (Fla. 5th DCA 2002).

5. Acceptance of late payments – common defense asserting waiver is the acceptance of late payments. Generally, a lender has the right to elect to accelerate or not to accelerate after a default. *Scarfo v. Peever*, 405 So. 2d 1064, 1065 (Fla. 5th DCA 1981). Default predicated on defendant's failure to pay real estate taxes could not be overcome by defendant's claim of estoppel due to misapplication of non-escrow payments. *Lunn Woods v. Lowery*, 577 So. 2d 705, 707 (Fla. 2d DCA 1991).

Acceptance of late payments by the Defendant, however, may give rise to a right by the consumer to rely upon the course of conduct of the lender in accepting late payments. See *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96 (Fla. 3d DCA 1973); *Montgomery Enterprises, Inc. v. Atlantic National Bank of Jacksonville*, 338 So. 2d 1078 (Fla. 1st DCA 1976); *Walker v. Ford Motor Credit Co.*, 484 So. 2d 61 (Fla. 1st DCA 1986); *Raffa v. Dania Bank*, 321 So. 2d 83 (Fla. 4th DCA 1975). On the other hand, a finding of waiver may be precluded by the anti-waiver clause included in the Retail Installment Contract. *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96, 100 (Fla. 3d DCA 1973)(a finding of waiver “is precluded” due to the anti-waiver provision in the contract). At least one court however, has held that this does not defeat the principle of estoppel. cf. *Pici v. First Union Nat’l Bank of Fla.*, 621 So. 2d 732 (Fla. 2nd DCA 1993).

6. Fraud in the inducement – defined as situation where parties to a contract appear to negotiate freely, but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party’s fraudulent behavior. *HTP, Ltd. V. Lineas Aereas Costarricenses, S. A.*, 685 So. 2d 1238, 1239 (Fla. 1996).

- Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks*, 820 So. 2d 325 (Fla. 5th DCA 2001). (Note that purchasers had first filed fraud in the inducement case and seller retaliated with foreclosure suit.). Further, the appellate court opined in the *Hinton* case that fraud in the inducement was not barred by the economic loss rule. *Id.*

7. Usury – defined by § 687.03, *Fla. Stat.* (2010), as a contract for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest. If the loan exceeds \$500,000 in amount or value, then the applicable statutory section is § 687.071, *Fla. Stat.* (2010). A usurious contract is unenforceable according to the provisions of Section 687.071(7), *Fla. Stat.* (2010).

8. Forbearance agreement – appellate court upheld summary judgment based on Defendant’s failure to present any evidence as to the alleged forbearance agreement of prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 935 So. 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

9. Statute of limitations – property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under *Section 95.281(1)(a)*, *Fla. Stat.* (2010);

American Bankers Life Assurance Co. of Fla. V. 2275 West Corp., 905 So. 2d 189, 191 (Fla. 3d DCA 2005).

10. Failure to pay documentary stamps – Section 201.08, *Fla. Stat.* (2010) precludes enforcement of notes and mortgages absent the payment of documentary stamps. *WRJ Dev., Inc. v. North Ring Limited*, 979 So. 2d 1046, 1047 (Fla. 3d DCA 2008); *Bonifiglio v. Banker's Trust Co. of Calif.*, 944 So. 2d 1087, 1088 (Fla. 4th DCA 2007).

- This is a limitation on judicial authority; not a genuine affirmative defense.

11. Res judicata – foreclosure and acceleration based on the same default bars a subsequent action unless predicated upon separate/different defaults. *Singleton v. Greymar Assoc.*, 882 So. 2d 1004, 1007 (Fla. 2004).

Additional cases: *Limehouse v. Smith*, 797 So. 2d 15 (Fla. 4th DCA 2001); (mistake); *O'Brien v. Fed. Trust Bank, F. S. B.*, 727 So. 2d 296 (Fla. 5th DCA 1999), (Fraud, RICO and duress); *Biondo v. Powers*, 743 So. 2d 161 (Fla. 4th DCA 1999), (usury); *Heimmermann v. First Union Mortgage Corp.*, 305 F. 2d 1257 (11th Circ. 2002), (Real Estate Settlement Procedures Act (RESPA) violations).

IX. FAIR DEBT COLLECTION PRACTICES ACT

A. OVERVIEW

The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) (Fla. Stat. 501.201 et. seq.) and its Federal counterpart (15 U.S.C 45 et. seq.), give consumers legal protection against unfair or deceptive acts in the conduct of any trade or commerce. FDUTPA provides for a private right of action, whereas the Federal Act only provides a right of action for the Federal Trade Commission.

1. **Purpose** – eliminate abusive debt collection practices by debt collectors and to promote consistent State action to protect consumers against debt collection abuse.
2. **Debt collector defined** – attorneys engaged in regular foreclosure work met the general definition of debt collector and are subject to the FDCPA. *Sandlin v. Shapiro*, 919 F. Supp. 1564, 1567 (M.D. Fla. 1996), (law firm engaged in collection foreclosure work was considered a debt collector where the firm sent correspondence advising of payoff and reinstatement figures and directed mortgagors to pay the law firm).
3. **Notice of Debt.** Debt collector’s obligation to send notice is triggered by an initial communication with the consumer. *McKnight v. Benitez*, 176 F. Supp. 1301, 1304 (M.D. Fla. 2001).

(a) Filing of suit is not “an initial communication which otherwise would have given rise to notice and verification rights.” *Acosta v. Campbell*, 2006 WL 3804729 (M.D. Fla. 2006).

(b) Foreclosure law firms have adopted the practice of attaching to their complaint: “Notice Required under the Fair Debt Collection Practice Act.” This notice held ineffective in *Martinez v. Law Offices of David J. Stern*, 266 B.R. 523 (Bank, S.D. Fla. 2001).

B. SCOPE/PURPOSE

Fla. Stat. 501.202 provides that the FDUTPA is to be liberally construed to promote the following policies:

1. To simplify, clarify, and modernize the law governing consumer protection; unfair methods of competition; and unconscionable, deceptive, and unfair trade practices.
2. To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.
3. To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

C. ELEMENTS

Fla. Stat. Section 501.202 does not set forth the elements of a claim, thus the elements have been derived from case law. The majority of courts have established the following elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Rollins, Inc., v. Butland*, 951 So. 2d 860, 869 (Fla. 2nd DCA 2006); *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997); *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008).

1. Deceptive Act or Unfair Practice

An act or practice is “**unfair**” when it “offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *PNR, Inc v. Beacon Prop. Mgmt*, 842 So. 2d 773 (Fla. 2003).

An act or practice is “**deceptive**” when the practice was likely to deceive a consumer acting reasonably in the same circumstances. *Id.*

A claim under FDUTPA may be supported by singular acts, or by multiple related acts constituting a pattern of practice. *Id.*

FDUTPA has been distinguished from a claim for fraud in that the plaintiff need not prove actual reliance. “[T]he question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances.” *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000).

2. Damages

The interpretation of the damage requirement has been somewhat inconsistent. The majority of courts have held that a claimant must be able to show damages to pursue a monetary claim, however, a showing of damages may not be required for injunctive relief. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000) (“The Act is designed to protect not only the rights of litigants, but also the rights of the consuming public at large; see § 501.202(2), Fla. Stat. (1999); *Sarkis v. Pafford Oil Co., Inc.*, 697 So. 2d 524 (Fla. 1st DCA 1997); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602 (Fla. 2d DCA 1997).

It follows that an aggrieved party may pursue a claim for declaratory or injunctive relief under the Act, even if the effect of those remedies would be limited to the protection of consumers who have not yet been harmed by the unlawful trade practice”); see also *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149 (Fla. 5th DCA 2012) (regardless of whether an aggrieved party can recover "actual damages" under section 501.211(2), it may obtain injunctive relief under section 501.211(1)); but see *Smith v. 2001 South Dixie Highway, Inc.*, 872 So. 2d 992 (Fla. 4th DCA 2004) (dismissing complaint for injunction under FDUTPA for failure to allege damages); *Dorestin v. Hollywood Imps., Inc.*, 45 So. 3d 819 (Fla. 4th DCA 2010) (dismissed for failure to allege damages).

3. Condition Precedent for Enforcing Authority Action

For an action brought by an enforcing authority, the FDUTPA requires as a condition precedent that the head of the enforcing authority review the matter and determine in writing that the enforcement action serves the public interest. *Fla. Stat.* 501.207(2).

D. POSSIBLE DEFENDANTS

Both a corporate entity and individual shareholders may be liable under FDUTPA so long as they directly participated in the unfair or deceptive act. *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1074 (Fla. 5th DCA 2008).

E. REMEDIES

1. Generally

The remedies under FDUTPA are cumulative with other remedies. *Fla. Stat.* 501.213. Case law expressly affirms the practice of filing a claim under FDUTPA for the same conduct which give rise to a breach of contract action, however, not all conduct that supports a breach of contract is “unfair or deceptive.” *PNR, Inc. v. Beacon Prop. Mgmt*, 842 So. 2d 773, N. 2 (Fla. 2003).

2. Private Party

a. Declaratory Judgment and Injunction: *Fla. Stat.* 501.211(1)(...anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.)

b. Actual damages have been defined as the difference between “the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.” *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d DCA 1984). Damages under FDUTPA have been limited only to the actual damages. Florida courts have held that “actual damages” do not include consequential damages, diminution in value, stigma damages, special damages, or incidental damages. *Id.* at 585; *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2d DCA 2004); *but see dissenting opinion in Dorestin v. Hollywood Imps., Inc.*, 45 So. 3d 819 (Fla. 4th DCA 2010) (citing the liberal intent of FDUTPA).

Note: *Fla. Stat.* 501.211 provides a bona fide error defense to an award for damages, costs, and fees “against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.” This bona fide error defense is limited to the remedies under subsection *Fla. Stat.* 501.211(2), which only applies to monetary recovery for damages, fees, and cost. The bona fide error defense is not incorporated into subsection 501.211(1) which provides a claimant the right to declaratory or injunctive relief, and therefore even were the bona fide error defense applies, the Plaintiff may still be entitled to a declaratory judgment or injunctive relief.

c. Fees and Costs (Defendants): *Fla. Stat.* 501.211(3) states that upon the Defendant’s filing of a motion alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the Court may, after hearing evidence, require that the Plaintiff post a bond for the purpose of indemnifying the Defendant’s fees and cost. The

implication is that the Defendant has a statutory right to recover their fees and costs if they have filed the §501.211(3) motion and ultimately show that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment. It is not clear if the Defendant would be entitled to recover their fees without having first filed the §501.211(3) motion and obtained the bond.

Note: The provision requiring a bond only applies to private litigants. Defendants in an action by an “enforcing authority” are expressly precluded from this benefit. *Id.*

3. Remedies of Enforcing Authority:

Similar to private remedies, the enforcing authority may bring:

- a. An action for a declaratory judgment;
- b. A request for an injunction; or
- c. An action for actual damages on the part of consumers.

The bona fide error defense also applies when the action is brought by the enforcing authority. “If a violator shows that a violation of this part resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the violator was unjustly enriched by the violation.” *Fla. Stat* 501.207(4)

4. Civil Penalties: The enforcing authority may seek a civil penalty up to \$10,000 per violation upon proof that the violations were willful. *See Fla. Stat.* 501.2075. For willful violations of FDUTPA relating to senior citizens, a person who has a disability, a military service member or the spouse or dependent child of a military service member, or the provision of cable services, the civil penalty is up to \$15,000 per violation. *Fla. Stat.* 501.2077; 501.2079.

5. Magistrates & Authority: In an action brought by the enforcing authority either the enforcing authority or any other interested party may make a motion to request installation of a general or special magistrate or receiver with sweeping powers: “...sequestration or freezing of assets, to reimburse consumers or governmental entities found to have been damaged; to carry out a transaction in accordance with the reasonable expectations of consumers or governmental entities; to strike or limit the application of clauses of contracts to avoid an unconscionable result; to bring actions in the name of and on behalf of the defendant enterprise, without regard to any wrongful acts that were committed by the enterprise; to order any defendant to divest herself or himself of any interest in any enterprise, including real estate; to impose reasonable restrictions upon the future activities of any defendant to impede her or him from engaging in or establishing the same type of endeavor; to order the dissolution or reorganization of any enterprise; or to grant legal, equitable, or other appropriate relief. The court may assess the expenses of a general or special magistrate or receiver against a person who has violated, is violating, or is otherwise likely to violate this part. Any injunctive order, whether temporary or

permanent, issued by the court shall be effective throughout the state unless otherwise provided in the order.” *Fla. Stat.* 507.207(3).

F. SPECIAL PROVISIONS FOR ENFORCING AUTHORITIES

1. Condition Precedent for Enforcing Authority Action

As a condition precedent, the head of the enforcing authority review the matter and determine in writing that the enforcement action serves the public interest. *Fla. Stat.* 501.207(2).

2. Investigation Rights

Where an enforcing authority has reason to believe, either by their own inquiry or as a result of complaints, that a person has engaged, or is engaging, in violations of FDUTPA, the enforcing authority is entitled under FDUTPA to administer oaths and affirmations, subpoena witnesses or matter, and collect evidence. *Fla. Stat.* 501.206(1). The person who is the subject of the inquiry has the right to petition to modify or set aside the subpoena upon application to the circuit court. *Id.* If the person who is the subject of the inquiry refuses to comply on the ground that the testimony or matter may incriminate him or her, the Court may still order the individual to provide the testimony after asserting a privilege against self-incrimination, at which point the testimony would be inadmissible for the purpose of criminal prosecution, except in a prosecution for perjury. *Id.* at 501.206 (4). Failure to fully comply with such a subpoena, or any efforts to conceal or alter requested evidence may result in a civil penalty up to \$5,000, attorneys’ fees, and costs. *Id.* at 501.206(5).

3. Special Evidential Hearsay Exception

FDUTPA provides a special evidentiary hearsay exception for claims brought by an enforcing authority under *Fla. Stat.* 501.207(7), where statements having circumstantial guarantees of trustworthiness may be used to supplement and explain other evidence and shall not be excluded as hearsay evidence, even though the declarant is available as a witness, if the trier of fact determines that:

- a. The statement is offered as evidence of a material fact;
- b. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

- c. The general purpose of the Florida Rules of Evidence and the interests of justice will be best served by the admission of such statement into evidence.

Use of this evidentiary exception requires advance notice to the adverse party. *Id.*

4. Express Authority to Compromise

FDUTPA expressly allows the Enforcing Authority to enter into a compromise upon the Defendant's written assurance of voluntary compliance. *Fla. Stat.* 507.207(6). The written assurance may be conditioned upon a commitment to reimburse consumers or governmental entities, make contributions, pay civil penalties, pay attorney's fees and costs, or take other appropriate corrective action. *Id.* Should the Defendant fail to comply with the terms of the written assurance, such breach is prima facie evidence of a violation of the FDUTPA action. *Id.* Additionally, such a written assurance would not limit a private party of pursuing a claim under FDUTPA. *Id.*

5. Special Procedure for Department of Legal Affairs

The Department of Legal Affairs is given authority to issue a cease and desist order if it has reason to believe a person is violating FDUTPA and if it appears that the order would be in the public interest. *Fla. Stat.* 501.208(1). The order shall be accompanied by a complaint, and shall be followed by a hearing pursuant to Chapter 120, the Administrative Procedure Act. *Id.* As set out in Chapter 120, the orders are subject to judicial review. *Id.* at (3). The Cease and Desist order is not effective until 10 days after all administrative action has been concluded or, if appeal is made to the district court of appeal and bond is posted, until a final order has been entered by that court. Each violation of a cease order may result in a civil penalty up to \$5,000. *Id.* at (7).

G. LIMITATIONS

1. **Enforcing Authority statute of limitations** ("SOL"): "No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a transaction involved in a violation of this part, whichever is later." *Fla. Stat.* 501.207.

2. **Private Litigant:** The SOL for private litigants is not expressly defined within the statute, and therefore defaults to *Fla. Stat.* 95.11(3)(f), which provides a 4 year SOL for an action founded on statutory litigation. *See Yusuf Mohamad Excavation, Inc. v. Ringhaver Equipment, Co.*, 793 So. 2d 1127, 1128 (Fla. 5th DCA 2001). **Note:** the delayed discovery doctrine has been ruled not to apply to the FDUTPA, thus a delay in discovery will not toll the SOL. *Id.*

H. DEFENSES

1. Good faith defense (*Fla. Stat.* 501.211(2)) – “...damages, fees, or costs are not recoverable ... against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.”

2. Conduct permitted under other law (*Fla. Stat.* 501.212(1)) – “This part does not apply to: (1) An act or practice required or specifically permitted by federal or state law...”

3. Other statutory exceptions *under Fla. Stat.* 501.212(2). A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part.

4. A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.

5. Any person or activity regulated under laws administered by:

(a) The Office of Insurance Regulation of the Financial Services Commission;

(b) Banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission;

(c) Banks or savings and loan associations regulated by federal agencies; or

(d) Any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services.

6. Any activity regulated under laws administered by the Florida Public Service Commission.

7. An act or practice involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475, which act or practice violates s. 475.42 or s. 475.626.

8. Causes of Action:

(a) Causes of action pertaining to commercial real property located in this state if the parties to the action executed a written lease or contract that expressly provides for the process of resolution of any dispute and the award of damages, attorney's fees, and costs, if any; or

(b) Causes of action concerning failure to maintain real property if the Florida Statutes:

(1) Require the owner to comply with applicable building, housing, and health codes;

(2) Require the owner to maintain buildings and improvements in common areas in a good state of repair and maintenance and maintain the common areas in a good state of appearance, safety, and cleanliness; and

(3) Provide a cause of action for failure to maintain the real property and provide legal or equitable remedies, including the award of attorney's fees.

This subsection does not affect any action or remedy concerning residential tenancies covered under part II of chapter 83, nor does it prohibit the enforcing authority from maintaining exclusive jurisdiction to bring any cause of action authorized under this part.

X. AUTOMOBILES & AUTOMOBILE DEALERS (NOTE: this section is not yet completed and still a work in progress)

A. Used Car Sales

Regulation Quick Guide

| Regulation | If advertised: | Then, <i>all</i> of the following must be must clearly and conspicuously disclosed: |
|-----------------------------------|--|--|
| Z (Finance Transaction) | <ul style="list-style-type: none"> • Amount of down payment • Amount of any payment • Quantity of payments or the period of repayment • Amount of finance charge | <ul style="list-style-type: none"> • Amount or % of down payment • Terms of repayment • APR |

| | | |
|--|---|---|
| <p>M</p> <p>(Lease Transaction)</p> | <ul style="list-style-type: none"> • Statement of any payment required before or at signing • No payment is required • Amount of any payment | <ul style="list-style-type: none"> • Transaction advertised is a lease • Total amount due before or at signing/delivery • Quantity, amounts, and due dates/periods of scheduled payments under lease • Whether security deposit is required • Any extra charges imposed at the end of the lease if the consumer's liability is based on the difference between what the property should be worth and what it is actually worth |
|--|---|---|

Clear and Conspicuous Standard Quick Guide

Questions to Ask:

| | |
|---------------------|---|
| PROMINENCE | <ul style="list-style-type: none"> • Is it big enough for consumers to notice and read? • Is the type size big enough for consumers to read easily? • Is there a sharp contrast between the disclosure and background? |
| PRESENTATION | <ul style="list-style-type: none"> • Is wording and format easy for consumers to understand? • Is the wording easy to understand (and free of legal jargon)? • Does the format encourage careful reading? • Does the font encourage careful reading? • Is it free of distractions that compete for consumer attention? |
| PLACEMENT | <ul style="list-style-type: none"> • Is it where consumers will look? |
| PROXIMITY | <ul style="list-style-type: none"> • Is it close to the claim it qualifies? • Is the information located so consumers can not miss it? • Is it in close proximity to the claim it qualifies? |
| NOTE: | <ul style="list-style-type: none"> • The test is not: "Is it readable? But rather: Is it read? |

B. New Car Sales

C. Truth In Lending Act ("TILA")

D. Advertisements**E. Lemon Law (§681.111)**

- a. Enforcing authority of the Motor Vehicle Warranty Enforcement Act (§681.110)
- b.

F. Defects/Accidents**G. YoYo Sales/Lending****H. Buy here-Pay Here****XI. CREDIT CARD ACTIONS****A. *BREACH OF CONTRACT*****1. Elements**

- a. Valid Contract;
- b. Material Breach; and
- c. Damages

2. Common issues**a. Incomplete documentation.**

1. “A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint.” *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001).

2. *See also, Fla. R. Civ. P. Rule 1.130(a)*. “All contracts or documents “upon which action may be brought...shall be incorporated in or attached to the pleadings.”

3. In credit card arrangements, the “contract” or “agreement” is comprised of several documents that usually include the credit card application, the card member agreement, and a document setting out the “Terms and Conditions.” *See Capital One v. Cuellar*, 15 Fla. *Law Weekly Supp.* 1116b (Count Court, 13th Judicial Circuit, Hillsborough County, September 8, 2008).

b. Documentation that does not refer to defendant or any specific account.

- If the “contract” or “agreement” fails to identify the defendant, the account number or any other information that would link the defendant to the account then the document would be insufficient to satisfy *Fla. R. Civ. P. Rule 1.130(a)*. See e.g. *Capital One Bank v. Branch*, 15 *Fla. L. Weekly Supp.* 166a (County Court, 20th Judicial Circuit, Lee County, October 11, 2007).

c. Pool of accounts sold (work in progress)

B. ACCOUNT STATED

1. Elements

- a. *Mercado v. Lion’s Enterprises, Inc.*, 800 So. 2d 753 (Fla. 5th DCA 2001).
 1. An agreement between the parties that a certain balance is correct and due;
 2. An express or implied promise to pay this balance.
- b. *Fla. R. Civ. P. Rule – Form 1.933*
 1. Prior to the action;
 2. The parties had
 - (a) business transactions, and
 - (b) agreed to the resulting balance
 3. Plaintiff rendered a statement of it to the defendant
 4. The Defendant did not object to the statement
 5. **Note:** The Florida Supreme Court approved form also requires that a copy of the account showing the items, time of accrual of each, and amount of each must be attached.

2. Common issues

a. Agreement to resulting balance

- (1) The elements of the cause of action require an agreement to the resulting balance PRIOR to the statement being rendered.
- (2) Since credit card accounts send statements prior to the consumer having an opportunity to dispute the charge, there is no agreement to the balance prior to the statement being rendered.
- (3) An argument can be made that pursuant to the terms of most credit card agreements (which are restated on the monthly statement) there is no agreement to the resulting balance since nonpayment triggers an additional amount in late fees and interest.

(4) There is no consensus on this issue.

b. **The agreement to the resulting balance is separate and apart** from the terms and conditions of the underlying credit card agreement.

(1) When the term “agreement” is used there is often times confusion as to what agreement is being referred to.

(2) Consider whether the credit card account arose from the terms and conditions of a credit card agreement vs. a balance agreement.

(3) An account stated refers to a totally separate agreement to a resulting balance and an express or implied promise to pay that balance.

c. **The promise to pay can be express or implied**

(1) Some courts have held that a consumer’s failure to object to a balance on a monthly credit card statement is an implied promise to pay the amount stated. **Need cite here**

(2) A question exists as to whether it must first be established that there is an agreement to any resulting balance before examining whether there is an implied promise to pay **Need cite here**

C. ***OPEN ACCOUNT***

1. Elements (*H&H Design Builders, Inc. v. Travelers’ Indemnity Co.*, 639 So. 2d 697 (Fla. 5th DCA 1994):

- a. Unsettled debt;
- b. Arising from items of work or labor, goods sold and other open transactions;
- c. That are NOT reduced to writing;
- d. The sole record of which is the account books of the owner of the demand.

2. Common issues

a. **Invalid cause of action if underlying written agreement shown to exist.**

(1) **“Express contracts” are actual agreements**, the terms of which are stated in distinct, explicit language in writing. *Rabon v. Inn of Lake City, Inc.*, 693 So. 2d 1126 (Fla. 1st DCA 1997).

(2) Since credit card accounts are created by and governed by the terms and conditions of a written credit card member agreement, it has been argued that open account is an invalid cause of action to collect a credit card debt. **Need cite here**

- b. **To state a valid claim on an open account**, the claimant must attach an “itemized” copy of the account. *Moore v. Boyd*, 62 So. 2d 427 (Fla.1952) and Fla. R. Civ. P. R Form 1.932

D. Money Lent

1. Elements: *Fla. R. Civ. P. Rule* – Form 1.933
 - a. Money was lent to consumer, on a specific date;
 - b. A certain amount is due plus interest since a specific date

2. Common Issues

Cash advances vs. money lent on credit.

- (1) As an open credit account, the resulting balance that creditors and debt collectors seek is not for a specific amount of money lent directly to the consumer at one time.
- (2) However, a cash advance would be lending a certain amount at a specific time.

E. Unjust Enrichment

1. Elements

(a) Plaintiff conferred a benefit to the defendant, who had knowledge of the benefit;

(b) Defendant voluntarily accepted and retained that benefit; and

(c) It would be inequitable for defendant to retain the benefit unless defendant paid plaintiff the value of the benefit.

2. Common issues

- **Invalid cause of action if underlying written agreement shown to exist.** *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. 5th DCA 1998). Upon a showing that an express contract (such as a credit card member agreement) exists, a claim for unjust enrichment fails.

F. Other Issues

1. Standing
 - a.. Assignment and chain of assignment
2. Cost Bond
3. Notice of Assignment

G. *Evidentiary issues*

H. *Defenses*

XII. GOVERNMENT ENFORCEMENT (pending – work in progress)

REMEDIES (F.S. 501.207)

A. Injunctive Relief (Cease and Desist Orders)

B. Distress Writs

C. Asset Freeze

D. Appointment of Receiver

E. Defenses

F. Hot Issues and Concerns

XIII. RESIDENTIAL EVICTIONS¹

A. BACKGROUND

Part II, Chapter 83, *Fla. Stat.*, is the Florida Residential Landlord Tenant Act (“Act”) and governs the rental of all dwelling units in Florida, including the rental of dwelling units that are subsidized by local, state or federal funds and also subject to local or federal laws, regulations or ordinances.

B. CASES THAT FALL WITHIN PART II, CHAPTER 83, FLORIDA RESIDENTIAL LANDLORD TENANT ACT

1. All rentals of dwelling units are covered by the Act, unless specifically excluded under *Fla. Stat.* § 83.42.

¹ The committee thanks Judge --- and ---

2. **UPDATE** – Change from 2012 is the exclusion of occupancy under a contract of sale of a dwelling in which the buyer *has paid at least 12 months’ rent or in which the buyer has paid at least 1 month’s rent and a deposit of at least 5% of the purchase price of the property.* (New language is italicized) See *McKinney vs. Dickson*, 21 Fla. L. Weekly Supp. 175a (Lake Co. 2013) and *Silverio V. Ramos and Hernandez*, 21 Fla. L. Weekly Supp. 794a. Tenants should still be entitled to the protections of an ejectment action and a case by case determination should be made if the tenant can show he or she has contributed to the equity in the property. See *Tardiff v. Haak*, 21 Fla. L. Weekly Supp 73A.

C. DUE PROCESS & SUMMARY PROCEDURE EXPEDITING RESOLUTION

1. In all actions for possession, the Landlord is entitled to summary procedure as provided in § 51.011, *Fla. Stat.*

2. Tenant has 5 days to file answer: *Berry v. Clement*, 346 So. 2d 105 (Fla. 2d DCA 1977), 5 days excludes weekends and legal holidays. Rule 1.090(a), *Fla. R. Civ. P.*

3. **10th business day** after Tenant served, file should be brought to judge if Landlord has submitted a final judgment of eviction.

4. **Recommendation once judge sees file:** Judge should quickly review file to determine if:

- (a) DEFAULT is proper **OR**
- (b) HEARING should be set **OR**
- (c) ORDER should be entered that money be placed into the Court Registry

5. Unnecessary trials may result if the judge does not review file prior to the case being set.

D. MOST COMMON SITUATIONS

1. **Tenant has defaulted (no answer filed) - Judgment** should be signed and file sent back to clerk. If a Writ of Possession is with file, the clerk will issue the writ.

2. **Tenant has answered but has not posted rent into the court registry (may have defaulted).**

E. JURISDICTION

1. The County Court has jurisdiction to, “consider landlord and tenant cases,” §34.011(1), *Fla. Stat.*, and exclusive jurisdiction to hear proceedings relating to, “the right

of possession of real property and to the forcible or unlawful detention of lands and tenements,” § 34.011(2), *Fla. Stat.*, unless:

- a. Amount in controversy exceeds the county court’s jurisdiction; or
- b. The Circuit Court has jurisdiction pursuant to § 26.012, *Fla. Stat.*

2. Responsive Pleading

- a. Counterclaim in excess of \$15,000
- b. Denial of landlord/tenant relationship
- c. Claim of right, title or interest

3. Hearing, Dismissal or Transfer

- a. Hearing to determine sufficiency of pleading
- b. Dismissal with leave to refile or amend
- c. Transfer to Circuit Court

4. If full amount of rent as alleged in complaint is posted into court registry, **Tenant** is entitled to a trial.

5. If Tenant alleges that they have paid the rent, they are entitled to a trial.

6. If partial amount of rent is posted into court registry, some judges will:

- a. Set case for trial immediately (this may not be proper). **need cite**
- b. Order balance to be placed into court registry by a fixed date or a **default judgment** will enter.
- c. If accrued rent, as determined by Court, landlord may be entitled to a **default judgment**. **need cite**

7. Grounds for Dismissal:

a. **Improper 3-Day Notice**. A proper 3-day notice to evict is a condition precedent to eviction. *Bell v. Kornblatt*, 705 So. 2d 113 (Fla. 4th DCA 1998) (holding that a defective notice does not deprive the court of subject matter jurisdiction). *See* §83.56(3), *Fla. Stat.*

- 1. Failure to exclude “court observed” holidays
- 2. Amounts other than “rent” demanded by the 3-Day Notice.
- 3. Mailed notice that does not add 5 additional days to expiration date

b. **Improper parties**

- a. Not all Tenants named on 3-Day Notice
- b. Improper owner as Landlord
- c. Fictitious name not filed for Landlord
- c. **Failure to give 7-Day Notice** of Non Compliance with Opportunity to Cure for Curable offense. *See* §83.56(2), *Fla. Stat.*
- d. Short Notice of Non-Renewal. *See* §83.57, *Fla. Stat.*

F. GROUNDS FOR EVICTION, sec. 83.56, *Fla. Stat.*

1. **Failure to pay rent** – if the landlord alleges that the tenant failed to pay rent when due, the landlord must first serve the tenant with a 3 day notice of nonpayment of rent, that substantially complies with the statutory notice, see *Fla. Stat.* § 83.56(3).

a. If the tenant fails to tender rent within the 3 days, the landlord may file an action for possession of the dwelling unit. If tendered within the 3 days, the landlord may not refuse or he or she has no basis to file the action for possession.

b. **UPDATE** – Change from 2012 for partial payment of rent by the tenant to the landlord. Prior to the 2012 change, if a landlord accepted any partial rent payment, he or she waived the right to go forward with an action for possession. *See Umadat v. Torres*, 20 Fla. L. Weekly Supp. 926c (Orange Co., July 2, 2013) Now if the landlord accepts partial rent, he or she “does not waive the right to terminate the rental agreement or to bring a civil action for that noncompliance.” The changes provide that the landlord “must,” if partial rent is accepted, handle the partial payment in one of 3 ways:

- i. “Provide the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession”; or
- ii. “Place the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession”; or,
- iii. “Post a new 3-day notice reflecting the new amount due.”

2. **Material noncompliance with tenant’s obligations**, §83.52, *Fla. Stat.*, or material provisions of the rental agreement or reasonable rules. There are two types of material noncompliance claims:

- a. No right to cure claim – there are two bases for this:

i.. if the noncompliance is either of such a nature that the tenant should not be given a right to cure, such as intentional destruction of the landlord's property, or,

ii. if the noncompliance is a "continuing noncompliance within 12 months of a written warning by the landlord of a similar violation."

b. **UPDATE** – Change from 2012 as to a continuing noncompliance. Under prior law, a landlord had to provide tenant with a **second notice of a con**

3. Holdover tenant

G. WHEN TRIAL SHOULD BE SET

1. **Tenant has alleged all rent has been paid.** Even then, if TRIAL ends up being set for next month, an ORDER, ordering the accrued rent be placed into the Court Registry should be entered.

2. **Tenant** has filed a "PROPER" Motion to Determine Rent.

H. MOTION TO DETERMINE RENT

1. A **Tenant** has a right to challenge the amount of rent that is asked for in the eviction complaint. *See* §83.60(2), *Fla. Stat.*

2. A proper **Motion To Determine Rent** alleges that the rent asked for in the complaint in "In error" AND the **Tenant** needs to attach **documentation**. *See* 83.60(2), *Fla. Stat.*

Common problem: Tenant asserts, "I disagree with the amount owed." This is not a proper motion to determine rent and may be stricken. Even if Tenant files a counterclaim, the Tenant must still post the alleged rent in the registry of the court. *K.D. Lewis Enterprises Corp. Inc. v. Smith*, 445 So. 2d 1032 (Fla. 5th DCA 1984). However, Tenant only loses right to possession of the premises and does not lose right to pursue other claims. *Premici v. United Growth Properties*, 648 So. 2d 1241 (Fla. 5th DCA 1995). Statute providing that failure of Tenant to pay rent into court registry shall be deemed absolute waiver of Tenant's defenses means Tenant's defenses to Landlord's claim for possession NOT to claim for money damages.

I. CONFLICT RESOLUTION

1. When **Tenant** admits to owing an amount of rent but deny another amount. The

judge should **order** the undisputed amount into the Court Registry. *See* 83.60(2), *Fla. Stat.*

2. **A motion to determine rent hearing is not the place for the trial to be held.** It is strictly for the judge to determine how much if any rent is to be placed into the court registry.

J. CONTINUANCE

1. The **Tenant** in possession would not typically be prejudiced by a delay in the trial date.

2. **Continuance should be limited** due to the potential waste and rent loss and the fact that it is under Summary Procedure. *See* §57.011, *Fla. Stat.*

K. PROCEDURE AT TRIAL

1. **If all parties are not present**, wait at least 20 minutes, as parties are often late due to parking issues, wrong courtroom or getting lost.

2. **Once 20 minutes has elapsed**, take uncontested evictions first as a large percentage of **Tenants** do not appear and these cases can be disposed of quickly.

L. CONFLICT RESOLUTION CONSIDERATIONS

1. **Ask parties if they have “had a chance to talk”** If the answer is NO, give at least a 10 minute chance to send parties into the hall to discuss case.

2. **Before beginning trial**, ask **Tenant** if they wish to stay, have vacated, are on their way out or just need a little time. Since this is often the case, the judge can order the **Tenant** to vacate on a fixed date and the judge can **order** same with a deadline.

M. DEFENSE OF NON-COMPLIANCE

1. If **habitability issues** are raised in defense:

A. The Tenant **must** prove that they gave the Landlord seven day notice of withholding rent. *See* 83.60(1), *Fla. Stat.*

B. Failure by the **Tenant** to put the **Landlord** on notice should result in **eviction judgment**. *See* 83.60(2), *Fla. Stat.*

N. RESOLUTION AT TRIAL

Once trial begins, often the Judge will often ask the **Tenant** **“Have you paid the rent.”**

1. If the answer is NO and it is due to financial difficulties, job loss, some judges will deem the case over and enter an **eviction judgment** entered.

2. Other judges will dismiss if rent is then fully paid or otherwise attempt to equitably resolve case.

O. EFFECT OF NON-COMPLIANCE

If the **Tenant** proves that they gave the **Landlord** a seven day notice of withholding rent, this constitutes a valid defense and **Tenant** can prove to the court why they should not have paid all or part of the rent. *See* 83.60(2), *Fla. Stat.*

1. The judge can then DENY the eviction at **TRIAL, OR**

2. Reduce the rent as the evidence presents itself at **TRIAL**

P. SCHEDULING PROBLEMS

1. **Judge or JA** may fail to recognize that another month's rent will be owed and **Tenant** may receive a month's free rent when the accrued rent has not been placed into the Court Registry.

2. Clerk advises **Tenant** to file an answer, place some money in the registry or file a **Motion To Determine Rent**.

Q. SETTLING THE EVICTION CASE

The 2 common types of Stipulations are:

A. **The Pay and Stay Stipulation** whereby the **Landlord AND Tenant** work it all out.

B. **The Temporary Stipulation** whereby the **Tenant** agrees to leave at a fixed date maybe paying a bit for the privilege or not.

R. STIPULATIONS

Settlement agreements are highly favored by the law and are construed following principles of contract interpretation. @ *Prestige Valet, Inc. v. Mendel*, 14 So. 3d 282, 283 (Fla. 2 DCA 2009), *see also Bateski v. Ransom*, 658 So. 2d 630, 631 (Fla. 2d DCA 1995).

Note on Stipulations –

Some courts will:

1. Decline to sign stipulations that continue on once the **Tenant** gets caught up; or,
2. Require the **Tenant** to be served with a new 3 day notice and/or posting of the notice of default.

S. MEDIATIONS

Rather than setting the case for trial, Court may direct parties to Mediation where the **Tenant** has answered, deposited and continues to place the accrued rent into the Court registry.

1. If a settlement is not accomplished, there is often a long delay until the trial date.
2. If the mediation order fails to require the accrued rent to be deposited, Court may leave **Tenant** in possession defeating rent.
3. If a case is sent to Mediation, the mediation order should require a rent deposit with a date a few days prior to the mediation, and require accruing rent to be deposited or the Mediation is canceled.

T. STAYING A WRIT OF POSSESSION

Motions to Stay Writ of Possession should be immediately reviewed by a court to determine if there is any merit, and if so, stay the writ and notify the sheriff.

- **Meritorious reasons to stay:** **Landlord** has accepted rent OR made a deal with the **Tenant**.

U. DECISION TO STAY DISBURSEMENT FROM REGISTRY

1. The **Tenant** may deposit rent into the Court registry, have a TRIAL etc. *See* 83.60(2), *Fla. Stat.*
2. If there is an issue regarding entitlement to the Court Registry, the Judge may set this for a later trial. *See* 83.61, *Fla. Stat.*

Consumer Pamphlets REVISIONS

1/16/2015

Pamphlets available in hard copy and online

| | | | Notes |
|---|---|---------|--|
| Name of Pamphlet | Review Contact | Updated | |
| 1 Adoption In Florida | Courtney Durham | Mar-14 | cdurham@rc5state.com |
| <i>Adoption In Florida (Spanish)</i> | | Mar-14 | Kenia Escobar |
| 2 Building a Home | Courtney Durham/ CPLC | Dec-14 | |
| <i>Building a Home (Spanish)</i> | | | |
| 3 Buying a Home | Courtney Durham/ CPLC | Mar-14 | cdurham@rc5state.com |
| <i>Buying a Home (Spanish)</i> | | Mar-12 | |
| 4 Consumer Bankruptcy In Florida | Ryan Moore | Jul-14 | rinky@parwanilaw.com |
| <i>Consumer Bankruptcy In Florida (Spanish)</i> | | Aug-10 | |
| 5 Divorce In Florida | Norberto Sergio Katz | Sep-11 | ctadnk1@ocnjcc.org |
| <i>Divorce In Florida (Spanish)</i> | | Sep-11 | |
| 6 Do You Have A Will? | | Mar-14 | les@longalaw.com |
| <i>Do You Have A Will? (Spanish)</i> | | Mar-11 | Not changes at this time |
| 7 Filing An Unlicensed Practice Of Law Complaint | Jeffrey Picker | Mar-14 | TFB |
| <i>Filing An Unlicensed Practice Of Law Complaint (Spanish)</i> | | Mar-14 | |
| 8 Florida Power Of Attorney | Wilhelmina Curtis | Nov-14 | |
| <i>Florida Power Of Attorney (Spanish)</i> | | Oct-11 | RPPTL Section |
| 9 Handbook For Jurors | L. Longa will review 1/2015 | Mar-12 | CPLC through Zannah |
| <i>Handbook For Jurors (Spanish)</i> | | Mar-12 | |
| 10 How To Find A Lawyer in Florida | Arne C. Vanstrum | Mar-14 | TFB |
| <i>How To Find A Lawyer in Florida (Spanish)</i> | PIBS | Mar-14 | |
| 11 Inquiry Concerning a Florida Lawyer | Arne C. Vanstrum | Mar-14 | no changes |
| <i>Inquiry Concerning a Florida Lawyer (Spanish)</i> | | Mar-14 | |
| 12 Intellectual Property | Woodrow Pollack/ Biz Section will review Oct 14 | Sep-10 | woodrow.pollack@gray-robinson.com , |
| <i>Intellectual Property (Spanish)</i> | | Sep-10 | |
| 13 Legal Guide for New Adults | LRE committee | Jan-14 | |
| <i>Legal Guide for New Adults (Spanish)</i> | | | Not offered in Spanish anymore |
| 14 Notaries, Immigration And The Law | Jacquelyn Needelman | Mar-14 | TFB |
| <i>Notaries, Immigration And The Law (Spanish)</i> | | Mar-14 | |
| 15 Parenting and Divorce | Asked Noberto Sergio Katz/ FLS | Sep-11 | ctadnk1@ocnjcc.org |
| <i>Shared Parenting After Divorce (Spanish)</i> | | Sep-11 | |
| 16 Probate in Florida | Mary Lewis | Jan-15 | tae@estatelaw.com |
| <i>Probate in Florida (Spanish)</i> | | Jul-11 | |
| 17 So You Want To Be A Lawyer | LRE committee | Apr-10 | In process |

| | | | | |
|-----------|---|--------------------------|---------|--|
| | <i>So You Want To Be A Lawyer (Spanish)</i> | | Apr-10 | |
| 18 | What Is Guardianship? | Courtney Durham/ CPLC | Mar-14 | cdurham@rc5state.com |
| | <i>What Is Guardianship? (Spanish)</i> | | Mar-14 | Kenia Escobar/PIBS |
| 19 | Hiring The Right Person To Help Me With My Legal Problems | Jeffrey Picker | Nov. 13 | jpicker@flabar.org |
| | <i>Hiring The Right Person To Help Me With My Legal Problems (Sp)</i> | | Nov. 13 | Kenia Escobar |

Pamphlets available online only

| Name of Pamphlet | | Review Contact | Updated | Notes |
|------------------|---|--------------------------|---------|--|
| 20 | A Consumer Guide To Client's Rights | Arne Vanstrum | Mar-14 | TFB |
| | <i>A Consumer's Guide to Client's Rights (Spanish)</i> | | Mar-14 | |
| 21 | Attorney's Fees | Arne Vanstrum | Mar-14 | TFB |
| | <i>Attorney's Fees (Spanish)</i> | Susan Austin | Mar-14 | |
| 22 | Client's Security Fund | Patricia J. Osborne | Nov. 13 | TFB |
| | <i>Client's Security Fund (Spanish)</i> | | Jul-11 | |
| 23 | Consumer Guide To The Legal Fee Arbitration Program | David Weintraub | Nov-14 | daw@stockbrokerlitigation.com |
| | <i>Consumer Guide To The Legal Fee Arbitration Program (Sp)</i> | | Jun-11 | |
| | Florida Registered Paralegal | Lori Holcomb | Nov. 13 | TFB |
| | | | | |
| 24 | Grievance Mediation | Arne Vanstrum | Mar-14 | TFB |
| | <i>Grievance Mediation (Spanish)</i> | Susan Austin | Mar-14 | |
| 25 | Immigration Update | Neil Rambana | Apr-12 | Neil.Rambana@Rambana.com |
| | <i>Immigration Update (Spanish)</i> | | Apr-12 | |
| 26 | Legal Aid In Florida | Alice Vickers | May-14 | Alice Vickers |
| | <i>Legal Aid In Florida (Spanish)</i> | PIBS (MVM) | Jun-12 | ***** |
| 27 | Mass Disaster | PIBS (MVM) | Jul-11 | TFB |
| | <i>Mass Disaster (Spanish)</i> | PIBS (MVM) | Jul-11 | |
| 28 | The Revocable Trust in Florida | Courtney Durham/ CPLC | Mar-14 | cdurham@rc5state.com |
| | <i>The Revocable Trust in Florida (Spanish)</i> | | Jun-12 | |
| 29 | U.S. Lawful Permanent Residents | Neil Rambana | Apr-12 | Neil.Rambana@Rambana.com |
| | <i>U.S. Lawful Permanent Residents (Spanish)</i> | | Apr-12 | |

Consumer Tips (online)

| Name of Consumer Tip | | Review Contact | Updated | Notes |
|----------------------|--|-----------------------------|---------|--|
| 1 | A Civil Case or A Criminal Case M. Etzler volunteered | | Jul-11 | Consumer Protection Law Comm. |
| | <i>A Civil Case or A Criminal Case</i> | | Jul-11 | |
| 2 | Automobile Insurance | John F. Eversole III | Aug-10 | jeversole@mletrial.com |
| | <i>Automobile Insurance (Spanish)</i> | Doug Kilby | Aug-10 | dkilby@ausley.com |
| | | Roy I. Glass | | lroyglas@tampabay.rr.com |
| 3 | Florida's Motor Vehicle "Lemon Law" | Janet Smith | Apr-14 | janet.smith@myfloridalegal.com |
| | <i>Florida's Motor Vehicle "Lemon Law" (Spanish)</i> | | Nov-11 | |
| 4 | Bankruptcy | Ryan Moore | Jul-14 | |
| | <i>Bankruptcy (Spanish)</i> | Stuart Marc Golant | Oct-11 | CPLC through Zannah |
| 5 | Buying a Mobile Home | Courtney Durham | Mar-14 | cdurham@rc5state.com |
| | <i>Buying a Mobile Home (Spanish)</i> | | | Kenia Escobar/PIBS |
| 6 | Credit Repair Fraud | Brendan Sweeney volunteered | Aug-10 | |
| | <i>Credit Repair Fraud (Spanish)</i> | | Aug-10 | |
| 7 | Debtor's Rights in Florida | Lynn Drysdale | Jun-14 | sasha@sampaiolaw.com |
| | <i>Debtor's Rights in Florida (Spanish)</i> | | Sep-10 | |
| 8 | General Information on Consumer Protection | Laura Boeckman | Sep-14 | Laura.Boeckman@myfloridalegal.com |
| | <i>General Information on Consumer Protection (Spanish)</i> | | Aug-10 | |
| 9 | How to Avoid being a Victim of Auto Repair and Service Station Gimmicks | Mona Fandel | Mar-14 | mfandel@broward.org |
| | <i>How to Avoid being a Victim of Auto Repair and Service Station Gimmicks (Spanish)</i> | | Feb-10 | |
| 10 | How to Safeguard Against Fraud When You Buy Property - M. Hale volunteered | M. Hale volunteered | Aug-10 | rinky@parwanilaw.com |
| | <i>How to Safeguard Against Fraud When You Buy Property (Spanish)</i> | | Aug-10 | |
| 11 | Identity Theft | Steve Fahlgren | Jun-14 | CPLC |
| | <i>Identity Theft (Spanish)</i> | Mirieth Valenciano | Feb-10 | PIBS |
| 12 | Legal and Binding Contracts | Lesly Longa | Mar-14 | les@longalaw.com |
| | <i>Legal and Binding Contracts (Spanish)</i> | Rinky S. Parwani | Aug-10 | rinky@parwanilaw.com |
| 13 | Mortgage Fraud | Alice Vickers | Jun-14 | alice.vickers623@gmail.com |
| | <i>Mortgage Fraud (Spanish)</i> | | Sep-11 | |
| 14 | Rights and Duties of Tenants and Landlords | Alice Vickers | May-14 | alice.vickers623@gmail.com |
| | <i>Rights and Duties of Tenants and Landlords (Spanish)</i> | | Feb-10 | |
| 15 | Your Rights and Responsibilities When applying for Credit or Loans | Lynn Drysdale | May-12 | Lynn.Drysdale@jaxlegalaid.org |
| | <i>Your Rights and Responsibilities When applying for Credit or Loans (Sp)</i> | | May-12 | |

CREDIT REPORT DISPUTES

1. What is a credit report?

A credit report contains information about your credit history and the status of your credit accounts. This information includes how often you make your payments on time, how much credit you have, how much credit you have available, how much credit you are using, and whether a debt collector is collecting on any debt you owe. Credit reports also can contain public records such as liens, judgments, and bankruptcies that provide insight into your financial status and obligations.

2. What goes into a credit report?

Credit reports often contain the following information:

- **Personal information:** The report lists your name and any name you may have used in the past in connection with a credit account, including nicknames; current and former addresses; birth date; Social Security number; and phone numbers. Carefully check your report to be certain these are accurate.
- **Credit accounts:** The report lists current and historical credit accounts, including the type of account (mortgage, installment, revolving, etc.), the credit limit or amount, account balance, account payment history, the date the account was opened and closed, and the name of the creditor and other information. Review this information carefully to be sure nothing is incorrect.
- **Collection items:** The report lists unpaid debts that have gone into collection.
- **Inquiries:** The report lists companies that have accessed your credit report.

3. How do credit reporting companies get my information?

Banks, credit unions, retail credit card issuers, auto lenders, mortgage lenders, debt collectors and others voluntarily send information to credit reporting companies. Shared information includes:

- When you apply for an account
- When an account is opened
- The amount loaned or the credit limit
- The account balance
- The status of your payments
- If your account is in collection

Credit reporting companies also purchase public records like liens, bankruptcy filings, and court judgments from public records providers.

4. How do I get a copy of my credit report?

Visit AnnualCreditReport.com to get a free copy of your credit report, technically known as a “file disclosure” from the nationwide credit reporting companies. You can receive a free credit report once every 12 months. You can also order your free credit report:

- **By Phone:** Call (877) 322-8228
- **By Mail:** Download and complete the Annual Credit Report Request Form (at <http://www.ftc.gov/bcp/edu/resources/forms/requestformfinal.pdf>) and mail to:
Annual Credit Report Request Service
P.O. Box 105281
Atlanta, GA 30348-5281

No matter which method you choose, you have the option to request reports from the nationwide credit reporting companies at once or one report at a time. By requesting the reports at the same time, you can determine whether any of your files have errors. By requesting the reports separately, you can monitor your credit file more frequently throughout the year.

Your free credit report does not include a credit score.

You are also eligible for free reports from nationwide specialty consumer reporting companies.

Please note: Be aware that there are many websites that claim to offer free credit reports. A number of these sites will only give you a free report if you buy other products or services. Still others give you a free report and then bill you for services you have to cancel. To get the free credit report authorized by law, go to AnnualCreditReport.com.

Please note: You’re also entitled to a free report if a company takes adverse action against you, such as denying your application for credit, insurance, or employment, based on information in your report.

You must ask for your report within 60 days of receiving notice of the action. The notice will give you the name, address, and phone number of the credit reporting company.

You’re also entitled to one free report a year if you’re unemployed and plan to look for a job within

60 days; if you're on welfare; or if your report is inaccurate because of fraud, including identity theft.

Otherwise, a credit reporting company may charge you a reasonable amount for another copy of your report within a 12-month period.

5. How long does negative information remain on my credit report?

A credit reporting company generally can report most negative information for seven years. Information about a lawsuit or an unpaid judgment against you can be reported for seven years or until the statute of limitations runs out, whichever is longer. Bankruptcies can stay on your report for up to 10 years.

Even though the credit reporting company usually won't report this negative information after the seven year limit, they still may keep your information on file, and there are certain instances where they will report it. These time limits on reporting negative information do not apply if the credit report will be used in connection with:

- Information about criminal convictions.
- Your application for a job that pays more than \$75,000.00 a year.
- Your application for more than \$150,000.00 worth of credit or life insurance.

6. How do I dispute an error on my credit report?

If you find something wrong in your credit report, you should dispute it. You may contact both the credit reporting company and the company that provided the information. You should explain what you think is wrong and why.

Please note: If you find a mistake in a report from a credit reporting company, you may submit a dispute not only to the credit reporting company, but also directly to the company that is the source of the information and can include the same supporting documentation. However, there are certain types of disputes that companies are not required to investigate. If the company corrects your information as a result of your dispute, it must notify all of the credit reporting companies to which it provided the wrong information, so they can update their reports with the correct information.

If you submit a dispute by mail, your dispute letter should include your complete name, address, telephone number, report confirmation number, and

account number for any account you may be disputing. You should clearly identify each mistake, state the facts, explain why you are disputing the information, and request that it be removed or corrected. The Federal Trade Commission has published a Sample Dispute Letter which can be found at <http://www.consumer.ftc.gov/articles/0151-disputing-errors-credit-reports>, a copy of which is also attached hereto.

In your letter, you may want to enclose a copy of the portion of your credit report that contains the disputed items and circle or highlight the disputed items. You should include copies (not originals) of documents that support your position. Send your letter of dispute to credit reporting companies by certified mail, return receipt requested, so that you will have a record that your letter was received.

You can contact the nationwide credit reporting companies online, by mail, or by phone:

EQUIFAX

- **Online:**
<https://www.ai.equifax.com/CreditInvestigation>
- **By Mail:** Download and complete the Equifax dispute form:
<http://www.equifax.com/cp/MailInDisclosureRequest.pdf> and mail the dispute form with your letter to:
Equifax Information Services LLC
P.O. Box 740256
Atlanta, GA 30374
- **By Phone:** Phone number provided on credit report or (800) 864-2978.

EXPERIAN

- **Online:**
www.experian.com/disputes/main.html
- **By Mail:** Use the address provided on your credit report or mail your letter to:
Experian
P.O. Box 4000
Allen, TX 75013
- **By Phone:** Phone number provided on credit report or (888) 397-3742.

TRANSUNION

- **Online:** www.transunion.com/personal-credit/credit-disputes-alerts-freezes.page
- **By Mail:** Download and complete the TransUnion Dispute Form:

<http://www.transunion.com/docs/rev/personal/InvestigationRequest.pdf> and mail the dispute form with your letter to:

TransUnion Consumer Solutions
P.O. Box 2000
Chester, PA 19022-2000

- **By Phone:** (800) 916-8800

Please note: Although the contact addresses above provide information on how to file your dispute online or via telephone, it is a better practice to send a written dispute via certified mail (written receipt requested).

Additionally, although some of the credit reporting agencies provide dispute forms, as detailed above, those forms are not exhaustive and providing additional information, including copies (not originals) of documents supporting your position is encouraged.

Keep copies of your dispute letter and enclosures.

7. What should my dispute letter to a credit reporting company look like?

You can find an example of a dispute letter on the Federal Trade Commission's website at <http://www.consumer.ftc.gov/articles/0151-disputing-errors-credit-reports>. A copy of the FTC's sample letter is also attached hereto. You should send a dispute letter to both the credit reporting company and the creditor or other entity that provided the information.

To help clarify the dispute, enclose the portion of your credit report that contains the disputed item, and circle or highlight the disputed item. Include copies (not originals) of documents that support your position.

Please Note: Provide additional identifying information in your complaint letter. To help the credit reporting company locate the correct file or credit information about you, provide additional identification information in your letter. Such information can include your date of birth, your Social Security number, your spouse (if married), and current employment information. If you send your Social Security number and other sensitive information by email, please take appropriate security measures including encrypting the email.

8. What does the credit reporting company do after I notify it of an error on my credit report?

The credit reporting company generally must investigate the dispute within 30 days of receiving it, or 45 days if you dispute, after receiving your free annual credit report. It is possible that the credit reporting company will resolve the dispute in your favor if it determines it has sufficient information to do so. More commonly, the credit reporting company will notify the company that provided the information and ask them to investigate your dispute.

Please note: Also go directly to the source of the error. When submitting a dispute with a credit reporting company to fix an error in your credit report, it's a good idea to also directly contact the company that provided the information.

When a company receives a dispute from a credit reporting company, it must investigate and report the results back to the credit reporting company. If the disputed information is wrong or cannot be verified, the company is required by law to delete or change the information and notify all of the credit reporting companies to which it provided the wrong information, so the credit reporting companies can update their files with the correct information.

The credit reporting company must send you the results of the investigation within five business days of the completion of the investigation. If your credit report was corrected, you will receive an updated credit report for free. This free report does not count as your annual free credit report.

If you ask, the credit reporting company must send notices of any deleted information to anyone you specifically designate who received your report for employment purposes during the past two years or for any other purpose during the past six months.

9. If a credit reporting error is corrected, how long will it take before I find out the results?

The credit reporting company has five business days after completing the investigation to notify you of the results. You will also receive a copy of your updated credit report. This free report does not count as your annual free report. Please note that if a company provides the wrong information to a credit reporting company and then corrects your credit report as a result of your dispute, it has a duty to forward the correction to every credit reporting company to which it has provided the incorrect information.

10. What can I do if I disagree with the results of a credit report dispute?

If an investigation doesn't resolve your dispute with the credit reporting company, you can ask that a brief statement of the dispute be included in your file and included or summarized in future reports. Also, if you are dissatisfied with the resolution, you have the option of submitting a complaint to the Consumer Financial Protection Bureau. To do so:

- Visit the Consumer Financial Protection Bureau website at: <http://www.consumerfinance.gov/complaint>.
- Select the icon labeled "credit reporting."
- Complete and submit the online form.

Please note that your right to include a statement in your file only applies to disputes you've submitted to a credit reporting company, not to disputes that you've submitted directly to companies that provided the wrong information to the credit reporting company. Additionally, the consumer reporting agency may limit such statements to not more than 100 words if it provides the consumer with assistance in writing a clear summary of the dispute.

11. Is it possible to remove accurate, negative information from my credit report?

You generally cannot remove negative information from your credit report if it is accurate. You can, however, dispute accurate information if it appears multiple times or if the negative information arose from fraud or identity theft. Most negative information will remain in your report for seven years. Some types of information remain longer.

You can dispute inaccurate information. Credit reporting agencies must fix mistakes, usually within 30 days, at no cost to you.



The Florida Bar

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Tequisha Myles, Chair
Consumer Protection Law Committee

850/561-5669
www.FLORIDABAR.org

2015 Consumer Protection Lawyer of the Year Award Nomination Form

Nominations may be submitted by email, FAX or mail.
The quickest way to send is to fill out the form online and click the **SUBMIT** button.

Or:

Email: syle@flabar.org

Mail: Susannah Lyle, 651 E. Jefferson St., Tall., FL 32399

FAX: (850) 561-9429, attn. S. Lyle

Deadline for nominations: Friday, April 10, 2015, at 5 p.m.

Nominee's Information

Name of Nominee

Florida Bar Number

Nominee's
Business Address

City

State

Zip Code

Nominee's Qualifications (attach additional sheets if necessary)

1. How has the nominee promoted the ideals and values of consumer protection and advocacy?

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- 2. Describe the nominee's participation in notable projects or activities advancing consumer protection (e.g., consumer protection casework, projects, extraordinary mentoring, extensive service on consumer advocacy groups or boards, leadership within the Bar, etc.):**

- 3. Other examples that demonstrate the lawyer's exemplary professionalism, excellence, character and commitment to consumer protection:**

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Submitted by

| | | | |
|------------------|-------|----------------------|-----------------------|
| Name | _____ | | |
| City | _____ | State | _____ Zip Code |
| Telephone | _____ | Email address | _____ |
| Signature | | Date | _____ |

Names/contact information of others familiar with reasons for nomination (optional):

This form can be filled online. Please click the button below to submit by email to Susannah Lyle.

