



COLE, SCOTT & KISSANE, P.A.

Litigation Quarterly

April-June 2010

CONSTRUCTION DIVISION

MEET ONE OF OUR CONSTRUCTION ATTORNEYS: George Truitt

Payment Defending the Architect against Contractor Claims for Wrongful Certification of Sufficient Grounds to Terminate Contractor for Cause Under the Standard Form of Agreement Between Owner and Contractor Where the Basis for Payment is a Stipulated Sum -- AIA Document A141 (2007 Edition)

**Payment Bond and Pay If Paid Provisions
– Payment Risk Hot Potato**

“You can’t pass me a tort when you’re given a contract action”: A Defense of Third Party Actions for indemnity and Contribution

Mortgage Deficiency Judgments

Right to Attorneys’ Fees in Federal Diversity actions in Florida: Fact or Fiction?

Regulating the Regulatory Scheme: Florida’s Legislative Clarification of the Role of Surplus Lines Carriers

GREG ACKERMAN
JEFFREY ALEXANDER
JESSICA ANDERSON
HEATHER ATKINSON
SCOTT A. BASSMAN
MICHAEL R. BEANE
RHONDA BEESING
RACHEL K. BEIGE
EVAN BERGER
MARK BERLICK
BROOKE L. BOLTZ
DAVID P. BRADLEY
MICHAEL E. BRAND
MONETT K. BREWER
J. CHRIS BRISTOW
CHRISTOPHER BURROWS
MELISSA L. BUTTON
ANIKI CAMPBELL
RON M. CAMPBELL
SHANNON H. CAMPBELL
CRISTINA CASTELLVI
ANDREA B. CHIRLS
LEE M. COHEN
RICHARD P. COLE
SCOTT A. COLE
JOHN D. COLEMAN
MARCO COMMISSO
DAVID A. CORNELL
LARA DABDOUB
CASSIDY DANG
WILLIAM A. DAVIS, JR.
ROBERT DEHNE
CARYN N. DIAMOND
TEMYS DIAZ
MICHELLE DOVER
DANIEL DUELLO
BENJAMIN M. ESCO
BRIAN FORBES
JOSHUA FRACHTMAN
JONATHAN FEUER
VINCENT GANNUSCIO
ANA GARDINER
J. CODY GERMAN
KEITH E. GITMAN
JOSHUA GOLDSTEIN
ELIZABETH GOMEZ
SHEILA M. GONZALES-JONASZ
JAMI L. GURSKY
ERIN HANTMAN
SAM HARDEN
JOY HARRISON
TREVOR G. HAWES
GEORGE HOOKER
CLAIRE HURLEY
TULLIO E. IACONO
SCOTT H. JACKMAN
VALERIE JACKSON
WILLIAM KAROLY, JR.
JEANETTE KERR
DANIEL J. KISSANE
GENE P. KISSANE
JOSEPH T. KISSANE
DANIEL J. KLEIN
BETH T. KOLLER
JULIE KORNFELD
ROSS KULBERG
KIP O. LASSNER
YUELING E. LEE
JANA LEICHTER
ANDREW LOEWENSTEIN
ROBERT MALANI
ROMINA MARCHESI
BRADLEY D. MARTIN
SCOTT MASON
MILES A. McGRANE IV
ARAM P. MEGERIAN
KATHLEEN MERWIN
JONATHAN M. MIDWALL
ABBY MOEDEL
MARIA MORRIS
ROBERT MORVAY

MARIA MORRIS
DENISE P. MURRAY
CRAIG NOVICK
ROCHELLE NUNEZ
ROBERT E. O'QUINN, JR.
MATTHEW OLMSTED
DEVON OMBRES
NICOLE PANITZ
PAULA PARISI
STEPHANIE PARTLOW
JOHN S. PENTON, JR.
ALEJANDRO PEREZ
PAULA PHILLIPS
BRIAN PITA
EDWARD S. POLK
BARRY A. POSTMAN
TRELVIS D. RANDOLPH
JENNIFER REYNOLDS
ERIC T. RIEGER
ROBERT RIGHTMYER
COLIN RILEY
CHAD ROBINSON
RANDY ROGERS
BRYAN A. ROTELLA
BRIAN D. RUBENSTEIN
ARMANDO RUBIO
JENNIFER V. RUIZ
GENEVIEVE RUPELLI
KINNA RUSSOMANNO
STEVEN SAFRA
HENRY SALAS
DAVID SALAZAR
BLAKE S. SANDO
GEORGE SAUD
TAWNA SCHILLING
HOWARD L. SCHOLL
SHERRY SCHWARTZ
KEVIN SCHUMACHER
DANIEL SCHUMAN
THOMAS E. SCOTT
MELISSA SECRIST
DANIEL A. SHAPIRO
SANJO SHATLEY
SCOTT SHELTON
WESLEY SHERMAN
MICHAEL W. SHIVER
JUSTIN D. SIEGWALD
SALLY L. SLAYBAUGH
JENNIFER SMITH
PATRICK SNYDER
JUSTIN SOREL
JAMES T. SPARKMAN
ERIN SPIRA
KARLY SPIRA
ALAN ST. LOUIS
CLARKE S. STURGE
ROBERT A. SWIFT
ASHLEY SYBESMA
LISA M. SZULGIT
TARA TAMONEY
LISA TAORMINA
IVAN J. TARASUK
LONNI D. TESSLER
WESLEY TODD
GEORGE TRUITT
JENNIFER K. VALENTIN
JONATHAN VINE
BRANDON WAAS
JEFFREY WANK
JONATHAN WEISS
ISAAC WANNOS
HAL WEITZENFELD
TODD WESLEY
RYAN K. WILLIAMS
JOSEPH WOLSZTYNIAK
STEVEN L. WORLEY
ROBERT WYKO
THOMAS YANNITELLI
ROSS ZELNICK
JOY ZUBKIN

-SURETY:	
Payment Bond and Pay If Paid Provisions Payment Risk Hot Potato –	3
- CONSTRUCTION DEFECTS	
“You Can’t Pass Me a Tort When You’re Given a Contract Action”: A Defense of Third Party Actions for Indemnity and Contribution:	5
- ARCHITECT ENGINEERS	
Payment Defending The Architect Against Contractor Claims for Wrongful Certification of Sufficient Grounds To Terminate Contractor For Cause Under the standard Form of Agreement Between Owner and Contractor Where The Basis For Payment Is a Stipulated Sum -- AIA Document A141 (2007 Edition).	8
Mortgage Deficiency Judgments:	14
Regulating the Regulatory Scheme: Florida’s Legislative Clarification of the Role of Surplus Lines Carriers.	17
Right To Attorneys’ Fees In Federal Diversity Actions In Florida: Fact Or Fiction?	18
Cole, Scott & Kissane’s Construction Law Division	20
Construction Division Group	21
MEET ONE OF OUR ATTORNEYS:	
George Truitt	23
Success Stories	24

PRACTICE AREAS

Admiralty and Aviation	Fidelity and Surety Litigation & Counsel
Appellate	Fraud Litigation
Arbitration, Alternative Dispute Resolution and Mediation	General Civil Litigation
Architects and Engineers	General Civil Litigation including Business/Commercial Law
Bad Faith and Extra-Contractual Liability	Insurance Coverage & Carrier Representation
Banking and Financial	Intellectual Property
Civil Rights Law	Land Use Litigation and Real Property Disputes
Commercial Litigation	Medicare Secondary Payer Compliance
Condominium & Homeowners’ Association	Nursing Home/Health Care
Condominium Law	Premises Liability
Construction & Surety	Product Liability
Construction Defects	Professional Malpractice
Corporate, Transactional & Real Estate	Professional Malpractice (Architects, Engineers, Physicians and other licensed professionals)
Directors and Officers	Securities
Education Law	SIU Insurance Fraud Defense
Employment & Labor	Vehicle Negligence
Environmental	Workers’ Compensation
Federal Practice	



● **Editors** Alejandro Perez ● John S. Penton, Jr. ● Angelica Velez (Graphics)

Providing services, throughout Florida with offices in

MIAMI | WEST PALM BEACH | TAMPA | KEY WEST | FT. LAUDERDALE | NAPLES | JACKSONVILLE | ORLANDO

Surety

PAYMENT BOND AND PAY IF PAID PROVISIONS - PAYMENT RISK HOT POTATO -



A problematic contract clause for a subcontractor is one that seeks to condition payment of the subcontract on the contractor being paid by an owner. A valid “pay if paid” provision must clearly and unambiguously communicate to the subcontractor that it is assuming the risk of non-payment to contractor.¹ There are a number of reasons why subcontractors have executed contracts with these provisions.

Our clients have indicated that due to prior extensive relationship with the contractor they did not foresee a potential problem with collecting payment pursuant to the contract. Also, in light of these troubled economic times, subcontractors in need of work will not quibble with the terms of a contract that provides work. Finally, there are those that simply do not understand the language of a contingent payment clause.

In the event a contractor provided a payment bond, the language

of a contingent or conditional payment provision, which is incorporated solely in the subcontract, will not prevent recovery against the payment bond surety.² If a payment bond fails to condition payment on final payment from the owner to the contractor, and does not incorporate the conditional payment terms of the sub-contract, the payment bond surety is on the hook to the subcontractor. The surety will then seek indemnity from the contractor. If the contractor wants to ensure that the payment risk is shifted to the subcontractor, then both the sub-contract and the payment bond must do so.

Compliance with F.S. § 713.245 is crucial if the payment bond surety does not want to act as an “insurer” against the owner’s non-payment. F.S. § 713.245 states in relevant part:

... if the contractor’s written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the following provisions are complied with:

(a) The bond is listed in the notice of commencement for the project as a conditional payment bond and is recorded together with the notice of commencement for the project prior to commencement of the project.

(b) The words “conditional payment bond” are contained in the title of the bond at the top of the front page.

(c) The bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.³

In these hard economic times, subcontractors must be vigilant with respect to the specific language of the contract that they sign. It may be better to walk away from a risky deal where the chance of providing labor and services without a guarantee of payment could be ruinous. Conversely, if the contractor wants to ensure that the risk of the owner’s nonpayment is shifted to the subcontractor, the contractor must ensure that the subcontract’s terms are clear. Finally, if a payment bond has been provided, it must comply with F.S. § 713.245 because failure to do so will result in payment to the surety.

1 See *Harris Air Systems, Inc v. Gentrac, Inc.*, 578 So. 2d 879 (Fla. 1st DCA 1991).

2 See *OBS Co., Inc. v. Pace Const. Corp.*, 558 So.2d 404 (Fla. 1990).

3 See Florida Statute 713.245.

CONSTRUCTION LAW

RECENT FLORIDA LAW AFFECTING SURETIES



Marseilles Condominium Owners Ass'n, Inc. v. Travelers Casualty and Surety Co. of American, --- So.3d ----, 2009 WL 3491016 (Fla. 1st DCA 2009): The First District Court of Appeals held that the condominium owners association was a “successor” to the developer under the performance bonds issued by a surety in connection with the construction of the condominium development and, as such, possessed standing to bring action under the bond to cure alleged defective work of the contractor. The court further held that the association assumed the developer’s obligation of maintaining and operating the condominiums, and replaced the developer as the controlling and responsible party, and the construction contract, which provided “any owner’s association” with warranties in the contract, was incorporated as part of the bond. Hence, the First District Court reversed and remanded the surety summary judgment, by stating that the association was a “successor” to the developer, and, as such, possessed standing to bring the action.



Zupnik Haverland, L.L.C. v. Current Builders of Florida, Inc., 7 So. 3d 1132 (Fla. 4th DCA 2009): A contractor brought action against a developer and the transfer bond surety for breach of a settlement agreement and to foreclose a lien against a transfer bond. The Palm Beach County Circuit Court entered a judgment in favor of the contractor after a trial and a separate nonjury proceeding on the lien foreclosure claim. The trial found that the parking lot work, which was requested by the developer as part of the settlement agreement with the contractor, tolled the contractor’s time to file a lien against the transfer bond for all of its work on construction project, even though the parking lot work was not within the scope of the original contract between the parties. During trial, the trial court excluded expert testimony regarding latent defects and building code violations resulting from the contractor’s work on certain stairs. The developer and surety appealed, but the Fourth District Court affirmed the lower court’s judgment. It affirmed the finding that the parking lot work, per the developer’s request as part of the settlement agreement, tolled the contractor’s time to file a lien. A disagreement regarding the amount of money owed to a contractor does not convert a good faith dispute into a fraudulent lien.



Construction Defects

“YOU CAN’T PASS ME A TORT WHEN YOU’RE GIVEN A CONTRACT ACTION”: A DEFENSE OF THIRD PARTY ACTIONS FOR INDEMNITY AND CONTRIBUTION

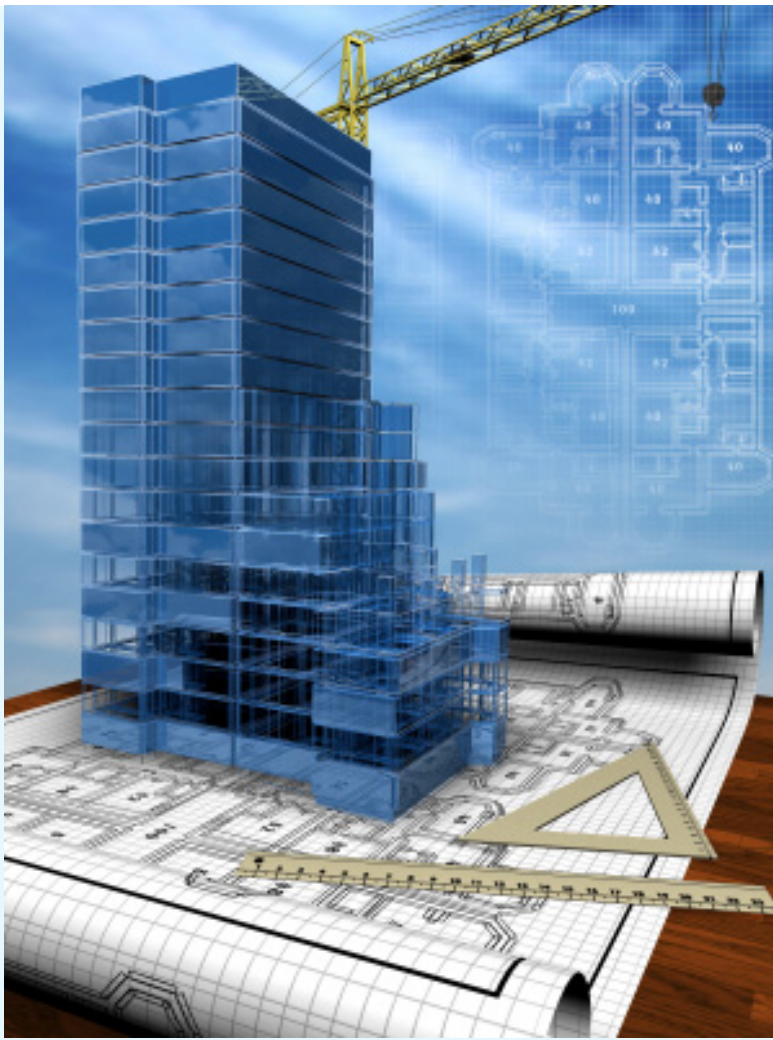
By Christopher H. Burrows



There is some predictability in the initial procedural blossoming of a lawsuit seeking damages for larger scale construction defects, but there is also a degree of legal nuance in the proper structuring of multi-party claims that can be overlooked by legal counsel and form the basis for a defense that is grounded in the fundamental tenants of our civil law. Under one common scenario, an owner complaining of actionable construction defects brings suit directly against its general contractor with whom it entered into contract, prompting the general contractor to institute third party claims against its subcontractors who performed the work, and who may be liable to the general contractor for the owner's claims. Depending on the particular facts of the project at issue, there may be cause for the subcontractors to pass through liability on the original owner's action further onto fourth party

sub-subcontractors, laborers, and material suppliers. What can sometimes be disregarded by defect case defendants, in their haste to divert a charge of liability, is the interplay between claims which are based in contract, and those which are based in tort law, and the difference in legal effect that may have on their ability to sustain pass through causes of action.

The owner's choice of legal theories determines what causes of action may be alleged by the general contractor, and those downstream of the general contractor, to pass liability. For reasons beyond the scope of this article, it may be necessary that the owner state the claims in the alternative, *e.g.*, the plaintiff owner may be able to state both a cause of action for breach of the contract against the general contractor as well as negligence, which is an action sounding in tort law, for damages unconnected with relief that may have been provided for in the contract with the general contractor. In some circumstances, the owner may decide to file only a breach of contract action against the general contractor and forego stating an alternative action for negligence. In such an event, the general contractor and downstream defendants are limited, as a matter of law, in their ability to bring third party causes of action in tort, such as common law indemnity and contribution, because an underlying breach of contract claim does not support tort-based claims for either common law indemnity or contribution.



Common law indemnification is an equitably-imposed shifting of the entire burden of loss from one tortfeasor, who has been compelled to pay the loss to another party whose active negligence is the primary cause of the injured party's harm.¹ Under this principle, one who is considered a "passive" tortfeasor may recover indemnity from a so-called "active" tortfeasor.² In other words, indemnification seeks to shift the loss from one tortfeasor, who has been compelled to pay, onto the shoulder of another tortfeasor, who should properly bear the loss instead.³

passively negligent is not an issue and is not relevant to those claims. Since a breach of contract defendant's liability cannot be based upon either active or passive negligence, it follows that the direct defendant has no indemnity claim against a third party defendant based upon a showing that it was only passively negligent.

Contribution among joint tortfeasors is a right that inures only by statute. There is no common law claim for contribution among tortfeasors.⁵ Fla. Stat. §768.31, titled "Contribution Among Tortfeasors", provides in pertinent part:

- (2) Right to Contribution
- (a) Except as otherwise provided in this Act, when two or more persons become jointly or severally liable in tort for the same injury to person or property ... this is a right of contribution among them ... (Emphasis Added)

Contribution requires common liability between contributory third party plaintiff and contributory third party defendant for plaintiff's injury. One without fault cannot recover for contribution.⁶ Contribution requires joint tortfeasors. Because breach of contract claims are based purely upon whether or not a defendant met its contractual obligations, and are not based upon the tort concept of fault, it follows that the direct defendant has no contribution claim against a third party defendant based upon joint liability in tort.

The state of Florida law, with respect to the availability of third party claims for common law indemnity and contribution for a general contractor facing only a breach of contract action by a property owner for construction defect, emphasizes the importance and ubiquity of indemnity provisions in subcontracts for construction projects. Third party contractual indemnity claims bridge the contract/tort law divide, ensuring that if an owner brings a cause of action against the general contractor for breach of contract only, the general contractor has a legal avenue to pursue pass-through liability to its subcontractors can be a significant precaution. Otherwise, third party defendants facing only tort-based claims may be found to have a defense that leaves its general contractor going it alone.

1 *Houdaille Industries v. Edwards*, 374 So.2d 490 (Fla. 1979).
 2 *Mims Crane Service, Inc. v. Insley Manufacturing Corp.*, 226 So.2d 836, 839 (Fla. 2nd DCA 1969).
 3 *VTN Consolidated, Inc. v. Coastal Engineering Association, Inc.*, 341 So.2d 226, 228 (Fla. 2nd DCA 1976).
 4 *Firestone Tire and Rubber Co. v. Thompson Aircraft Tire Corp.*, 353 So.2d 137, 139 (Fla. 3rd DCA 1977).
 5 *Florida Patient's Compensation Fund v. St. Paul Fire and Marine Ins. Co.*, 559 So.2d 195, 197 (Fla. 1990).
 6 *Kala Investments, Inc. v. Sklar*, 538 So.2d 909, 916 (Fla. 3rd DCA), *rev. denied* 551 So.2d 461 (Fla. 1989).

CONSTRUCTION LAW

RECENT FLORIDA LAW AFFECTING DEVELOPERS AND CONTRACTORS



Worthington Communities, Inc. v. Mejia, --- So. 3d ---, 2009 WL 482511 (Fla. 2d DCA 2009): The Second District of District Court of Appeals affirmed a judgment based on premises liability against a developer who also served as a general contractor on a subdivision in Lee County. The Court held that a developer/contractor has a duty to an employee of a subcontractor, who was injured when performing the subcontracted work by a condition which was created by the subcontractor, and arose within the subcontractor's scope of work. The court also held that the trial court's instruction that a general contractor has the "ultimate duty" to provide a safe job site was an accurate statement of current Florida law, and when considered with limiting language in the instructions, was not likely to mislead the jury on the scope of the developer/general contractor's duty.

The Court held that the issue of whether the developer/contractor negligently allowed a dangerous condition to exist on a work site. In a change negligence case brought by a subcontractor's employee who was rendered quadriplegic when a 370-pound wire mesh bundle was improperly loaded on top of a partially-braced joist system. While an owner who hires an independent contractor

is not generally liable for injuries sustained by that contractor's employees, an exception to this general rule exists when the owner actively participates in the construction to the extent that he directly

influences the manner in which the work is performed or has engaged in acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee. After a jury trial, the Lee County Circuit Court entered a judgment apportioning 10% negligence to project owner, and finding project owner liable for 95% of economic losses. This judgment was affirmed. The developer/contractor has filed motions for rehearing and rehearing en banc and requested that the Second District Court of Appeals certify the question to the Florida Supreme Court as one of great public importance.



Banner Supply Co. v. Harrell, 25 So. 3d 98 (Fla. 3d DCA 2009): The supplier of allegedly defective Chinese drywall was not entitled to abatement of the owner's claim for property damage, though the claimants failed to follow statutory notice and opportunity to inspect requirements of Chapter 558, Florida Statutes, prior to filing suit. The court found that abatement and the Chapter 558 process would have been futile because the claimants had already invited an inspection by the supplier, but the supplier did nothing to attempt to inspect the property,

either after the claimants filed their initial complaint (alleging only personal injury) or after the claimants filed their amended complaint asserting property damages claim, to which the Florida statute § 558.001 et seq. applied. Thus, the supplier was given opportunity to inspect and chose not to do so.



Lake Forest Master Community Ass'n, Inc. v. Orlando Lake Forest Joint Venture, 10 So. 3d 1187 (Fla. 5th DCA 2009): A homeowners' association brought an action against the developer of a subdivision for breach of implied warranty, defective construction, and building code violations. The developer argued that Association lacked standing to pursue the claim because a notice to the association members, at which the decision to proceed with the claim was made, was defective. The Seminole County Circuit Court entered summary judgment in favor of the developer, and the association appealed. The Fifth District Court of Appeal reversed the summary judgment, holding that the association was not required to supply written notice of the reconvened meeting date to discuss legal action against the developer to all association members if meeting was properly adjourned, despite the absence of the majority of the owners. Furthermore, it held that the association's failure to obtain proper notice for the meeting was not an affirmative defense to association's action against the developer for construction defects. The Fifth Circuit Court reasoned that even though, the developer had the right to complain about defective notice of a homeowners' association meeting where the developer was entitled to vote because of its status as an owner with voting interests, the developer at most would have been entitled to abatement until the asserted defect in the notice was rectified and approval obtained and, thus, could not enjoin the association from prosecuting lawsuit against the developer for alleged construction defects.

Architects & Engineers

PAYMENT DEFENDING THE ARCHITECT AGAINST CONTRACTOR CLAIMS FOR WRONGFUL CERTIFICATION OF SUFFICIENT GROUNDS TO TERMINATE CONTRACTOR FOR CAUSE UNDER THE STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR WHERE THE BASIS FOR PAYMENT IS A STIPULATED SUM -- AIA DOCUMENT A141 (2007 EDITION)

By George Truitt



In the majority of commercial construction projects, the design professional agrees to administer the construction contract between the owner and contractor. These services typically include observing the contractor's work for purposes of recommending payment to the owner, responding to the contractor's requests for information, and evaluating the contractor's requests for change orders for additional money and extensions of the contract time.

In the Standard Form of Agreement Between Owner and Contractor Where the Basis for Payment is a Stipulated Sum, American Institute of Architects ("AIA") Form A101-2007 Edition) (the "Prime Contract"), the architect's construction administration duties derive from the A101 and the general conditions, which are incorporated by reference into the contract. Of all of the construction administration services provided by the design professional, few services are more certain to lead to litigation than addressing whether sufficient grounds exist to justify the owner's termination of the

general contract.

This article briefly examines the state of Florida law on the architect's duties regarding certification and the defenses available to the architect to claims by the contractor that the architect wrongfully certified its termination. Finally, the article concludes with some practical advice to the architect and its counsel about minimizing the potential for being drawn into litigation over certification and maximizing the potential for a successful defense if sued by the contractor.



The intention of the AIA documents, 2007 Edition, is to establish a tripartite relationship between the owner, contractor, and design professional. The relationship is created by incorporating a single set of standard general conditions into both the owner-contractor agreement, e.g., A101, and the owner-architect agreement, e.g., B101.

The architect's construction administration functions are set forth in A101, B101, and the general conditions. The standard general conditions are contained in AIA Document A201, General Conditions of the Contract for Construction ("A201-2007"), which include the architect's duty, upon the owner's request, to certify whether sufficient grounds exist to justify the owner's termination of the contract for cause.¹

Paragraph 14.2 of the Conditions, **Termination by the Owner for Cause**, provides that:

The Owner may terminate the Contract if the Contractor:

1. persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
2. fails to make payment to Subcontractors for materials or labor in accor-

dance with the respective agreements between the Contractor and the Subcontractors;

3. persistently ignores laws, statutes, ordinances, or other rules or regulations; or
4. otherwise is guilty of substantial breach of a provision of the Contract Documents.

Paragraph 14.2.2 provides:

When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor.

Traditionally, the General Conditions have provided that the architect administering the Prime Contract makes the initial decisions in all claims between the owner and the contractor. However, the 2007 General Conditions allow the owner and contractor to choose someone other than the architect to serve as the "Initial Decision Maker" for most claims arising between them.² If, however, the owner-contractor agreement fails to identify a third party selected to serve this function, the architect will, by default, serve as the Initial Decision Maker, as it has traditionally done.³

The owner's request that the architect certify grounds sufficient to justify termination of the contract is a "Claim" under Article 4.3 of the General Conditions.⁴ While there is no Florida law on this particular issue, the New Jersey Supreme Court has squarely addressed the matter⁵, and the reasoning is solidly based on the broad definition of "claims" in the general conditions. Therefore, in addition to the duties conferred by Article 14.2, in its role as Initial Decision Maker, the architect is tasked with

deciding if sufficient cause exists to justify the owner's termination of the Prime Contract for cause.⁶

Article 14.2.2 provides that when any of the enumerated grounds for default exist, the owner may terminate the contract. However, before the owner can do so under the contract, the Independent Decision Maker must certify that sufficient cause exists to justify such action based on the grounds provided in the termination for cause provision.⁷ This is "without prejudice to any other rights or remedies of the owner" existing under common law.⁸

In other words, the owner may have additional bases to terminate the owner-contractor agreement based upon common law principles, or the owner may have the independent right to terminate the contract under common law for prior, material breaches based on the same conduct for which it requests certification.

WHAT SHOULD AN ARCHITECT DO WHEN FACED WITH A REQUEST TO CERTIFY GROUNDS FOR TERMINATION?

The Initial Decision Maker is called upon to exercise independent judgment in deciding whether to certify a termination. In fulfilling this role, the design professional should conduct a due diligence investigation and, within a reasonable amount of time, render a decision. The claims mechanism in Article 4 provides a timeline for the Architect's decision, which can be extended by the Architect's request for additional information.

No matter what the architect ultimately decides, the decision will likely result in legal action against him. Certainly, the decision to certify grounds for termination will result in a disgruntled contractor and the decision not to certify will result in a disgruntled owner, leaving the architect with a Morton's Fork.

As set forth in Article 4.2.2, the architect's decisions must be consistent with the intent of the contract documents and without partiality to either the contractor or owner.⁹ In many cases, however, the considerations at issue will involve the drawings and construction administration provided by the architect, placing the architect in the awkward position of judging its

own performance. This potential conflict and the fact that architects' fees are paid by the owner may cause considerable unease in the contractor over whether the architect can truly serve as an impartial arbiter in the certification process.

The design professional's only option under these circumstances is to render a decision in good faith and with impartiality to both the owner and the contractor. Having said that, that the architect will be sued for certifying or not certifying termination is a near certainty. When asked to address certification, the architect should



keep this in mind and position itself for the successful defense of the litigation. There are several important defenses available to the architect that derive from both the contract and common law, and the architect is a unique position to be able to strengthen those defenses with its approach to the certification and the certification itself. Some of the pertinent defenses are discussed briefly below.

NO PROXIMATE CAUSE

It does not necessarily follow from the architect's certification that the owner must terminate the contract or that the owner necessarily relies on the architect's certification in deciding to terminate the contractor. The certification is a condition precedent to termination of the contractor's employment under Article 14.2.2. Often, the owner will have its representative and its own counsel involved in evaluating whether to terminate the contractor.

More sophisticated owners will often have an owner's representative administer the owner's duties under the Prime Contract. Often, the owner's representative is as qualified as the architect to evaluate the bases for certification identified by the owner and will have the knowledge to do so from his involvement in the project. In those cases, the architect's certification, while a condition precedent under the contract, is a formality to the owner's decision to terminate. When a sophisticated owner employs an owner's representative, counsel for the architect should explore whether the owner truly terminated based on the architect's certification or whether it exercised independent judgment in terminating the contract, relying on the opinions of its representative.

If the owner terminates the Prime Contract on a basis not certified by the architect, it has presumably exercised its common law termination right. In such cases, the architect's defenses to a wrongful certification claim by the contractor or a professional negligence or indemnity claim by the owner should include that the architect's certification was not the proximate cause of any damages.

The damages flowing from the architect's certification, as opposed to the owner's independent termination, may be speculative. The independent basis for the common law termination provides an opportunity for the architect to argue that the owner's termination on the independent basis was the cause of any damages, rather than its termination based on the architect's certification.

PROSPECTIVE RELEASE OR WAIVER

Generally, when the architect performs this function, the contract provides that the architect "will not be liable" for the consequences of a decision rendered in good faith.¹⁰ Because the general conditions are incorporated into both the Prime Contract and owner architect agreement, this lan-

guage should provide the basis for a release or waiver of any claims by the contractor or owner against the architect for a good faith certification. However, the enforceability of one type of exculpatory provision in favor of the design professional – the limitation of liability clause -- has recently been called into question¹¹, and the practitioner should advise the architect accordingly.

ARBITRAL IMMUNITY

When the architect agrees to serve as the Initial Decision Maker, it becomes an arbiter of claims between the owner and contractor. Article 4.3.2, Decisions of the Architect, identifies the architect as the initial arbiter of claims,¹² and Article 4.4, Decisions of the Architect, provides that the architect's decisions are final and binding, subject to arbitration or litigation. These provisions make clear the role of architect as arbiter, and the architect's counsel should assert arbitral immunity as a defense.

Generally, arbitral immunity is absolute immunity from suit. However, the key issues of whether arbitral immunity for certification is immunity from suit or from liability and whether the immunity is absolute or qualified have not been addressed by Florida courts.

The Florida Supreme Court has addressed the architect's immunity for decisions regarding the quality and quantity of the contractor's work.¹³ In that context, the Court held that the immunity conferred on the architect, as arbiter, is qualified, and the architect is immune from liability unless decision was rendered fraudulently or with such gross error as to amount to fraud.¹⁴

Because the architect may be called to assess the quality of its own design and construction administrative services when evaluating certification and because the architect is paid by the owner, the Florida high court would most likely hold that arbitral immunity is qualified. In our opinion, the immunity should be suit immunity, and the contractor should be required to specifically plead the factual basis for a claim that the architect has rendered its certification fraudulently, or so grossly in error that the error amounts to fraud.

SOVEREIGN IMMUNITY

During the construction phase of the project, the architect is appointed by the owner as its limited agent for certain construction administration functions.¹⁵ These functions arguably include addressing whether grounds exist to justify termination of the contractor upon the owner's request.

When the project involves a public owner, the architect may be entitled to sovereign immunity, as an agent of the State of Florida or its political subdivisions.¹⁶ For governmental agents, the immunity is qualified suit immunity. To circumvent the immunity and establish tort liability, the claimant must plead and prove that the agent acted outside the course and scope of its agency or acted with willful and wanton disregard of the claimant's rights.

A key issue in the agency analysis will typically be whether to apply tort or contract law principles to the agency determination. The tort concepts of agency turn on the control retained or exercised by the principal over the purported agent. The determination is often one a disputed fact requiring resolution by the judge or jury.

However, under the standard tripartite contractual relationship created by the AIA 2007 documents, the contract law concepts of actual and apparent agency may be more appropriate to the application of sovereign immunity from contractor claims based upon wrongful certification. This is because the contract documents clearly identify the architect as the owner's representative for certain construction administration functions, and, by incorporating the general conditions into the Prime Contract, the contractor agrees to accept the architect as the owner's representative. The issue of agency, therefore, is not necessarily one of control, but one of the owner's appointment of the architect as agent and the delegation of certain authority to the architect to act on the owner's behalf.

Once again, Florida courts have not addressed the issues of agency involved in the architect's certification of grounds



to terminate a construction contract with a public owner. Nevertheless, counsel for the architect should raise sovereign immunity as a defense to the contractor's claim based on wrongful certification.

RISK MINIMIZING STRATEGIES

The architect has two important opportunities to eliminate or minimize its exposure to the contractor's claim for wrongful certification. The first is at the contracting stage, and the second is when the architect is requested by the owner to address certification.

At the contracting stage, the architect should take the opportunity to eliminate or minimize its risk by reviewing the Prime Contract, the owner architect agreement and the General Conditions and eliminating its role as the Initial Decision Maker for claims and disputes its certification of grounds sufficient to justify termination as a condition precedent to the owner's contractual termination for cause rights.

The architect should also suggest to the owner that it negotiate with the contractor to include a "Termination for Convenience" clause in the Prime Contract or

make the termination for cause provisions as broad as possible to afford the owner greater latitude in terminating the contractor. For instance, the phrase "persistently or repeatedly" can be deleted from subsection 1 of Article 14.2 to allow termination for only one reasonable period during which the contractor fails to provide sufficient manpower or materials.

During the construction phase, if the architect has not agreed to act as Initial Decision Maker or to address certification, it can and should simply refuse to do so. If the architect then voluntarily assumes the duty to address certification, it should require the owner to defend, indemnify, and hold it harmless for any claims arising out of or related to the decision and require the owner to prospectively release the architect from any claims arising out of or related to the decision. Because limitations of liability operate to prospectively exculpate design professionals from exposure to

damages greater than an agreed to amount or arising from agreed to conditions, the practitioner should counsel the design professional about the possibility that the risk shifting and exculpatory provisions may not be enforceable. Nevertheless, the architect should insist on them when agreeing to assume the certification duty.

If the architect agrees to provide the service, it must be objective and conduct a *bona fide*, due diligence investigation into the bases for certification and termination requested by the owner. Upon receipt of the owner's request for certification, the architect should immediately notify the contractor and its performance and payment bond surety of the owner's request and solicit their participation in the investigation.

The architect's initial acknowledgment of the owner's request should call attention to the gravity of the consequences of termination, including the likelihood of litigation to result from termination. It should also remind the owner of its common law right to terminate the Prime Contract based on any prior, material breaches by the contractor and, if applicable, remind

the owner that some of the bases for certification may involve legal analysis and judgment which is outside of the architect's expertise.

The architect should advise the owner to consult its own counsel and owner's representative before terminating the contract and remind the owner while certification is a condition precedent to the owners' contractual termination rights, the owner is not required to terminate upon receiving the certification, and it should exercise its own independent judgment in determining whether to terminate the contract for cause. Again, a copy of the acknowledgment and request should be provided to the contractor's performance and payment bond surety.

If the architect certifies, it should assume that the certification letter will be an exhibit at trial and craft the language accordingly. The letter should include the following key provisions:

- a. A quote or paraphrase of Quote of the waiver and release provision in the general conditions for decisions made by the Architect in "good faith";
- b. If the contractor refuses to meaningfully participate in the due diligence process, a reminder of the Architect's invitation and the contractor's refusal;
- c. A description of the investigation conducted by the Architect and the reasoning by which the Architect arrived at the conclusion that one or more of the bases for certification and termination requested by the Owner exist;
- d. A caveat that some of the Architect's opinions may be legal in nature, and that the Owner should consult with counsel before termi-

nating the contract and that certification does not require termination; and

- e. A reminder that the Owner may have a common law right to terminate the contract for cause and, if applicable, a contractual right to terminate the contract for convenience.

The architect should once again copy the payment and performance bond surety with the certification letter. While the owner's request and the architect's certification may not create a duty on the surety's part to perform under the bonds, they may persuade the surety to intervene and attempt to avoid the inevitable litigation that follows termination.

By employing these strategies, the architect can eliminate or reduce its exposure to wrongful certification claims by a contractor. If litigation ensues, by employing these strategies and asserting these defenses, the architect should be in a strong position to defend the contractor's claim for wrongful certification.¹⁷



- 1 AIA Commentary to A201-2007, <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia076835.pdf>
- 2 A101 - 2007 § 6.1.
- 3 *Id.*
- 4
- 5 *Ingrassia Construction Company, Inc. v. Vernon Township Bd. of Education*, 345 N.J. Super. 130, 137-138, 784 A.2d 73, 78 (N.J. Super. 2001). See also *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392 (1989) (Architect's determination of certification is prima facie correct, and the burden is upon the other parties to show fraud or mistake).
- 6 A201 - 2007 § 1.1.8.
- 7 A201 - 2007 § 14.2.1.
- 8 A201 - 2007 § 14.2.2.
- 9 A201 - 2007 § 4.2.12.
- 10 A201 - 2007 4.2.11 provides that "The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor."

Paragraph 4.2.12 provides:

Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents . . . When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and ***will not be liable for results of interpretations or decisions so rendered in good faith.*** [Emphasis supplied].

11 See *Witt v. La Gorce Country Club*, 2009 WL 1606437 (Fla. 3d DCA 2009). Cf. *Fla. Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985).

12 A201 - 2007 § 4.3.2, Decision of Architect. Claims . . . shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due.

A201 - 2007 § 4.4, Resolution of Claims and Disputes.

If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim.

13 See *Duval County v. Charleston Engineering & Contracting Co.*, 101 Fla. 341, 352 (Fla. 1931). See also, *Willcox v. Stephenson*, 30 Fla. 377, 11 So. 659 (Fla. 1892); *James A. Cummings, Inc. v. Young*, 589 So. 2d 950 (Fla. 3d DCA 1991).

14 *Id.*

15 Cite to Article 2 - Owner's representative.

16 Florida Statute § 768.28(9)(a) (2010).

CONSTRUCTION LAW

RECENT FLORIDA LAW AFFECTING DESIGN PROFESSIONALS



Witt v. LaGorce Country Club, --- So.3d ---, 2009 WL 1606437 (Fla. 3d DCA 2009): In a controversial opinion, the Third District Court of Appeal held that a limitation of liability clause in a geological firm's contract with the owner was unenforceable to limit the liability of the individual geologist providing the service, as a matter of public policy. The Court rejected the holding and rationale of the Eleventh Circuit Court of Appeals in Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316 (11th Cir. 1985) as outdated and not reflecting the current state of Florida law. As support, the Court relied heavily on the Florida Supreme Court's decision in Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999), in which the Court rejected the Economic Loss Rule as a defense to claims for economic damages caused by professional negligence. Witt and amicus curae have filed motions for rehearing and rehearing *en banc*, which are pending, and requested the appellate court to certify the issue to the Florida Supreme Court as one of great public importance.



Marseilles Condominium Owners Ass'n, Inc. v. Travelers Casualty and Surety Co. of American, --- So.3d ---, 2009 WL 3491016 (Fla. 1st DCA 2009): The First District Court of Appeals held that a condominium association was a "successor" to the developer, who had standing to sue the contractor's performance bond surety. The decision is discussed further below. However, the decision may be important to design professionals because it may allow them to bind condominium and homeowners' associations to exculpatory, waiver, and limitation of liability provisions in their contracts with the developers.



M&H Profit, Inc. v. City of Panama City, --- So.3d ---, 2009 WL 4756147 (Fla. 1st DCA 2009): In a matter of first impression, the Private Property Rights Protection Act, which enacted the ordinance imposing height restriction and additional setbacks on structures in general commercial zone, was limited to "as-applied" challenges, and did not provide for facial challenges based on the mere enactment of a new ordinance. The City's motion to dismiss was granted and subsequently affirmed by the First District Court of Appeals, after a property owner brought an action against the City under the Act, alleging it caused a significant loss of value in its property. The Court stated that the district-wide height and setback restrictions are normally considered to be enactments related to the general welfare of the community. It is important that architects and engineers be familiar with the Private Property Rights Act because they may be generally responsible to plan and design in accordance with zoning regulations, unless specifically excluded from the scope of their services. *Gravlich v. Frederic H. Berlowe*

& Associates, Inc., 338 So. 2d 1109 (Fla. 3d DCA 1978); *Krestow v. Wooster*, 360 So. 2d (Fla., 3d DCA 1978).



Jessla Construction Corp. v. Miami-Dade County School Board, 23 So. 3d 1247 (Fla. 3d DCA 2009): A construction company brought a wrongful termination action against the school board. The Third District Court of Appeals affirmed the circuit court's judgment in favor of school board, holding that the company failed to establish its wrongful termination claim. The general contract expressly authorized either the project architect or "its authorized representative" to certify that cause existed to terminate company's employment. The individual who signed the termination certification was an authorized representative of project architect, and the termination certification complied with the requirements of the contract.

MORTGAGE DEFICIENCY JUDGMENTS:

By Christopher Burrows and David Salazar

A BRIEF OVERVIEW



Amid the current economic crisis, foreclosure sales are running rampant, lawyers are howling at the moon on behalf of their clients, and the courts are seemingly befuddled with determining what is, in fact, “fair market value.” This opinion discusses, among other things, the standards the Florida courts must follow when granting or denying a Motion for Deficiency Judgment, the factors that Florida courts have taken into consideration in doing so, and the most effective manner, in our view, for a lender to position itself to obtain a favorable deficiency judgment.

DEFINITION, AUTHORITY, AND CALCULATION OF DEFICIENCY JUDGMENTS IN FORECLOSURE PROCEEDINGS

A deficiency judgment in a mortgage foreclosure suit is defined as a judgment for the balance of the indebtedness after applying the proceeds of a sale of the mortgaged property to such indebtedness.¹

The authority for a deficiency judgment in mortgage foreclosure rests on the rule that, where the court undertakes jurisdiction, it will administer full legal and equitable relief.² In other words, Florida courts look to principles of fairness when dealing with deficiency judgments.

The correct formula for calculating a deficiency judgment is the total debt, as established by the final judgment of foreclosure (which, in addition to the principal indebtedness, generally includes all interest and costs of the foreclosure proceedings), minus the **fair market value** of the foreclosed property, as determined by the court.³

The date at which the fair market value is determined for purposes of calculating a deficiency judgment is the date of the foreclosure sale.⁴

TRIAL COURT STANDARD FOR GRANT OR DENIAL OF A DEFICIENCY JUDGMENT

Florida Statutes Chapter 702, entitled “Foreclosure of Mortgages, [...]”, Section 702.06, entitled “Deficiency decree, [...]” codifies the common-law right of a mortgagee to recover a deficiency judgment in a real property foreclosure proceeding, and states as follows:

“In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be **within the sound judicial discretion of the court**, [...]” (emphasis added).

The entry of a deficiency judgment is, therefore, at the discretion of the court and the exercise of that discretion allows the court to inquire into the reasonable and fair market value of the property, the reasonableness of the price at the foreclosure sale, and other equitable considerations.⁵ The court must first determine the difference between the amount of the outstanding debt and the fair market value of the property and then ascertain whether any “equitable considerations” exist that warrant reduction of the actual deficiency.⁶

What is “Fair Market Value?”

Subsection 8 of Florida Statutes Section 45.031, which is the judicial sales procedure employed in carrying out mortgage foreclosure judgments, states that: “If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.”

The amount of the deficiency therefore is not necessarily the difference between the judicial sale price and the amount of the judgment. The mortgagee has the burden of setting forth, typically in a hearing before the court, evidence that the fair market value of the property was less than the total debt determined by the foreclosure judgment. The mortgagor, in turn, may offer evidence to refute the mortgagee’s contention. For purposes of determining a right to a deficiency judgment, fair market value of property may be deemed to be that sum which, considering all circumstances, would be arrived at by fair negotiations between an owner willing to sell and a purchaser willing to buy, neither being under any pressure.⁷ Such a definition leaves much room for debate between the parties as to what is fair market value in each particular case.

Some of the more common factors considered by Florida courts in determining fair market value in deficiency proceedings include the price paid at the foreclosure sale, a subsequent sales price for the property, and expert opinion testimony. In a proceeding to obtain a deficiency judgment, a trial court has the power to act upon the assumption that the foreclosure sale price reflects the fair market value of the subject property, in the absence of any other evidence submitted by the defendant as to fair market value of the property.⁸ In *Merrill v. Nuzum*, 470 So. 2d 128 (1985), the mortgagor was entitled in the deficiency proceeding to challenge the mortgagee’s contention that the subsequent sale of the foreclosed property represented the fair market value of the property at the time of the foreclosure by showing, among



other things, that the subsequent sale was not an arm's length transaction or that, even if it was, events between the time of the foreclosure sale and subsequent sale thereafter altered the value of the property. In *Federal Deposit Ins. Corp. v. Morley*, C.A.11 (Fla. 1990) 915 F. 2d 1517, the appellate court acknowledged the lower court's discretion in weighing expert testimony and utilizing a wholesale bulk-sale standard of valuation rather than an individual retail sales standard in determining the amount of a deficiency judgment in a foreclosure action.

APPELLATE COURT STANDARD OF REVIEW IN THE GRANT OR DENIAL OF DEFICIENCY JUDGMENTS

Additionally, and highly important from a lender's perspective, if the court decides to deny or reduce a deficiency judgment, the court must state with particularity the equitable principles it relied upon.⁹ This is because, generally, granting a deficiency judgment is the rule rather than the exception, unless there are facts and circumstances creating equitable considerations upon which a court should deny the deficiency judgment in the exercise of its discretion.¹⁰

While the grant or denial of a deficiency judgment is a matter within the sound judicial discretion of the trial court, such discretion is not absolute and unbridled, and

where the exercise of such discretion results in a denial of a deficiency judgment, it must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such actions.¹¹ As another court has put it: the discretion of the court as to entry of a deficiency judgment must be exercised within limits of proof and evidence and should not be arbitrary.¹²

A trial court's refusal to grant a deficiency judgment in a mortgage foreclosure suit will be reversed by a reviewing appellate court unless the record under review, on appeal, discloses the facts and circumstances creating equitable considerations upon which the trial court could properly deny a deficiency judgment in its discretion.¹³ However, a denial of a deficiency judgment in a foreclosure proceeding will not be disturbed on appeal absent a clear abuse of discretion, where there are facts and circumstances in the record under review that create equitable considerations supporting the trial court's denial.¹⁴

EXEMPLARY CASES OF ABUSE OF DISCRETION IN DENIAL OF DEFICIENCY JUDGMENT

Some noteworthy examples of cases where appellate courts have found an abuse of discretion in the trial court's denial of a deficiency judgment include the following:

- *Lloyd v. Cannon*, 399 So. 2d 1095 (1981), in which the reviewing court found that, where the mortgagor was indebted to the mortgagee in the amount of \$16,790, and the foreclosure sale of the mortgaged property to a third person produced the sum of \$9,000, leaving a deficiency of \$7,790, the trial court's finding that the property was worth at the time of the foreclosure sale the same amount that it was worth at the time the mortgagee sold it to the mortgagor, and that the mortgagee apparently recovered at least the amount of her cost basis in the property, failed to show equitable considerations constituting sound and sufficient reasons for denying the mortgagee's motion for deficiency and depriving her of the benefit of her contract; thus, the trial court abused its discretion in denying the motion for deficiency judgment.
- *Steketee v. Balance Homes, Inc.*, 376 So. 2d 873 (1979), in which the appellate court found that the trial court's denial of the petition for judgment against the mortgagors for a deficiency on account of the court's perception of the mortgagee's dilatory prosecution of the foreclosure action, constituted an abuse of discretion even though the case had been dormant for two and one-half years, because the appeals court determined that the record sufficiently evidenced that the mortgagee had made serious and substantial efforts to pursue its right to a deficiency against the mortgagors and otherwise mitigate its loss in a reasonable manner.
- *Barnard v. First Nat. Bank of Okaloosa County*, 482 So. 2d 534 (1986), in which the appellate court found that the deficiency judgment rendered in favor of the mortgagee, following foreclosure of seven residential lots securing a loan, was an abuse of discretion, where the fair market value of the lots at the time of the foreclosure sale was substantially in excess of the debt owed to the mortgagee, the mortgagee and the foreclosure sale purchaser were one and the same, the mortgagee



was the only bidder at the foreclosure sale, and the bid price of the mortgagee was more an indication of a “quick sale” value than of the lots’ true fair market value.

There are also many examples of cases in which the appellate court found that a denial of a deficiency judgment was not an abuse of the trial court’s discretion, including:

- *Wilson v. Adams & Fusselle, Inc.*, 467 So. 2d 345 (1985), in which the appellate court found that the act of the trial court in declining to enter a deficiency judgment sought by mortgagee after it purchased the mortgaged property at the foreclosure sale on a bid of \$100 was not an abuse of discretion in that experts for mortgagor and mortgagee alike testified as to the market value of the property in amounts varying from \$14,400 to \$50,800 and no clear showing was made that the value of the property was less than the mortgage debt of \$20,500.
- *Thomas v. Premier Capital, Inc.*, 906 So.2d 1139 (2005), in which the appellate court found that the trial court did not abuse its discretion in a foreclosure action by entering deficiency judgment of \$45,363.39 against mortgagors following foreclosure sale of the property, as the trial court considered the testimony of the mortgagee’s appraiser, appraiser’s report, and testimony of the mortgagor who was not a real estate agent, broker, or appraiser, and found mortgagee’s evidence more persuasive as to fair market value of the property.

- *Realty Mortgage Co. v. Moore*, 85 So. 155 (1920), in which the appellate court determined that in a suit for a deficiency against a mortgagor who had conveyed the property subject to a mortgage, and where it appeared that the property was sufficient to pay the debt on its maturity, and where the mortgagee had granted extensions without the mortgagor’s knowledge, to which he protested, pointing out the danger of depreciation in the value of the property, the mortgagee could not obtain a deficiency judgment against the mortgagor after the property had acutely depreciated due to a generalized housing market decline.

ANALYSIS & CONCLUSION

Deficiency judgments in foreclosure proceedings are a judicial means to accord full and fair relief to the mortgagee in such circumstances and consideration should be given them as a significant stage of the foreclosure process. The determination of fair market value of the property at the time of the foreclosure sale is, due to the nature of land valuation, necessarily conducted on a case by case basis. However, there are some predictable factors that will weigh heavily in the court’s judgment.

Since the mortgagee bears the burden of proof in a deficiency proceeding, it is advisable in all cases, as a matter of course, to obtain a professional appraisal of the subject property as of the foreclosure sale date to submit to the court in evidence of the claimed deficiency amount and to have the appraiser available in the event a hearing on the matter is held. Because the deficiency judgment is at the trial court’s discretion, they are not required to conduct an evidentiary hearing on

the matter and familiarity with the presiding judge in a foreclosure matter will speak much as to how the deficiency process may proceed. However, the judge will always consider valuation evidence presented by the parties and therefore proof of third party offers to purchase the subject property received by the mortgagee following the foreclosure sale will also be helpful, probative, and admissible as to what the fair market value of the property is for purposes of a deficiency judgment. It is, therefore, recommended that all such offers be properly documented and provided to counsel for presentation to the court.

With proper preparation and precaution, deficiency proceedings can be fairly straightforward and relatively short and provide the mortgagee with an opportunity to mitigate its losses to the greatest extent possible.



1 *Commercial Bank v. First Nat. Bank*, 87 So. 315 (1921); *Grace v. Hendricks*, 140 So. 790 (1932).

2 *Younghusband v. Ft. Pierce Bank & Trust Co.*, 130 So. 725 (1930).

3 *Kahn v. Simkins Industries, Inc.*, 687 So. 2d 16, 18 (Fla. 3d DCA 1996); *Residential Funding Corp. v. Barrera*, 762 So. 2d 948, 949 (Fla. 3d DCA 2000).

4 *Estepa v. Jordan*, 678 So. 2d 876, 878 (Fla. 5th DCA 1996); *Community Bank of Homestead v. Valois*, 570 So. 2d 300, 301 n.1 (Fla. 3d DCA 1990).

5 *FDIC v. Hy Kom Dev. Co.*, 603 So. 2d 59 (Fla. 2d DCA 1992).

6 *Federal Deposit Ins. Corp. v. Morley*, C.A.11 (Fla. 1990) 915 F. 2d 1517.

7 *Flagship Bank of Orlando v. Bryan*, 384 So. 2d 1323 (1980).

8 *Fara Mfg. Co., Inc. v. First Federal Sav. And Loan Ass’n of Miami*, 366 So. 2d 164 (1979).

9 *Chidnese v. McCollem*, 696 So. 2d 879 (Fla. 4th DCA 1997).

10 *S/D Enterprises, Inc. v. Chase Manhattan Bank*, 374 So. 2d 1121 (1979).

11 *Lloyd v. Cannon*, 399 So. 2d 1095 (1981).

12 *Horne v. Smith*, 368 So. 2d 392 (1979).

13 *Nathanson v. Weston*, 163 So. 2d 41 (1964).

14 *FDIC v. Hy Kom Dev. Co.*, 603 So. 2d 59 (Fla. 2d DCA 1992).

REGULATING THE REGULATORY SCHEME: FLORIDA'S LEGISLATIVE CLARIFICATION OF THE ROLE OF SURPLUS LINES CARRIERS

By YueLing Lee

Surplus lines insurers, also known as “non-admitted” carriers, have long served Florida consumers by providing coverage for unique risks that Florida-licensed (“admitted”) insurers may shy away from. In order to effectuate the placement of these risks, surplus lines carriers, who often are headquartered in other states, traditionally were exempt from much of the regulatory structure applicable to admitted insurers. For many years, it was commonly understood that the practices of surplus lines carriers were governed by whereas licenses carriers were subject to the more detailed requirements of Florida Statutes, Chapter 627. For example, under Chapter 627, property insurers licensed in Florida are required to provide coverage or sinkholes, a natural phenomenon not commonly found in other states; requiring surplus lines carriers to write this insurance may dissuade them from doing business in Florida.

However, the traditional view, and the stability of the surplus lines market, were challenged by a pair of 2008 decisions holding that certain portions of 627 did apply to surplus lines policies. For example, in *Essex Insurance v. Zota*, 985 So.2d 1036 (Fla. 2008), the court held that surplus lines insurers must comply with all of the insurance code applicable to admitted carrier with the exception of Part I only.¹ In *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, 2008 WL 3823898 (11th Cir. 2008), the court held that the portion of Florida’s insurance code requiring filing and approval of insurance forms also applied to surplus lines insurance. These cases opened the door to a slew of lawsuits for sinkhole losses against surplus lines insurers. Plaintiffs also saw the valued policy law, requiring that an insurer tender



the face value of the policy upon a showing of a total fire loss, the prompt payment requirements of Fla. Stat. § 627.70101(5)(a) and required availability of replacement cost and ordinance and law coverage as fair game for lawsuits, after the decisions in *Essex Insurance* and *CNL Hotels*.

The Florida Legislature responded to the concerns of businesses and surplus lines associations by enacting HB 853 and ultimately promulgating new statutes. The ambiguities caused by the case law were removed when Fla. Stat. § 626.913 was enacted on June 11, 2009. At paragraph 4, this new

statute provides “except as may be specifically stated to apply to surplus lines insurers, the provisions of chapter 627 do not apply to surplus lines insurance authorized under §§ 626.913-626.937, the Surplus Lines Law.” The new law also contained a retroactivity provision applying the new language from October 1, 1988 onward “except with respect to lawsuits that are filed on or before May 15, 2009.” This change resulted in a race to the courthouse by surplus lines insureds to file lawsuits regarding sinkhole and other claims.

Other notable changes were also made to the law. The law was changed to require additional language with respect to policies issued after October 1, 2009. For example, Fla. Stat § 626.924 requires a notice that surplus lines policy rates and forms are not approved by any Florida regulatory agency, and § 626.9374 requires language regarding deductibles and co-pays for hurricane or wind losses.

In conclusion, although the Legislature made its intent clear, the above-noted changes in the law, including the new policy language requirements, will have to be fully tested and resolved by the courts before the contours of the duties of surplus lines carriers are fully defined.



¹ Fla. Stat. § 627.021(2)(e), found in “Part I: Rates and Rating Organizations” of the insurance code provides that “this chapter does not apply to... surplus lines insurance placed under the provisions of ss. 626.913-0626.937.” As such, surplus lines insurers were exempted from the requirement that their rates be filed with, and approved by, the Office of Insurance Regulation.

RIGHT TO ATTORNEYS' FEES IN FEDERAL DIVERSITY ACTIONS IN FLORIDA: FACT OR FICTION?

By Steven Safra



It is not well-known that Florida's offer of judgment statute can, in some instances, apply with full force in federal court so as to permit for the recovery of attorneys' fees.

Rule 68 of the Federal Rules of Civil Procedure (commonly referred to as the federal offer of judgment rule) limits defendants to the recovery. Costs incurred from the date of filing of the offer.¹ On the other hand, in Florida state courts, litigants use Rule 1.442 of the Florida Rules of Civil Procedure and §768.79, Fla. Stat. (the Florida state court offer of judgment statute) in civil actions for damages as a means of compelling reasonable settlements and recovering both attorneys' fees and costs.² Together, they are a timely and cost-effective means of dispute resolution. What most attorneys and insurance industry representatives are not aware of is that *both* plaintiffs and defendants may recover attorneys' fees and costs under section 768.79 and Rule 1.442 in a federal court

sitting in diversity in Florida deciding only questions of state law as well.³ Parties should therefore proceed cautiously and defensively.

Under the *Erie* doctrine, a federal court sitting in diversity applies federal procedural law and state substantive law.⁴ Unless there is a major countervailing federal policy that trumps the state practice, if ignoring the state law would lead to forum shopping by plaintiffs and unequal administration of the laws, the court must honor state common law when deciding state law issues.⁵

For *Erie* purposes, Florida law considers section 768.79 to be substantive law.⁶ Principally, section 768.79 is fully applicable in 11th circuit diversity actions. The 11th Circuit has held that the Florida state court offer of judgment statute, section 768.79, which applies in civil actions for damages in "courts of this state," applies to actions filed in federal courts located in Florida since such courts are "courts in Florida" that adjudicate

claims under Florida law and are a part of the judicial system in this state.⁷ Therefore, litigants and insurance industry representatives are not limited by Rule 68—which, as previously stated, limits recovery of costs only to defendants—and can recover attorneys' fees and costs under section 768.79.

In Florida state courts, however, a party often times may not collect attorneys' fees and costs under section 768.79 because the offer fails to comply with Rule 1.442.⁸ More than likely, there is a deficiency or ambiguity that exists on the face of the offer under Rule 1.442 that prevents enforcement. As a result, when seeking attorneys' fees and costs in a federal diversity action, litigants should propound an offer of judgment in federal diversity actions on the opposing party pursuant to both section 768.79 and Rule 1.442.

Under *Erie*, the use of Florida Rule of Civil Procedure 1.442 in federal court



presents procedural conflict. Rule 1.442 is a state rule of procedure and a federal court sitting in diversity applies only federal procedural law. One must ask then should an attorney or insurance industry representative err on the side of caution and not propound an offer of judgment on an opposing party in a federal diversity action pursuant to Rule 1.442, a state rule of civil procedure. The answer is NO! Courts in the 11th circuit view Rule 1.442 as **substantive** law for *Erie* purposes.⁹ Attorneys and insurance industry representatives should propound offers of judgment pursuant to both section 768.79 and Rule 1.442 to avoid substantive issues with compliance and ensure the offer of judgment is not deficient or ambiguous on its face. To do otherwise would jeopardize one's ability to recover fees.

With any right of recovery there are advantages and disadvantages. Propounding an offer of judgment on an opposing party may trigger the opposing party to do the same. Invoking section 768.79 and Rule 1.442, or rejecting an offer or demand under the same, is really a business decision, weighing the possibility of receiving a reciprocal offer or demand from the opposing party against the prospects of protecting oneself from an overvalued or undervalued claim.

Summarily, attorneys and insurance

industry representatives in federal diversity actions should proceed cautiously and defensively. With the use of section 768.79 and Rule 1.442 in federal diversity actions, **all** litigants can now recover attorneys' fees in addition to costs.¹⁰ This presents both a benefit and detriment. Section 768.79 is also broader, addressing offers of judgment, demands for judgment, and offers of settlement, while Fed. R. Civ. P. 68 applies only to offers of judgment.¹¹ In federal diversity actions, litigants face exposure to potentially large adverse claims where most attorneys and insurance industry representatives do not otherwise recognize liability. Attorneys and insurance industry representatives should make a proper valuation of the offer of judgment, demand for judgment, or offer of settlement, and determine the reasonableness of the offer or demand prior to acceptance or rejection. The same should be done prior to propounding an offer of judgment on an opposing party as well.



¹ See Fed Rules Civ. Proc. Rule 68, 28 U.S.C.A.

² See §768.79, Fla. Stat. (2001).

³ Courts have drawn a distinction between those claims in which the court's basis for subject

matter jurisdiction is a federal question and diversity in applying Rule 1.442 and section 768.79 in federal court in Florida. To avoid issues outside the scope of this article, this article is limited to those instances where a federal court sits in diversity and is faced with state substantive issues as these are the circumstances where Rule 1.442 and section 768.79 apply in federal court in Florida.

⁴ See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

⁵ See *supra* Note 4.

⁶ See *Jones v. United Space Alliance, L.L.C.*, 494 F.3d 1306 (11th Cir. 2007) (citing *McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir. 2002), modified on other grounds, 311 F.3d 1077 (11th Cir. 2002)); *Cambridge Mut. Fire Ins. Co. v. City of Claxton*, 720 F.2d 1230, 1232 (11th Cir. 1983) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

⁷ *Menchise v. Akerman Senterfitt*, 532 F.3d 1146, 1150 (11th Cir. 2008).

⁸ See, e.g., *McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir. 2002), modified on other grounds, 311 F.3d 1077 (11th Cir. 2002); Compare §768.79, Fla. Stat., with Fed. R. Civ. P. 68.

⁹ See *Morris v. Arizona Beverage Company*, 2005 WL 5544961 (S.D. Fla. 2005) (citing, e.g., *McMahan*, 311 F.3d at 1082-83).

¹⁰ *Id.*

¹¹ Compare §768.79, Fla. Stat., with Fed. R. Civ. P. 68; See also *Menchise* 532 F.3d at 1152.



COLE, SCOTT & KISSANE'S CONSTRUCTION LAW DIVISION

The law firm of Cole, Scott & Kissane, P.A. has eight offices strategically located throughout the State of Florida. This allows CSK to effectively and cost efficiently cover the entire State of Florida thereby reducing travel time and expense when handling the claims within the state. We now have endeavored to ensure that we have dedicated and designated attorneys and technical consultants available in each of our strategically placed offices qualified to handle the numerous types of cases under the umbrella of Construction Law. This expertise coupled with our firm's history and reputation of success in the trial arena results in a high likelihood of success in either early reasonable resolution or a final disposition in favor of the clients with the total payouts after settlement, expert witness fees, and attorney's fees being at the lowest possible level due to the nature and placement of the most qualified attorneys and resources.

A short bio of each of the attorneys and technical consultant dedicated to the Construction Law Division can be found below. These professionals, working in conjunction with each other and utilizing the resources available in personnel and technology in the Miami headquarters, facilitate an effective and economically efficient structure for handling these often large and highly complex and technical cases, requiring specialized technical analysis, document management and specialized equipment. In addition to having attorneys in each

office qualified to handle all aspects of construction litigation, we have specialized personnel and technical support on our Miami headquarters available to all offices throughout the state. We have an In-House Construction Consultant, Robert Knapp, who holds numerous construction and technical certifications. This technical support allows us to offer unique services in the handling of Construction Law matters, for example:

Our consultant can review initial construction documents and conduct an expert review quickly and substantively for a fraction of the cost of an expert as his billing rates are less than an attorney or retained expert witness.

Our consultant can conduct a site inspection at the earliest possible date utilizing a professional with construction and technical expertise in order to promptly evaluate the case expertly and thoroughly to determine if the matter should be resolved or defended, and if the latter, to assist from a construction and/or technical standpoint with the initial defense strategy. This can be done more quickly and economically than if an expert witness were retained.

Our consultant can arrange for an immediate meeting with the clients, who are normally themselves construction and/or technical professionals. This gives our firm additional credibility that our consultant "speaks the same language" as the clients which often results in heightened levels of trust, communication and comfort,

and thus a better chance of rapport and cooperation leading to an ultimate successful defense or resolution of the case.

Because we have such a consultants CSK provides more efficient and economical interaction with expert witnesses. Our consultant is able to communicate with the expert witnesses more efficiently resulting in a streamlined and issue specific assignment with less cost and with less time spent on an overall or general review by the expert looking for the relative issues of the case. Our consultant's expertise also allows for a more educated scope of work and scrutiny of expert fees when it is determined that an expert is necessary.

CSK performs ongoing cross checks and interaction amongst our professionals so that every possible defense and strategy may be effectively presented. The organization fosters communication and peer review as the dedicated attorneys work with each other with our In-House Consultant leading to a greater likelihood that all defenses and strategies are explored.

Finally, the technical availability of high speed scanning and search software, blueprint printing capability, time line software, and resource data from software and hard copy libraries result in not having to reinvent the wheel on each case allowing for most cost effective and comprehensive handling of cases.

CONSTRUCTION DIVISION GROUP



George Truitt (Miami), George R. Truitt was admitted to the practice in 1992, and is A-V Rated by Martindale Hubbell. Since his admission, his practice has consisted primarily of construction litigation, including representation of design professionals in professional liability claims, developers, contractors, and subcontractors in construction defect, contract, and construction lien enforcement claims, and payment and performance bond sureties in bond and subrogation claims.



Joe Wolsztyniak (Ft. Lauderdale), Over the course of his career, Mr. Wolsztyniak has tried cases in construction litigation as well as governmental and environmental matters. He has handled complex litigation designated cases in the areas of construction transactions and defects, mold infestation, and commercial litigation. These included the Baptist Medical Arts Building litigation in Miami, the Royal Marco litigation in Collier County, and the Glades Plaza mold cases in Palm Beach County.



Barry Postman (West Palm Beach) is a trial attorney, who provides counseling and defense in the areas of construction defects, professional malpractice, condominium and homeowners association matters, architects and engineers, land use litigation and real property disputes. Mr. Postman has also been a repeat speaker for the National Business Institute at seminars since 2001 wherein he presented relative to various areas of law, including Damages in Florida Civil Trial Practice; Advanced Issues in Florida Employment Law; The Practitioner's Guide to Litigating Elder Abuse Claims in Florida; Admissibility of Evidence and Expert Testimony in Florida; Handling Medical Negligence Cases in Florida; and Minimizing and Managing Labor and Employment Issues in the School Setting.



Christopher Burrows (Miami), an associate in the firm's Miami office, is a graduate of the University of Florida and received his Juris Doctor from Stetson University in 2001. He practices in all phases of civil litigation in the state and federal courts with a focus on construction defects and architects and engineers defense. Mr. Burrows developed an expertise in construction law, including defect claims litigation, through several years practice as regional outside counsel for one of the nation's preeminent homebuilders.



Robert Knapp (Miami)

Certifications:

- Mold Inspector
- Mold Remediation Contractor
- IAQA Microbial Investigator

Memberships:

- ASCE - Construction Institute - #957474
- ASCE - Architectural Institute - #957474
- ASCE - Structural Engineering Institute - #957474
- ASCE - Associate Membership - #100579
- American Institute of Architects
- Construction Association of South Florida
- Association of Certified Fraud Examiners (ACEF) - #571168
- International Code Council - #8045501
- Engineers Without Borders - USA
- Building Officials Association of Florida
- National Society of Professional Insurance Investigators.

Over 17 years of construction and paralegal experience, specializing in construction defects, AIA contracts, OSHA, payment and performance bonds, permitting and inspection processes, sub-trades and architects and engineers litigation. Bob has managed hundreds of construction matters through resolution. Currently, Bob is the In-House Construction Consultant and manages the construction unit on a state wide basis for eight (8) offices.

Bob has managed complex construction matters through all phases of litigation. He has also prepared dozens of cases for trial and attended these trials as the construction paralegal in charge of all pertinent trial material. Bob has specifically developed an expertise in many areas of the construction industry, including, but not limited to, construction defects litigation, architects and engineers litigation, transactional work. He has extensive knowledge of the Florida Building Code, OSHA Regulations, AIA documents and the applicable statutes regarding the construction industry.



Aram P. Megerian (Tampa), a partner with the firm, vigorously represents his clients in the defense of personal injury claims and liability actions involving professionals such as real estate brokers, commercial banking and financial litigation and insurance agents. Additionally, Mr. Megerian offers first party coverage defense and opinion representation for insurance companies, including windstorm insurance claims, among other specialties. Mr. Megerian is an AV rated attorney. He has also been accepted as a member of the Tampa Bay Inn of Court in 2004.

CONSTRUCTION DIVISION GROUP



David Salazar (Miami), earned a Bachelor of Science degree from the University of Florida, cum laude, and a Juris Doctor degree from Stetson University College of Law, where he was the President the Legal Honor's Society and was on the Dean's List in all but one semester. Since graduating from law school, David has focused his practice on, among other things, construction litigation and other complex commercial and civil litigation matters. David is admitted to practice before the United States Southern District Court of Florida, the Supreme Court of Florida, and all other State courts within the State of Florida.



Rochelle Nunez (Miami), Rochelle Nunez is an associate in the Miami office, and concentrates her practice on construction litigation. Ms. Nunez received a Bachelor of Arts in English Literature from the University of Miami. She received her Juris Doctor and LL.M. in International Taxation from St. Thomas University School of Law. Throughout her law school career, Ms. Nunez has volunteered her time to helping others in the community. She has served as a Volunteer Income Tax Assistant, organized several projects with Habitat for Humanity, interned with Pax Romana at the United Nations Headquarters in New York, and traveled to Nairobi, Kenya to conduct extensive research on finance for development. Ms. Nunez was distinguished for her leadership and community service in 2008, receiving a scholarship award from the Florida Association of Women Lawyers. Rochelle is also an active member of the National Association of Women in Construction and the Latin Builders Association.



Robert Swift (Orlando), handles construction defect cases. He received his J.D., cum laude, from the Western New England College School of Law. Mr. Swift was member of the school's Law Review. Mr. Swift received various academic awards including the Outstanding Scholastic Achievement award. Mr. Swift was also awarded letters of distinction for his excellence in both Torts and Insurance. Mr. Swift is also admitted to practice law in the State of Connecticut.



Genevieve Rupelli (Ft. Lauderdale), mainly practices in the area of premises liability and construction defects. Ms. Rupelli received her Juris Doctor from Nova Southeastern University where she graduated with a concentration in International.



Joseph Kissane is a partner in the Jacksonville office. He handles an active litigation practice in the areas of fidelity and surety litigation, insurance bad faith, insurance coverage, trucking industry liability, class action, professional malpractice, commercial banking and financial litigation, personal injury litigation and fraud claims. In 2006 and 2009 Mr. Kissane was named as a "Super Lawyer" in the area of Insurance Coverage by Florida Super Lawyers magazine. He holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability. In 2005, Mr. Kissane was acknowledged by Florida Trend Magazine in its "Legal Elite" edition as one of the top insurance lawyers in the State of Florida.



Daniel Shapiro (Tampa), Before joining CSK, Mr. Shapiro served as a project manager for numerous projects throughout Florida. He litigates construction and performance bonds, Chapter 713 mechanic's liens, and AIA contract disputes, and he was voted one of Florida's Top Civil and Commercial litigators by Florida Trend Magazine. He is an AV-Rated attorney with extensive experience in construction defects and architects and engineers litigation, and he has litigated such cases to verdict.



Daniel Kissane (Jacksonville), Mr. Kissane has extensive experience in construction defects and architects and engineers litigation. He litigates construction and performance bonds, Chapter 713 mechanic's liens, and AIA contract disputes. He is a Prime Member of the Association of Defense Trial Attorneys, is an author of various articles and guides on civil litigation, and was voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine.



Sanjo Shatley (Jacksonville), Mr. Shatley has extensive experience in construction defects, Chapter 713 Mechanic's liens, and architects and engineers litigation. He has also provided consultation on the execution and modification of AIA contracts. He has represented developers, general contractors, structural engineers, professional engineers, architects, surveyors, roofers, HVAC contractors, waterproofing contractors, and concrete-forming companies.

CONSTRUCTION DIVISION GROUP



Robert D. Rightmyer (Orlando), practices in the following areas: professional malpractice defense (including the representation surveyors and real estate brokers), complex commercial litigation, fraud litigation



Robert Dehne (Orlando) has extensive experience in construction defects, professional negligence, and property litigation. He has represented general contractors, engineers, surveyors, and other related professionals.



Sally Slaybaugh (Tampa), earned a Bachelor of Arts in History at Florida State University, and received her Juris Doctor from The University of Florida College of Law and presently practices in general construction law among other areas.



Joshua D. Frachtman (West Palm Beach) is an associate in the firm's West Palm Beach office. He practices in the area of construction law, condominium and community association law, insurance coverage, civil rights, and general civil liability.



MEET ONE OF OUR CONSTRUCTION ATTORNEYS



GEORGE R. TRUITT

George R. Truitt was admitted to the practice in 1992, and is A-V Rated by Martindale Hubbell. Since his admission, his practice has consisted primarily of construction litigation, including representation of design professionals in professional liability claims, developers, contractors, and subcontractors in construction defect, contract, and construction lien enforcement claims, and payment and performance bond sureties in bond and subrogation claims.

He obtained his Bachelors of Science from Rollins College, cum laude, in 1988 and his Juris Doctor from Nova Southeastern University Shepard Broad Law School in 1992.

He is admitted to The Florida Bar and the United States District Courts for the Southern and Middle Districts of Florida, George is a third-generation Floridian born in Jacksonville, Florida.

SUCCESS STORIES



John Penton recently obtained a very favorable appellate opinion from the United States Court of Appeals for the Eleventh Circuit. At trial, District Court for the Middle District of Florida ruled that the client's prior attorneys committed malpractice in a real estate action. John persuaded the Eleventh Circuit to reverse, finding that "the District Court's judgment unquestionably invalidated the state court's final judgment granting foreclosure and therefore offended the Rooker-Feldman doctrine." The lawyers and their law firm were facing a potential \$800,000 professional negligence case for their handling of the case prior to the appeal.

Mike Brand and Rhonda Beesing tried a case in Hillsborough County in which the plaintiff, a dialysis patient, was struck on the head by a falling fire extinguisher while receiving his dialysis treatment. The fire extinguisher had also fallen off the wall only two days earlier and had been placed back in the same spot. He claimed that, as a result, he was required to undergo an angioplasty to his subclavian artery after it was externally compressed by the extinguisher, among other injuries. After two full days of trial, the plaintiff accepted a nominal amount (less than 20% of the medical bills alone) to settle the case.

Valerie Jackson, Ben Esco, and Ivan Tara-suk obtained a complete defense verdict in a first property insurance matter. The case involved a fire loss in which the Plaintiffs alleged that the insurer undervalued their claim and needed to pay for substantial additional renovations, including a replacement air conditioning unit, duct work, replacement of contiguous floor tiles, tens of thousands of dollars of cleaning and replacement of contents, and substantial attorney's fees. The plaintiffs argued that the Claim Settlement Practices Statute required that the carrier replace the tile in the entire home even though only one tile

was damaged during the loss. The jury rejected this argument.

Scott Jackman and Abby Moeddel obtained a complete defense verdict in a real estate malpractice action in Federal Court. The Plaintiff alleged our client's malpractice cost them the sale of their home and requested over \$400,000.00 from the jury.

James Sparkman received a defense verdict after a three day jury trial here in Broward County. This was a construction defect case in which we represented the roofer who put a foam surface on an existing roof. A portion of the roof blew off in Hurricane Frances in Sept of 2004. The plaintiff's suffered water damage in all 9 units of the condo and sued for breach of warranty, contract and negligence. Plaintiff asked for \$1.2 million in damages for cost of repair of the units, interest on the building loan, loss of rents, damage to personal property. The jury found for the defendant on all three counts and the plaintiff received a zero verdict. We had filed proposal for settlement for \$150,000.00.

Dan Shapiro and Bryan Rotella received a complete defense verdict in a general liability case. The Plaintiff alleged that he fractured his femur as a result of the negligence of the landlord in leaving a pool table to fall on him, resulting in joint pain and diagnosis of juvenile arthritis. In defense of these allegations, Dan and Bryan argued that the tenants specifically requested that the pool table be left for their use and did not reference removal of the pool table in the move-in and lease documents.

John Penton obtained an affirmance in a motor vehicle negligence appeal. The Appellant, who allegedly suffered a seizure disorder following our

client's truck plowing into his vehicle, asserted that the trial judge had erred in disallowing testimony of two additional seizures that allegedly occurred during the trial of his case. One of these new seizures resulted in a trip to the hospital, while no previous seizures had resulted in any trip to the hospital. Michael Brand had successfully argued at trial, and John reasserted on appeal, that the trucking company defendant would be prejudiced by admission of such evidence due to the fact that no discovery could be conducted and the hospitalization was being offered to show a more serious condition that the injuries presented throughout the case. The Third District Court of Appeals affirmed the decision of the trial judge disallowing such evidence.

John Penton obtained an affirmance in the appeal of an attorney's fee award in a condominium association case. The unit owner's counsel, who failed to keep any contemporaneous time records, had appealed the attorney's fee award as to the hourly rate, hours awarded, and fee multiplier.

Paula Phillips recently obtained summary judgment on behalf of a condominium association in a slander of title case for filing a lien on his property when he became delinquent on his maintenance fees. We moved for summary judgment on the basis that 1) plaintiff could not prove that the lien was false, 2) plaintiff never tried to obtain financing during the pendency of the lien and, therefore, could not prove causation, and 3) plaintiff could not prove damages, because he could not show the difference between the rates had he been able to refinance and the rates he is currently paying on his ARM loan. The Court was persuaded that the failure to attempt the refinancing rendered the causation and damages speculative and granted summary final judgment in favor of all defendants

Robert Swift and Jennifer Reynolds obtained a defense verdict in an auto accident involving serious back injuries as a result of a motorcycle striking a car.

Kip Lassner with the help of **Kinna Rus-somanno and Michael Beane**, secured a defense victory in a heavily litigated statute of limitations claim before the Fort Lauderdale Workers' Compensation Department. The Claimant's counsel, at the time of the trial, accused the Employer/Carrier of fraud and misrepresentation. Kip was able to quash that attempt and he obtained a complete defense verdict for the Employer/Carrier.