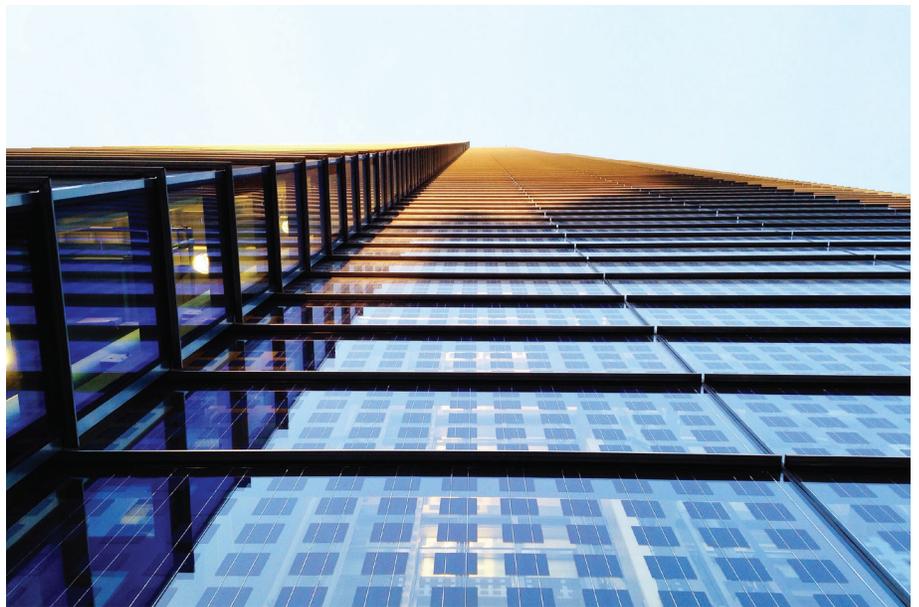


# Real Property and Business Law Update - Vol. VIII

January - December 2015



 **McGLINCHEY STAFFORD**  
Where Business & Law Intersect

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 1**  
**January 3, 2015**  
**Manuel Farach**

**Doty v. Bryson**, --- So.3d ----, 2015 WL 24112 (Fla. 5th DCA 2015).

A promissory note is a form of written agreement, and a court may not look beyond its terms to discern the intent of the parties if it is clear and unambiguous.

**Tropic Ocean Airways, Inc. v. Floyd**, --- Fed.Appx. ----, 2014 WL 7373625 (11th Cir. 2014).

A trademark is descriptive and not suggestive if it combines a geographic term and a common industry term as doing so does not “require[] a leap of the imagination to get from the mark to the product.”

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 2**  
**January 10, 2015**  
**Manuel Farach**

**Federated Nat. Ins. Co. v. Restoration 1 of South Florida, LLC**, --- So.3d ----, 2015 WL 71653 (Fla. 4th DCA 2015).

An action for declaratory judgment must be within the monetary jurisdiction of the court in which it is filed, i.e., over \$15,000 in controversy if filed in circuit court.

**Kelly v. BankUnited**, FSB, --- So.3d ----, 2015 WL 71694 (Fla. 4th DCA 2015).

Mortgagor is entitled to an award of attorneys' fees as the prevailing party in a foreclosure action if suit is voluntarily dismissed as part of a voluntary short sale.

**AMS Staff Leasing, Inc. v. Taylor**, --- So.3d ----, 2015 WL 71705 (Fla. 4th DCA 2015).

Threatened loss of continued employment and improper influence by a third party do not constitute "duress" such to invalidate an employment agreement.

**Nucci v. Target Corp.**, --- So.3d ----, 2015 WL 71726 (Fla. 4th DCA 2015).

The function of social networking sites is to share personal information, thus information posted on social networking sites are neither privileged nor protected by any right of privacy.

**Southern Comfort Grill, Inc. v. Hanks Const., LLC**, --- So.3d ----, 2015 WL 71753 (Fla. 4th DCA 2015).

In order to permit intervention, a trial court must first determine whether a party's interest is indispensable and then examine whether the party's interest is of a direct and immediate character.

**Bank of New York v. Calloway**, --- So.3d ----, 2015 WL 71816 (Fla. 4th DCA 2015).

A witness may testify to the business records acquired from another business so long as the acquired records are now business records of the acquiring business and the trial court is satisfied of the trustworthiness of the acquired records through additional evidence, clarifying the holding of *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So.2d 230 (Fla. 2d DCA 2005).

**Richardson v. Everbank**, --- So.3d ----, 2015 WL 71850 (Fla. 4th DCA 2015).

Lender does not violate § 15 U.S.C. § 1691(a)(1) (2012) of the Equal Credit Opportunity Act of 1974 (lenders may not discriminate on the basis of gender or marital status of a credit applicant) by requiring spouse to sign loan instruments when a substantial amount of the assets pledged as security are owned by both spouses.

**Infrac Systems, Inc. v. Wood**, --- So.3d ----, 2015 WL 72260 (Fla. 2d DCA 2015).

A party may not claim damages under Florida Statute § 68.065 (treble damages for dishonored checks) when it merely inquires at the account holder's bank whether the account has sufficient funds but never presents the check.

**Paramo v. Floyd**, --- So.3d ----, 2015 WL 72444 (Fla. 2d DCA 2015).

A default only admits liquidated damages, and damages are not liquidated if taking of evidence is necessary in order to establish the actual amount of damages.

**Allied Shelving & Equipment, Inc. v. National Deli, LLC**, --- So.3d ----, 2015 WL 72487 (Fla. 3d DCA 2015).

“Hybrid” contracts sales contracts have a sale of goods component (covered by the Uniform Commercial Code) and a provision of services component (not covered by the Uniform Commercial Code).

**Collins v. Experian Information Solutions, Inc.**, --- F.3d ----, 2015 WL 55345 (11th Cir. 2015).

A consumer's credit report need not be published to a third party for actual damages to accrue under 15 U.S.C. § 1681i(a).

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 3**  
**January 17, 2015**  
**Manuel Farach**

**Hubsch v. Howell Creek Reserve Community**, --- So.3d ----, 2015 WL 196171 (Fla. 5th DCA 2015).

Party is denied due process when they file a timely and proper motion to appear telephonically at a dispositive hearing and the motion is denied.

**The Florida Bar v. Marrero**, --- So.3d ----, 2015 WL 175189 (Fla. 2015).

Attorney violated rule of professional conduct prohibiting attorneys from conduct involving dishonesty, fraud, deceit, or misrepresentation by failing to inform lender that funds she provided were not being used as she instructed as first mortgage, failing to inform second lender of prior loan, and failing to list prior loan on title commitment.

**Jomar Properties, L.L.C. v. Bayview Const. Corp.**, --- So.3d ----, 2015 WL 159055 (Fla. 4th DCA 2015).

Asking questions to understand the issues does not demonstrate the “evident partiality” required to vacate an arbitration award. “Results obtained” under *Florida Patient’s Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), means both examining what issues were won or lost and how much was won (or not won).

**Snow v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2015 WL 160326 (Fla. 3d DCA 2015).

The following is a notice of default, not an automatic or self-executing acceleration that starts the running of the statute of limitations, because it does not state the debt has been accelerated, does not state the full amount due, and merely states that the debt will be accelerated in the future:

This letter serves as further notice that EMC Mortgage Corporation intends to enforce the provisions of the Note and Security Instrument. You must pay the full amount of the default on this loan by the thirty-fifth (35th) day from the date of this letter which is 01/10/2008 (or if said date falls on a Saturday, Sunday, or legal holiday, then on the first business day thereafter). If you do not pay the full amount of the default, we shall accelerate the entire sum of both principal and interest due and payable, and invoke any remedies provided for in the Note and Security Instrument, including but not limited to the foreclosure sale of the property ....

**Casino Inv., Inc. v. Palm Springs Mile Associates, Ltd.**, --- So.3d ----, 2015 WL 160703 (Fla. 3d DCA 2015).

A trial court is without jurisdiction on remand to change the law of the case as directed by the appellate court in the prior appeal.

**T-Mobile South, LLC v. City of Roswell, Ga.**, --- S.Ct. ----, 2015 WL 159278 (2015).

A locality must provide reasons in writing for denying a cellular tower siting permit, and the determination must be supported by substantial, competent evidence so as to comply with the Telecommunications Act of 1996, § 332(c)(7)(B)(iii), 47 U.S.C.A. § 332(c)(7)(B)(iii).

**Jesinoski v. Countrywide Home Loans, Inc.**, --- S.Ct. ----, 2015 WL 144681 (2015).

The Truth In Lending Act only requires that written notice of intent to seek rescission be given within three-year period; the filing of suit within that time is not required.

**National Maritime Services, Inc. v. Straub**, --- F.3d ----, 2015 WL 151703 (11th Cir. 2015).

A district court has ancillary jurisdiction over a judgment creditor's supplementary proceedings that is filed to avoid a fraudulent conveyance.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 4**  
**January 24, 2015**  
**Manuel Farach**

**In re Florida Rule of Judicial Admin. 2.420**, --- So.3d ----, 2015 WL 263902 (Fla. 2015).

Florida Rule of Judicial Administration 2.420 is amended to include new categories of information (behavioral health evaluations and drug court program referral records) to the list of categories considered confidential.

**Appel v. Bard**, --- So.3d ----, 2015 WL 248642 (Fla. 4th DCA 2015).

A party cannot be forced, over invocation of his Fifth Amendment privilege against self-incrimination, to answer questions whether he has filed tax returns for prior years.

**Murray v. HSBC Bank USA**, --- So.3d ----, 2015 WL 248651 (Fla. 4th DCA 2015).

A non-holder in possession under Florida Statute § 673.3011 seeking to enforce a promissory note that has been transferred multiple times must prove the “chain of transfers” of the note.

**CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron**, --- So.3d ----, 2015 WL 248796 (Fla. 2d DCA 2015).

A waiver of statute of limitations defense contained in a mortgage is enforceable. The statute of repose for obligations secured by mortgages is 20 years unless the maturity date is ascertainable from the face of the instrument.

**Miccosukee Tribe of Indians of South Florida v. Bermudez**, --- So.3d ----, 2015 WL 249274 (Fla. 3d DCA 2015).

Court registry fees are a taxable cost under Florida Rule of Appellate Procedure 9.400(a) (4).

**Hana Financial, Inc. v. Hana Bank**, --- S.Ct. ----, 2015 WL 248559 (2015).

A jury determines whether “tacking” (assumption of a priority position of an earlier mark by a new mark) is permissible.

**Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.**, --- S.Ct. ----, 2015 WL 232131 (2015).

The Federal Circuit must apply a clear error standard when resolving subsidiary factual matters during patent construction.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 5**  
**January 31, 2015**  
**Manuel Farach**

**In re Professionalism Complaints**, --- So.3d ----, 2015 WL 357969 (Fla. 2015).  
Members of local professionalism panels are entitled to absolute immunity from civil suits for work associated with the panels.

**In Re: Standard Jury Instructions In Civil Cases -- Report No. 2014-02**, --- So.3d ----, 2015 WL 357994 (Fla. 2015).  
Standard Civil Jury Instructions 201.2 (Introduction of Participants and Their Roles) and 202.4 (Juror Questions) are slightly revised.

**Holt v. Calchas, LLC**, --- So.3d ----, 2014 WL 5614374 (Fla. 4th DCA 2014).  
A witness not from the company that prepared the business records must be sufficiently familiar with the procedures at the company where the business records were prepared that she can meet the foundation requirements of the Business Records Exception to the Hearsay Rule; it is not necessary to call the person who prepared the document to testify to admit the document under the Rule so long as proper foundation is laid.

**Wachovia Mortg., FSB v. Montes**, --- So.3d ----, 2015 WL 340764 (Fla. 4th DCA 2015).  
A court may not involuntarily dismiss a case before the plaintiff concludes presenting their case.

**Epstein v. Bank of America**, --- So.3d ----, 2015 WL 340781 (Fla. 4th DCA 2015).  
A mortgage with an incorrect legal description may be corrected before foreclosure, but only in a new, separate proceeding after foreclosure.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 6**  
**February 7, 2015**  
**Manuel Farach**

**Colon v. JP Morgan Chase Bank, NA**, --- So.3d ----, 2015 WL 477629 (Fla. 5th DCA 2015).

A verified complaint may support a motion for summary judgment, but only if it is made on personal knowledge and otherwise in compliance with the rules of evidence.

**Bendo v. Silver Woods Community Ass'n, Inc.**, --- So.3d ----, 2015 WL 477631 (Fla. 5th DCA 2015).

Covenants that run with the land are construed in favor of the free and unrestricted use of land, and ambiguous covenants are construed in favor of the landowner.

**Life Care Ponte Vedra, Inc. v. H.K. Wu**, --- So.3d ----, 2015 WL 477815 (Fla. 5th DCA 2015).

Construction of a contract against its drafter is a secondary rule of interpretation to be used only when intent cannot be ascertained by other means. Moreover, an ambiguous contract may be interpreted as a matter of law when the ambiguity can be resolved through undisputed parol evidence of the parties.

**AmMed Surgical Equipment, LLC v. Professional Medical Billing Specialists, LLC**, --- So.3d ----, 2015 WL 489744 (Fla. 2d DCA 2015).

Bankruptcy Code section 11 U.S.C. §§ 362(a) and 108(c) prevail over Florida Rule of Appellate Procedure 9.130(b) such that the automatic stay prevents a debtor from filing a notice of appeal within thirty days of rendition but allows the debtor to file the notice of appeal within thirty days of the order lifting the bankruptcy stay.

**Waterview Towers Yacht Club-Ultimate, Owners' Ass'n, Inc. v. Givianpour**, --- So.3d ----, 2015 WL 468996 (Fla. 1st DCA 2015).

There is no "right of redemption," only an "equity of redemption," after foreclosure. The equity of redemption will be extinguished upon the filing of the certificate of sale if the final judgment so provides.

**Juno Ocean Walk Condominium Ass'n, Inc. v. North County Co., Inc.**, --- So.3d ----, 2015 WL 444341 (Fla. 4th DCA 2015).

Allowing a party to opt out of a class action final judgment is a "modification" and not "enforcement" of the judgment, so a trial court's "enforcement" of the final judgment is not proper if untimely under time requirements of Florida Rule of Civil Procedure 1.540.

**Ryan v. City of Boynton Beach**, --- So.3d ----, 2015 WL 444440 (Fla. 4th DCA 2015).

While reduction of appellate fees may be proper, a landowner in condemnation proceedings cannot be denied his appellate attorney's fees simply because he was not the prevailing party in the appeal.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 7**  
**February 14, 2015**  
**Manuel Farach**

**Faddis v. City of Homestead**, --- So.3d ----, 2015 WL 543128 (Fla. 3d DCA 2015).

An appellate court may *sua sponte* award fees as a sanction under Florida Statute § 57.105, and may require the fees sanction to be paid by counsel alone.

**Salazar v. HSBC Bank, USA, NA**, --- So.3d ----, 2015 WL 543411 (Fla. 3d DCA 2015).

Objections to a foreclosure sale can only be directed to the sale (not the underlying litigation or the judgment itself), and must demonstrate fraud, mistake or other irregularity in the conduct of the sale.

**Foche Mortg., LLC v. CitiMortgage, Inc.**, --- So.3d ----, 2015 WL 548405 (Fla. 3d DCA 2015).

A trial court is without jurisdiction to rule on an untimely motion seeking relief under Florida Rule of Civil Procedure 1.530.

**Meadowbrook Meat Co. v. Catinella**, --- So.3d ----, 2015 WL 574042 (Fla. 2d DCA 2015).

Orders granting motions for new trial are subject to a heightened abuse of discretion standard, i.e., a stronger showing of abuse of discretion is required to overturn an order granting a new trial than is required to sustain an order denying a motion for new trial.

**Skelton v. Lyons**, --- So.3d ----, 2015 WL 574248 (Fla. 2d DCA 2015).

A purchaser at foreclosure sale has a protectable legal interest, and the foreclosure sale may not be aside without due process to the foreclosure sale purchaser, i.e., notice and a legal basis for vacating the sale.

**Department of Transp. v. Mid-Peninsula Realty Inv. Group, LLC**, --- So.3d ----, 2015 WL 630201 (Fla. 2d DCA 2015).

Land held in fee by Department of Transportation is subject to being extinguished under Marketable Record Title Act as land held in fee is not subject to “easements exception under Florida Statute section 712.03(5), following *Florida Department of Transportation v. Dardashti Properties*, 605 So.2d 120 (Fla. 4th DCA 1992), and certifying conflict with *Clipper Bay Investments, LLC v. State, Department of Transportation*, 117 So.3d 7 (Fla. 1st DCA 2013).

**Wiand v. Schneiderman**, --- F.3d ----, 2015 WL 525694 (11th Cir. 2015).

Clawback actions brought by court-appointed receivers are not exempt from having to arbitrate those claims subject to arbitration under the Federal Arbitration Act.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 8**  
**February 21, 2015**  
**Manuel Farach**

**McCullough v. Kubiak**, --- So.3d ----, 2015 WL 672353 (Fla. 4th DCA 2015).

A defamatory statement made during the course of a judicial proceeding, i.e., a deposition, is absolutely privileged. *DelMonico v. Traynor*, 116 So.3d 1205 (Fla.2013), is distinguished as it involved defamation outside of a court proceeding, i.e., defamation during the out of court questioning of a non-party witness.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 9**  
**February 28, 2015**  
**Manuel Farach**

**City of Jacksonville v. Smith**, --- So.3d ----, 2015 WL 798154 (Fla. 1st DCA 2015).  
 Construction or development on an adjacent parcel does not “inordinately burden” a parcel of real property so as to provide compensation under the Bert Harris Act, Florida Statute § 70.001.

**HSBC Bank USA, Nat. Ass'n v. Karzen**, --- So.3d ----, 2015 WL 798946 (Fla. 1st DCA 2015).

If the affected party has notice of the claim during the limitations period, an amended complaint relates back to the filing date of the original claim even if the amended claim is filed beyond the statute of limitations period.

**Hart v. Wachovia Bank, Nat. Associates**, --- So.3d ----, 2015 WL 798961 (Fla. 1st DCA 2015).

The waiver provisions of a guaranty may suffice as the “agreed otherwise in writing” requirement of Florida Statute section 222.11 for written consent to a continuing writ of garnishment.

**Edge Pilates Corp. v. Tribeca Aesthetic Medical Solutions, LLC**, --- So.3d ----, 2015 WL 774635 (Fla. 4th DCA 2015).

A landlord proves a *prima facie* case for eviction when it proves the rental agreement, failure to make required rental payments, and the service of a three day notice.

**Club Mediterranee, S.A. v. Fitzpatrick**, --- So.3d ----, 2015 WL 799256 (Fla. 3d DCA 2015).

A court will look to the factual allegations of a complaint, not the causes of action asserted, in determining whether a law suit falls within an arbitration provision.

**Two Islands Development Corp. v. Clarke**, --- So.3d ----, 2015 WL 799270 (Fla. 3d DCA 2015).

A court cannot issue an injunction which interferes with the rights of those who are not parties to the litigation.

**Lorant v. Whitney Nat. Bank**, --- So.3d ----, 2015 WL 754244 (Fla. 1st DCA 2015).

A party may not “supplement” its final judgment (including substantive provisions that allow deficiency judgments to be domesticated in foreign jurisdictions) under Florida Rule of Civil Procedure 1.540 (a) as the rule only corrects clerical mistakes.

**In re Rosenberg**, --- F.3d ----, 2015 WL 845578 (11th Cir. 2015).

A debtor may be awarded trial court and appellate attorneys’ fees for a bad faith filing of an involuntary petition which is later dismissed.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 10**  
**March 7, 2015**  
**Manuel Farach**

**Alexander v. Quail Pointe II Condominium**, --- So.3d ----, 2015 WL 965668 (Fla. 5th DCA 2105).

The Doctrine of Invited Error applies whether the error was invited solely by appellant's counsel or jointly by appellant's and appellee's counsel, i.e., agreed to by all counsel.

**Fern v. Eagles' Reserve Homeowners' Ass'n Inc.**, --- So.3d ----, 2015 WL 968465 (Fla. 2d DCA 2015).

Owners subject to homeowner's associations may not have the same obligations as condominium owners to fund assessments levied to pay obligations of the association as condominium associations require greater protection of their common elements.

**Florida Dept. of Transp. v. Mallards Cove, LLP**, --- So.3d ----, 2015 WL 968710 (Fla. 2d DCA 2015).

Deposit of condemnation funds under "quick take" condemnation proceedings entitles the landowner to full compensation for the taking, but not necessarily to the fund itself that has been deposited. Thus, landowners are not entitled to interest that has accrued on the deposited "quick take" funds.

**In re Amendments to Florida Rules of Civil Procedure**, --- So.3d ----, 2015 WL 919765 (Fla. 2015).

Florida Rule of Civil Procedure 1.491 is amended so that mortgage foreclosure magistrates have the same powers as general magistrates under Rule 1.490.

**Simon v. Koplin**, --- So.3d ----, 2015 WL 895319 (Fla. 2d DCA 2015).

Pursuant to Florida Statute section 689.15, joint tenants may agree to have ownership interests contain survivorship rights even if the joint interests are not equal.

**Pronman v. Styles**, --- So.3d ----, 2015 WL 894245 (Fla. 4th DCA 2015) (*en banc*).

Based upon an amendment to Florida Statute section 57.105, the Fourth District recedes from *Perlman v. Ameriquest Mort. Co.*, 987 So.2d 1292 (Fla. 4th DCA 2008), and holds that a trial court need not make an "express finding that the attorney was not acting in good faith based upon the representations of his client."

**HSBC Mortg. Corp. (USA) v. Mullan**, --- So.3d ----, 2015 WL 894254 (Fla. 2d DCA 2015).

Trial courts may grant summary judgment only on bases that have been raised in the motion for summary judgment itself.

**Hatadis v. Achieva Credit Union**, --- So.3d ----, 2015 WL 894319 (Fla. 2d DCA 2015).  
A forbearance agreement that waives notice requirements during the term of the forbearance agreement does not constitute an agreement to waive notice after the forbearance agreement ends.

**Hamilton v. Pilgrim's Pride Corp.**, --- So.3d ----, 2015 WL 873531 (Fla. 1st DCA 2015).

Claims arising during the pendency of a bankruptcy may be a liability “incurred and payable in the ordinary course of business” of the bankruptcy debtor and not required to go through the bankruptcy administrative claims process or barred by failure to do so.

**Direct Marketing Ass'n v. Brohl**, --- S.Ct. ----, 2015 WL 867663 (2015).

Colorado’s statutory requirement for informational filings on sales inside the state is not a “tax,” and thus suits over the statute are not barred by the Tax Injunction Act.

**Clements v. LSI Title Agency, Inc.**, --- F.3d ----, 2015 WL 857964 (11th Cir. 2015).

Title insurance agent, law firm and attorney earned their portion of settlement fee, and thus did not violate RESPA as they witnessed the closing, and provider did not violate RESPA by marking up price of government recording charges as the government entity actually provided a service and gave nothing back to provider.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 11**  
**March 14, 2015**  
**Manuel Farach**

**Bank of New York Mellon v. Mestre**, --- So.3d ----, 2015 WL 1071113 (Fla. 5th DCA 2015).

A note and mortgage that is fraudulently executed is not an enforceable contract, and thus does not provide prevailing defendants with a basis for contractual attorneys' fees.

**Fiore v. Hilliker**, --- So.3d ----, 2015 WL 1088449 (Fla. 2d DCA 2015).

Summary judgment is not appropriate if there are two reasonable interpretations of a contract because there remains an issue of fact regarding the parties' intent.

**Sybac Solar AG, Co. v. Falz**, --- So.3d ----, 2015 WL 1088480 (Fla. 2d DCA 2015).

While a written order deciding a *forum non conveniens* motion need not detail the trial court's four-step analysis under Florida Rule of Civil Procedure 1.061(a), the record must demonstrate the court considered and ruled on the factors.

**In re Amendments to Florida Rule of Appellate Procedure 9.210**, --- So.3d ----, 2015 WL 1058130 (Fla. 2015).

The rule is amended to permit longer appellate briefs in death penalty cases.

**Harold v. Sanders**, --- So.3d ----, 2015 WL 1034621 (Fla. 2d DCA 2015).

If an arbitrator serves a Florida Statute section 44.103 arbitration decision by mail, Florida Rule of Civil Procedure 1.090(e) adds five days to the date by which a party objecting to the non-binding arbitration under must demand a trial *de novo*.

**Tilus v. AS Michai LLC**, --- So.3d ----, 2015 WL 1040522 (Fla. 4th DCA 2015).

An undated blank indorsement on a promissory note filed after suit is filed does not demonstrate standing at time of filing suit. Likewise, an assignment of mortgage does not confer standing.

**JBK Associates, Inc. v. Sill Bros., Inc.**, --- So.3d ----, 2015 WL 1040603 (Fla. 4th DCA 2015).

The investment of homestead sale proceeds in securities was not so inconsistent with the purposes of the homestead exemption that the funds lost their status as protected claims of creditors.

**Bymel v. Bank of America, N.A.**, --- So.3d ----, 2015 WL 1044247 (Fla. 3d DCA 2015).

A short-sale purchaser has a sufficient interest in the real property that he is entitled to intervene in the foreclosure proceedings regarding the property.

**Russell Post Properties, Inc. v. Leaders Bank**, --- So.3d ----, 2015 WL 1044276 (Fla. 3d DCA 2015).

While the better practice is to attach a copy of the general release to a Proposal for Settlement, a sufficient description can substitute for the release itself.

**Russell v. Southeast Housing, LLC**, --- So.3d ----, 2015 WL 1044315 (Fla. 3d DCA 2015).

Real property that is being jointly developed by the federal government and a private developer is exempt from ad valorem taxation if the federal government retains both equitable and beneficial ownership of the land.

**Rollet v. de Bizemont**, --- So.3d ----, 2015 WL 1044369 (Fla. 3d DCA 2015).

An allegation that a defendant is “*sui juris*” is insufficient to confer long-arm jurisdiction.

**CK Regalia, LLC v. Thornton**, --- So.3d ----, 2015 WL 1044400 (Fla. 3d DCA 2015).

Former clients may not file a declaratory judgment action attacking charging liens before the original action (to which the charging liens apply) is determined to be successful, i.e., before there is a fund to which the charging liens can attach.

**Lary v. Trinity Physician Financial & Ins. Services**, --- F.3d ----, 2015 WL 1089326 (11th Cir. 2015).

A single facsimile can constitute two violations of the Telephone Consumer Protection Act, but treble damages for “willful and knowing” requires proof that sender knew they were sending a facsimile and that it was wrong to do so under the circumstances.

**In re Seaside Engineering & Surveying, Inc.**, --- F.3d ----, 2015 WL 1061718 (11th Cir. 2015).

Although they should not be issued lightly, bankruptcy courts have authority to approve non-consensual non-debtor releases or bar orders in bankruptcy restructuring plans.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 12**  
**March 21, 2015**  
**Manuel Farach**

**Estate of Williams v. Jursinski**, --- So.3d ----, 2015 WL 1259497 (Fla. 2d DCA 2015).  
 Notwithstanding the dictates of Florida State section 682.03 (6) (“If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.”) and even if all the defendants in the lawsuit are related, a claimant may avoid arbitration by dropping parties from the lawsuit not subject to the arbitration clause.

**AG Beaumont 1, LLC v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2015 WL 1259649 (Fla. 2d DCA 2015).

Privileged documents exchanged between counsel for joint defendants pursuant to a joint defense agreement are protected by the attorney-client privilege.

**Boyette v. BAC Home Loans Servicing, LP**, --- So.3d ----, 2015 WL 1211771 (Fla. 2d DCA 2015).

In order to be affirmed on appeal, a final judgment of foreclosure requires competent, substantial evidence of both the main damages (the amounts outstanding on the note and mortgage) and the collateral damages and costs (prejudgment interest, costs of property inspections, attorneys’ fees calculations, etc.).

**Fernandez v. Office of Financial Regulation**, --- So.3d ----, 2015 WL 1222679 (Fla. 4th DCA 2015).

Appellate jurisdiction may not be conferred by stipulation of trial counsel, even if all trial counsel agree they did not timely receive the order on appeal.

**Bianchi & Cecchi Services, Inc. v. Navalimpianti USA, Inc.**, --- So.3d ----, 2015 WL 1223663 (Fla. 3d DCA 2015).

A trial court must balance the privacy interests of third parties against the need of litigants for information from the third parties; the trial court has discretion in how to conduct its inquiry and is not necessarily required to hold an evidentiary hearing or conduct an *in camera* review of the documents in order to do so.

**Bank of America, N.A. v. Pate**, --- So.3d ----, 2015 WL 1135923 (Fla. 1st DCA 2015).  
 Concurring opinion details facts constituting unclean hands defense to foreclosure.

**In re Intern. Management Associates, LLC**, --- F.3d ----, 2015 WL 1245503 (11th Cir. 2015).

Except for privilege issues, a trial court is not bound by the rules of evidence in making the preliminary determination of whether evidence is admissible. A person testifying as to business records must demonstrate the trustworthiness of the records, but need not have personal knowledge of how the records were created or kept in order to testify.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 13**  
**March 28, 2015**  
**Manuel Farach**

**Florida Department of Transportation v. Clipper Bay Investments, LLC**, --- So.3d -- --, 2015 WL 1379975 (Fla. 2015).

Land held in fee simple by the Florida Department of Transportation (“FDOT”) qualifies for the right of way exception under the Marketable Record Title Act, Florida Statute section 712.03 (“MRTA”), and all parts of the property held in fee by FDOT (whether currently used as a right of way or not) are exempt from the application of MRTA.

**Joara Freight Lines, Inc. v. Perez**, --- So.3d ----, 2015 WL 1313203 (Fla. 3d DCA 2015).

Parties may not be referred to a special master without their consent as doing so violates Florida Rule of Civil Procedure 1.490 (c).

**Corkidi v. Franco Investments, LLC**, --- So.3d ----, 2015 WL 1315952 (Fla. 3d DCA 2015).

Upon remand, a trial court has the authority to carry out the implicit - as well as the explicit - instructions of the appellate court opinion.

**White v. Ocwen Loan Servicing, LLC**, --- So.3d ----, 2015 WL 1319777 (Fla. 3d DCA 2015).

The twenty-day notice requirement of Florida Rule of Civil Procedure 1.510 (c) is not jurisdictional and may be waived by failing to timely object.

**Seffar v. Residential Credit Solutions, Inc.**, --- So.3d ----, 2015 WL 1334288 (Fla. 4th DCA 2015).

In order to be a “holder” of a negotiable instrument, the instrument must be indorsed to the person or indorsed in blank. A non-holder in possession of a negotiable instrument may enforce the instrument, but must prove the “chain of custody” of the instrument.

**Lloyd v. Bank of New York Mellon**, --- So.3d ----, 2015 WL 1334292 (Fla. 4th DCA 2015).

When relying on an undated indorsement to prove standing at time of filing foreclosure suit, plaintiff must introduce evidence the indorsement was signed prior to filing suit.

**Matthews v. Federal Nat. Mortg. Ass'n**, --- So.3d ----, 2015 WL 1334310 (Fla. 4th DCA 2015).

A backdated assignment does not establish standing to foreclose a mortgage.

**B & B Hardware, Inc. v. Hargis Industries, Inc.**, --- S.Ct. ----, 2015 WL 1291915 (2015).

Decisions of the Trademark Trial and Appeal Board can form the basis for issue preclusion of issues and cases brought under the Lanham Act.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 14**  
**April 4, 2015**  
**Manuel Farach**

**Philip Morris USA, Inc. v. Russo**, --- So.3d ----, 2015 WL 1472282 (Fla. 2015).

Statute of limitation and statute of repose have differing reliance requirements when applied to fraud claims; reliance is not required during the statutory period for statutes of repose but continuing reliance is required for claims subject to limitations.

**Hess v. Patrick**, --- So.3d ----, 2015 WL 1443113 (Fla. 2d DCA 2015).

A foreign judgement recorded under Florida's Enforcement of Foreign Judgments Act is subject to Florida's twenty-year statute of limitations for enforcement of judgments, beginning from the date the foreign judgment was rendered in the foreign forum.

**22nd Century Properties, LLC v. FPH Properties, LLC**, --- So.3d ----, 2015 WL 1448446 (Fla. 4th DCA 2015).

The party opposing a fee award must generally point out those fees that are duplicative or excessive otherwise the objection is waived. Likewise, the result is what matters and a party seeking fees should not be penalized for seeking recovery on alternative bases on which they did not prevail. For purposes of fee awards, issues are inextricably intertwined or involve a common core of facts when work for one claim cannot be distinguished from work on other claims; claims are separate and distinct when they can support an independent action not simply alternative theories of recovery.

**TRG Columbus Development Venture, Ltd. v. Sifontes**, --- So.3d ----, 2015 WL 1449633 (Fla. 3d DCA 2015).

A contingency fee multiplier for a case taken to trial is appropriate when the evidence demonstrates the market provides many attorneys willing to take cases on contingency but few willing to take cases to trial on contingency.

**Blechman v. Estate of Blechman**, --- So.3d ----, 2015 WL 1500021 (Fla. 4th DCA 2015).

Agreements between business partners as to disposition of ownership interests upon death may trump testamentary instruments regarding the same interests.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 15**  
**April 11, 2015**  
**Manuel Farach**

**R.J. Reynolds Tobacco Co. v. Townsend**, --- So.3d ----, 2015 WL 1578537 (Fla. 1st DCA 2015).

The interest rate applied to unpaid amounts on a judgment changes whenever the statutory rate changes, i.e., the interest rate on date of a judgment does not remain the same if the statutory rate changes over the life of the unpaid judgment.

**Morejon v. F & M Real Estate, Inc.**, --- So.3d ----, 2015 WL 1542215 (Fla. 2d DCA 2015).

A circuit court may not, as part of a mediation order, compel a mortgagor to provide financial information prior to judgment that would not otherwise be discoverable in the litigation prior to judgment.

**Cornerstone SMR, Inc. v. Bank of America, N.A.**, --- So.3d ----, 2015 WL 1545006 (Fla. 4th DCA 2015).

The Contribution Amongst Joint Tortfeasors statute, Florida Statute section 768.041, applies to judgments received and not losses incurred. Accordingly, the statute sets off recovery from the total settlement amount if there was an undifferentiated or undetailed settlement agreement which failed to set forth which claims or actions were settled.

**Tilus v. AS Michai LLC**, --- So.3d ----, 2015 WL 1545223 (Fla. 4th DCA 2015).

An assignment of mortgage, even if dated prior to the filing of the foreclosure lawsuit, does not demonstrate standing if it does not also assign the note.

**Schindler v. Bank of New York Mellon Trust Co.**, --- So.3d ----, 2015 WL 1545225 (Fla. 4th DCA 2015).

Lender may not seek to foreclose upon the same default or breach as that of a case that in which it previously has not prevailed.

**Padgett v. Kessinger**, --- So.3d ----, 2015 WL 1545228 (Fla. 4th DCA 2015).

Claims for fraud in the inducement and for breach of contract are separate and distinct for purposes of awarding attorneys' fees.

**Stranburg v. Panama Commons L.P.**, --- So.3d ----, 2015 WL 1546080 (Fla. 1st DCA 2015).

The tax exemption for affordable housing under Florida Statute section 196.1978 cannot be repealed retroactively.

**Nestor v. Ward**, --- So.3d ----, 2015 WL 1578710 (Fla. 3d DCA 2015).

A court may only confirm or vacate an arbitration award, and may not "clarify" an award by modification.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 16**  
**April 18, 2015**  
**Manuel Farach**

**Hahamovitch v. Delray Property Investments, Inc.**, --- So.3d ----, 2015 WL 1652713 (Fla. 4th DCA 2015).

A merger and integration clause in a contract does not bar a fraud claim. Real estate contracts are subject to an implied duty of good faith and fair dealing, but the implied duty cannot contravene an express term, must be pursued in conjunction with a breach of contract claim, and applies only to the purportedly breached term.

**Frisbie v. Carolina Cas. Ins. Co.**, --- So.3d ----, 2015 WL 1736905 (Fla. 5th DCA 2015).

The affirmative defense of unclean hands typically requires determination of disputed issues of fact, and thus cannot usually be resolved on summary judgment.

**Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, P.A.**, --- So.3d ----, 2015 WL 1736915 (Fla. 5th 2015).

A contract must be interpreted as a whole, and the manner of use of the word “settled” in this attorneys’ engagement agreement means “resolved by any means” when the engagement agreement is read as a whole.

**Audiffred v. Arnold**, --- So.3d ----, 2015 WL 1724250 (Fla. 2015).

A single offer to a single offeree that requests resolution of claims by or against additional parties (who are not offerors nor offerees) is a “joint proposal” that is subject to the apportionment requirement of the offer of judgment statute.

**Colson v. State Farm Bank, F.S.B.**, --- So.3d ----, 2015 WL 1650300 (Fla. 2d DCA 2015).

The amount of indebtedness in a mortgage foreclosure trial cannot be determined merely by the introduction of the loan payment history.

**Griffin Industries, LLC v. Dixie Southland Corp.**, --- So.3d ----, 2015 WL 1652599 (Fla. 4th DCA 2015).

A tenant cannot terminate a lease based on constructive eviction unless the premises are unsafe, unfit or unsuitable for the demised purposes; standing storm water on the premises is not a constructive eviction unless the standing water creates a safety issue or interferes with the tenant’s operations. A landlord has no duty to mitigate damages, but if it does, a breaching tenant is responsible for the difference between its rent and rent paid by the substitute tenant if the landlord mitigates by obtaining a new tenant.

**Florida Power & Light Co. v. Hicks**, --- So.3d ----, 2015 WL 1667033 (Fla. 4th DCA 2015).

In distinction to the work product privilege, attorney-client documents continue to be protected notwithstanding a showing of relevance and necessity for the documents.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 17**  
**April 25, 2015**  
**Manuel Farach**

**Fiorentino v. BAC Home Loans, L.P.**, --- So.3d ----, 2015 WL 1851566 (Fla. 5th DCA 2015).

A trial court cannot enter a “final summary judgment” as its judgment after a trial.

**Amelia Island Restaurant II, Inc. v. Omni Amelia Island, LLC**, --- So.3d ----, 2015 WL 1809308 (Fla. 1st DCA 2015).

The non-compete provisions of Florida Statute section 542.335 are meant to apply to personal contracts, and are not meant to create exclusivity provisions for leases.

**Newborn v. Isbell**, --- So.3d ----, 2015 WL 1809314 (Fla. 1st DCA 2015).

The prevailing party in an action under the Florida Power of Attorney Act is entitled to an award of attorney’s fees.

**AHF-Bay Fund, LLC v. City of Largo**, --- So.3d ----, 2015 WL 1809577 (Fla. 2d DCA 2015).

It is unconstitutional and in violation of Florida Statute section 196.1978 for a local government to require payments under a PILOT program in lieu of ad valorem taxes.

**Laquer v. Falcone**, --- So.3d ----, 2015 WL 1810318 (Fla. 3d DCA 2015).

The voluntary dismissal of the cross-claims that contain the dispute’s only arbitration clauses renders the arbitrator without jurisdiction to enter an award.

**Firstbank Puerto Rico v. Othon**, --- So.3d ----, 2015 WL 1813996 (Fla. 4thDCA 2015).

Although granting continuances of foreclosure sale dates is within the discretion of the trial court, compassion, benevolence, hopes of a short sale, and medical illness are not legally cognizable grounds for postponement of the sale.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 18**  
**May 2, 2015**  
**Manuel Farach**

**J.B.J. Inv. of South Florida, Inc. v. Maslanka**, --- So.3d ----, 2015 WL 1942877 (Fla. 5th DC 2015).

Florida Statute section 48.23(2) imposes a “good cause” requirement for extending a *lis pendens* that is not founded on a duly recorded instrument, and protection of property central to the underlying litigation constitutes sufficient “good cause.”

**Cypress Fairway Condominium Ass'n, Inc. v. Cypress Madison Ownership Co.**, --- So.3d ----, 2015 WL 1942943 (Fla. 5th DCA 2015).

An “agreed order” on defendant’s motion to dismiss the complaint does not count as a “dismissal” for purposes of the “two dismissal rule,” Florida Rule of Civil Procedure 1.420(a)(1), as such is not a “voluntary” dismissal.

**ASI Holding Co., Inc. v. Royal Beach & Golf Resorts, LLC**, --- So.3d ----, 2015 WL 1928615 (Fla. 1st DCA 2015).

Disqualification of opposing counsel is proper under Rule of Professional Conduct 4-1.9 when opposing counsel previously represented the client in a same or substantially related matter.

**Kinney v. Countrywide Home Loans Servicing, L.P.**, --- So.3d ----, 2015 WL 1934290 (Fla. 4th DCA 2015).

A borrower is not entitled to a jury trial on a promissory note count tried as part of a mortgage foreclosure as the lender’s remedy for the promissory note is actually a mortgage foreclosure deficiency tried through the promissory note.

**Resnick v. J. Weinstein and Sons, Inc.**, --- So.3d ----, 2015 WL 1934537 (Fla. 4th DCA 2015).

An agreed two-step dispute resolution process where a neutral party makes a determination followed by binding arbitration does not make the neutral party’s decision non-appealable, and does not confer jurisdiction to arbitrate on the same third party.

**Gonzalez v. Barrenechea**, --- So.3d ----, 2015 WL 1940784 (Fla. 3d DCA 2015).

An appraiser’s failure to make a proper adjustment between different properties goes to the weight, not the legal sufficiency, of the appraiser’s opinion.

**London v. Dubrovin**, --- So.3d ----, 2015 WL 1940786 (Fla. 3d DCA 2015).

The remedy for unfair surprise during trial is a continuance, and the failure to request or accept a continuance offered by the trial court precludes reversal on appeal.

**Kendall Commercial Associates, LLC v. Drakes, LLC**, --- So.3d ----, 2015 WL 1945064 (Fla. 3d DCA 2015).

A court may not grant summary judgment on matters not moved for summary judgment nor noticed for hearing.

**In re Valone**, --- F.3d ----, 2015 WL 1918138 (11th Cir. 2015).

Chapter 13 bankruptcy debtors who do not claim the homestead exemption may instead choose the “wildcard” exemption” under Florida Statute section 222.25(4) even if they protect their home through the use of the Chapter 13 bankruptcy process.

**Home Legend, LLC v. Mannington Mills, Inc.**, --- F.3d ----, 2015 WL 1918254 (11th Cir. 2015).

Mere originality, not complete novelty, is all that is required for a work to be copyrightable. Accordingly, flooring design which applies creativity to make a non-wood product look like wood planks is copyrightable.

**Ekins v. Harbourside Funding, LP**, --- Fed.Appx. ----, 2015 WL 1898451 (11th Cir. 2015).

A settlement agreement is a different contract than the underlying contract or claim, and does not impact Florida Statute 475.11 (real estate commissions can only be paid to licensed agents) even if the underlying claim is one for payment of real estate commissions.

**F.D.I.C. v. First American Title Ins. Co.**, --- Fed.Appx. ----, 2015 WL 1906139 (11th Cir. 2015).

A bank which purchases all the assets of a failed institution from the F.D.I.C. is entitled to enforce claims against title insurers the failed bank previously possessed.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 19**  
**May 9, 2015**  
**Manuel Farach**

**J.B.J. Inv. of South Florida, Inc. v. Maslanka**, --- So.3d ----, 2015 WL 1942877 (Fla. 5th DC 2015).

Florida Statute section 48.23(2) imposes a “good cause” requirement for extending a *lis pendens* that is not founded on a duly recorded instrument, and protection of property central to the underlying litigation constitutes sufficient “good cause.”

**Cypress Fairway Condominium Ass'n, Inc. v. Cypress Madison Ownership Co.**, --- So.3d ----, 2015 WL 1942943 (Fla. 5th DCA 2015).

An “agreed order” on defendant’s motion to dismiss the complaint does not count as a “dismissal” for purposes of the “two dismissal rule,” Florida Rule of Civil Procedure 1.420(a)(1), as such is not a “voluntary” dismissal.

**ASI Holding Co., Inc. v. Royal Beach & Golf Resorts, LLC**, --- So.3d ----, 2015 WL 1928615 (Fla. 1st DCA 2015).

Disqualification of opposing counsel is proper under Rule of Professional Conduct 4-1.9 when opposing counsel previously represented the client in a same or substantially related matter.

**Kinney v. Countrywide Home Loans Servicing, L.P.**, --- So.3d ----, 2015 WL 1934290 (Fla. 4th DCA 2015).

A borrower is not entitled to a jury trial on a promissory note count tried as part of a mortgage foreclosure as the lender’s remedy for the promissory note is actually a mortgage foreclosure deficiency tried through the promissory note.

**Resnick v. J. Weinstein and Sons, Inc.**, --- So.3d ----, 2015 WL 1934537 (Fla. 4th DCA 2015).

An agreed two-step dispute resolution process where a neutral party makes a determination followed by binding arbitration does not make the neutral party’s decision non-appealable, and does not confer jurisdiction to arbitrate on the same third party.

**Gonzalez v. Barrenechea**, --- So.3d ----, 2015 WL 1940784 (Fla. 3d DCA 2015).

An appraiser’s failure to make a proper adjustment between different properties goes to the weight, not the legal sufficiency, of the appraiser’s opinion.

**London v. Dubrovin**, --- So.3d ----, 2015 WL 1940786 (Fla. 3d DCA 2015).

The remedy for unfair surprise during trial is a continuance, and the failure to request or accept a continuance offered by the trial court precludes reversal on appeal.

**Kendall Commercial Associates, LLC v. Drakes, LLC**, --- So.3d ----, 2015 WL 1945064 (Fla. 3d DCA 2015).

A court may not grant summary judgment on matters not moved for summary judgment nor noticed for hearing.

**In re Valone**, --- F.3d ----, 2015 WL 1918138 (11th Cir. 2015).

Chapter 13 bankruptcy debtors who do not claim the homestead exemption may instead choose the “wildcard” exemption” under Florida Statute section 222.25(4) even if they protect their home through the use of the Chapter 13 bankruptcy process.

**Home Legend, LLC v. Mannington Mills, Inc.**, --- F.3d ----, 2015 WL 1918254 (11th Cir. 2015).

Mere originality, not complete novelty, is all that is required for a work to be copyrightable. Accordingly, flooring design which applies creativity to make a non-wood product look like wood planks is copyrightable.

**Ekins v. Harbourside Funding, LP**, --- Fed.Appx. ----, 2015 WL 1898451 (11th Cir. 2015).

A settlement agreement is a different contract than the underlying contract or claim, and does not impact Florida Statute 475.11 (real estate commissions can only be paid to licensed agents) even if the underlying claim is one for payment of real estate commissions.

**F.D.I.C. v. First American Title Ins. Co.**, --- Fed.Appx. ----, 2015 WL 1906139 (11th Cir. 2015).

A bank which purchases all the assets of a failed institution from the F.D.I.C. is entitled to enforce claims against title insurers the failed bank previously possessed.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 20**  
**May 16, 2015**  
**Manuel Farach**

**Branch Banking and Trust Co. v. Tomblin**, --- So.3d ----, 2015 WL 2259463 (Fla. 5th DCA 2015).

A foreclosing mortgagee is entitled to a credit bid at foreclosure sale, but is not available to a senior mortgagee that has not been joined or has not foreclosed its mortgage.

**McDonnell v. Sanford Airport Authority, Etc.**, --- So.3d ----, 2015 WL 2260504 (Fla. 5th DCA 2015).

A motion for rehearing on a PCA is not authorized, and is proper only when a more recent decision demonstrates error in the PCA.

**Condron v. Arey**, --- So.3d ----, 2015 WL 2364301 (Fla. 5th DCA 2015).

The addition of the words “upon” and “across” to a ten-foot easement that is “over, upon and across” makes the easement conterminous with the ten-foot area.

**In re Appellate Procedure 9.200**, --- So.3d ----, 2015 WL 2236702 (Fla. 2015).

Florida Rule of Appellate Procedure (Record) is amended to require statewide adoption of uniform requirements and attributes for electronic records on appeal.

**The Florida Bar re Community Ass'n Managers**, --- So.3d ----, 2015 WL 2236890 (Fla. 2015).

Community association managers are not engaged in the practice of law when they prepare certificates of assessments, but are engaged in the practice of law when they prepare construction lien documents or interpret statutory or case law to reach a legal conclusion on an issue.

**Coba v. Tricam Industries, Inc.**, --- So.3d ----, 2015 WL 2236905 (Fla. 2015).

A party must object to an inconsistent verdict, i.e., one that relies on findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at the same time, before the jury is discharged in order to preserve the issue for appellate review.

**Vista Golf, LLC v. Vista Royale Property Owners Ass'n**, --- So.3d ----, 2015 WL 2214495 (Fla. 4th DCA 2015).

The following language is not an affirmative covenant that a golf course be operated, but a restrictive covenant that the land can only be used for a golf course:

1. Operation of Golf Course. The land ... shall be continuously operated as a twenty-seven (27) hole golf course similar to its operation as of the date hereof. This operation shall continue until such time as the condominium ownership of all lands constituting the condominium communities known as VISTA ROYALE and VISTA ROYALE GARDENS ... is terminated.

2. Unity of Title. The land shall, for the period of time set forth in Paragraph 1, hereof, be held, sold, conveyed, leased, mortgaged and otherwise dealt with only as a single parcel; and no portion thereof shall, during such period of time, be separately held, sold, conveyed, leased, mortgaged or otherwise dealt with.

**Michaluk v. Credorax (USA), Inc.**, --- So.3d ----, 2015 WL 2215979 (Fla. 3d DCA 2015).

The following language is a permissive (not a mandatory) forum selection clause because it does not contain mandatory words of regarding jurisdiction:

This Agreement shall be governed by and construed in accordance with the Laws of Malta and each party hereby submits to the jurisdiction of the Courts of Malta as regards any claim, dispute or matter arising out of or in connection with this Agreement, its implementation and effect.

**Comptroller of Treasury of Maryland v. Wynne**, --- S.Ct. ----, 2015 WL 2340843 (2015).

Failure to give credit Subchapter S shareholders for taxes paid in other states (while giving the credit if paid as an individual) violates the Dormant Commerce Clause.

**In re Metzler**, --- B.R. ----, 2015 WL 2330131 (Bkrtcy.M.D.Fla., 2015).

“Surrender” of an asset under Chapter 13 “requires more than allowing stay to be lifted as to collateral securing a creditor's claim; “surrender” under the Bankruptcy Code prevents debtors from taking any overt act to prevent creditor from foreclosing on its interest in collateral.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 21**  
**May 23, 2015**  
**Manuel Farach**

**CB Condominiums, Inc. v. GRS South Florida, Inc.**, --- So.3d ----, 2015 WL 2393329 (Fla. 4th DCA 2015).

A non-party deponent can only be found in contempt of court “fails to be sworn or to answer a question after being directed to do so by the court,” and a trial court has no jurisdiction to sanction a non-party deponent for other discovery violations.

**Planned Parenthood of Greater Orlando v. MMB Properties**, --- So.3d ----, 2015 WL 2414382 (Fla. 5th DCA 2015).

An appellate court will review a covenant restricting the use of land *de novo*, and read the covenant in plain language. A party who is aware of a covenant and proceeds at their own risk cannot later argue it would be harmed by an injunction enforcing the restrictive covenant.

**Le v. U.S. Bank**, --- So.3d ----, 2015 WL 2414456 (Fla. 5th DCA 2015).

A prior mortgage servicer’s testimony contains the elements of trustworthiness and may be admitted into evidence if the witness is generally knowledgeable about the industry and can testify about the prior servicer’s practices, can testify the records were tested and the specifics of the verification process.

**Vasilevskiy v. Wachovia Bank, Nat. Ass’n**, --- So.3d ----, 2015 WL 2414502 (Fla. 5th DCA 2015).

Absent some prejudice, failure to satisfy a condition precedent is not a defense to an otherwise enforceable contract such that giving only 28 days’ notice to cure (when 30 is called for under the contract) and not taking any action under the notice for four years demonstrates a lack of prejudice.

**Yankeetown Management, LLC v. Suntrust Mortg., Inc.**, --- So.3d ----, 2015 WL 2431880 (Fla. 2d DCA 2015).

A party that does not intervene prior to final judgment in the trial court is a stranger to the case and has no standing to appeal.

**Eiman v. Sullivan**, --- So.3d ----, 2015 WL 2432024 (Fla. 2d DCA 2015).

Presuming *Johnson v. Davis* applied to a claim for the sale of vacant land, claimants are not entitled to damages for subsurface conditions (layers of muck) that increased the cost of construction if claimants did not investigate the subsurface conditions prior to purchase, did not prove that defendants knew of the subsurface conditions, and purchased the property under an “as is” contract.

**Miles v. Weingrad**, --- So.3d ----, 2015 WL 2401261 (Fla. 2015).

A one-sentence opinion of a district court of appeal is sufficient for Florida Supreme Court conflict jurisdiction if the “four corners” of the opinion references other decisions.

**Victoriana Building, LLC v. Ft. Lauderdale Surgical Center, LLC**, --- So.3d ----, 2015 WL 2393274 (Fla. 4th DCA 2015).

The failure of a landlord to provide code-compliant means of fire egress is a breach of the lease excusing the tenant from further performance under the lease.

**Christopher N. Link, P.A. v. Rut**, --- So.3d ----, 2015 WL 2405650 (Fla. 4th DCA 2015).

A law firm charging lien is an equitable right, and cannot relate back to the date of the signing of the law firm engagement so as to gain priority over other recorded rights.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 22**  
**May 30, 2015**  
**Manuel Farach**

**Holton, Appellant v. Worldwide Event Productions, Etc.**, --- So.3d ----, 2015 WL 2458126 (Fla. 5th DCA 2015).

A mediated settlement agreement (MSA) may be “incorporated by implication” into a final judgment such that a party may enforce the prevailing party attorneys’ fees provision of the MSA without attaching it to or incorporating it by reference into the final judgment when the trial court seeks to enforce the final judgment and MSA.

**Browning v. Poirier**, --- So.3d ----, 2015 WL 2458005 (Fla. 2015).

The statute of frauds bars only those contracts which cannot be performed within the space of one year; those contracts that are even remotely possible to perform within the space of one year are not subject to the statute of frauds.

**Taylor Morrison Services, Inc. v. Ecos**, --- So.3d ----, 2015 WL 3407929 (Fla. 1st DCA 2015).

Whether a contractor is licensed or unlicensed under Florida Statute section 489.128 is determined as of the effective date of the construction contract.

**Torocsik v. HSBC Bank USA**, --- So.3d ----, 2015 WL 3387916 (Fla. 4th DCA 2015).

A bank may dishonor payment on a cashier’s check based only on the real or personal defenses the bank has, and may not rely on the defenses of a third party to the check.

**Yaralli v. American Reprographics Co., LLC**, --- So.3d ----, 2015 WL 3387966 (Fla. 4th DCA 2015).

Fraudulent conveyance claims are typically not subject to determination by summary judgment.

**Saulnier v. Bank of America, N.A.**, --- So.3d ----, 2015 WL 3388103 (Fla. 4th DCA 2015).

A subordinate lienholder must claim surplus foreclosure sale funds by filing a claim under Florida Statute section 45.031(1)(a) within sixty days of foreclosure sale; failure to receive a copy of the foreclosure judgment does not waive the statutory requirement.

**Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n, Inc.**, --- So.3d ----, 2015 WL 3388254 (Fla. 4th DCA 2015).

Florida Statute section 720.3085 unconstitutionally impairs the contract rights of owners in an association whose declaration states that present owners are not jointly responsible with prior owners for unpaid assessments.

**Froonjian v. Ultimate Combatant, LLC**, --- So.3d ----, 2015 WL 3388387 (Fla. 4th DCA 2015).

A member of an LLC that does not have an operating agreement may be expelled pursuant to a majority vote of the members, but his membership interest may not be distributed among the remaining members as the result of his expulsion.

**Curcio v. State Dept. of Lottery**, --- So.3d ----, 2015 WL 3389290 (Fla. 1st DCA 2015). The State of Florida has waived sovereign immunity for breach of contract claims, but not for Florida Unfair and Deceptive Trade Practices claims.

**Grove Key Marina, LLC v. Casamayor**, --- So.3d ----, 2015 WL 3390070 (Fla. 3d DCA 2015).

A city which leases its land to a private business is subject to county ad valorem taxes on the property since the property is being used for proprietary and not public purposes. Unless the lease between the city and the private business provides for pass-through to the private business, the private business is not liable to the city for payment of the ad valorem taxes and may not be sued for same by the county.

**Daniels v. Sorriso Dental Studio, LLC**, --- So.3d ----, 2015 WL 3404071 (Fla. 2d DCA 2015).

The discharge in bankruptcy of a defendant's debt to a plaintiff does not also discharge a garnishee's independent, statutory liability to a plaintiff under a writ of garnishment.

**Commil USA, LLC v. Cisco Systems, Inc.**, --- S.Ct. ----, 2015 WL 2456617 (2015). A defendant's belief of a patent's validity is not a defense to a claim of infringement.

**Wellness Intern. Network, Ltd. v. Sharif**, --- S.Ct. ----, 2015 WL 2456619 (2015).

Article III of the United States Constitution permits bankruptcy courts to adjudicate *Stern v. Marshall*, 564 U.S. ———, ———, 131 S.Ct. 2594, 2618, 180 L.Ed.2d 475, claims when the parties consent to the bankruptcy court doing so.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 23**  
**June 6, 2015**  
**Manuel Farach**

**Homestead Land Group, LLC v. City of Homestead**, --- So.3d ----, 2015 WL 3479418 (Fla. 3rd DCA 2015).

A potential reversionary interest is not a sufficient interest in land to permit a party to participate in condemnation proceedings.

**Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach County, Inc.**, --- So.3d ----, 2015 WL 3480114 (Fla. 4th DCA 2015).

Statements by the Better Business Bureau regarding a business may be actionable under the Florida Unfair and Deceptive Practices Act, and likewise are not protected by the First Amendment of the United States Constitution.

**Air Turbine Technology, Inc. v. Quarles & Brady, LLC**, --- So.3d ----, 2015 WL 3480236 (Fla. 4th DCA 2015).

A contract that provides for a prevailing party's recovery of "legal costs and expenses" does not award prevailing party attorney's fees under Florida law. To the extent an attorney expressed a correct opinion of Florida law which was not followed by a federal court, the opinion is covered by judgmental immunity and is not malpractice.

**Shirley's Personal Care Services of Okeechobee, Inc. v. Boswell**, --- So.3d ----, 2015 WL 3480289 (Fla. 4th DCA 2015).

A demand for attorney's fees must be made in a pleading otherwise it is waived. However, a narrow exception exists if a party raises the issue of attorney's fees in a pretrial stipulation or otherwise puts the opposing party on notice.

**Zuccarelli v. Barfield**, --- So.3d ----, 2015 WL 3486661 (Fla. 4th DCA 2015).

Affidavits filed in judicial proceedings are absolutely privileged under the litigation privilege and cannot form the basis for defamation claims.

**Fanelli v. HSBC Bank USA**, --- So.3d ----, 2015 WL 3486692 (Fla. 4th DCA 2015).

A sentence in a mortgage foreclosure complaint demanding attorneys' fees is sufficient to put the opposing party on notice of a claim for fees, and thus meets the requirements of *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla.1991).

**Bank of America, N.A. v. Caulkett**, --- S.Ct. ----, 2015 WL 2464049 (2015).

A mortgage is deemed an allowed secured claim under the Bankruptcy Code, thus a Chapter 7 debtor may not "strip off" a mortgage pursuant to 11 U.S.C.A. § 506(d) even if the mortgage is an inferior mortgage that is wholly "underwater."

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 24**  
**June 13, 2015**  
**Manuel Farach**

**Sterling Crest, Ltd., v. Blue Rock Partners Realty Group, Sterling Crest, Ltd., --- So.3d ----, 2015 WL 3631608 (Fla. 5th DCA 2105).**

A general partner may sell assets of a limited partnership in the ordinary course, but if outside of the ordinary course, only if permitted by the limited partnership agreement or with consent of the limited partners. Apparent authority of a general partner to act on behalf of the limited partners exists only when there is “a) a representation by the purported principal; (b) [reasonable] reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.”

**In Re: Amendments To The Rules Regulating The Florida Bar (Biennial Petition), - -- So.3d ----, 2015 WL 3617835 (Fla. 2015).**

The Florida Supreme Court approves amendments to the Rules Regulating the Florida Bar, including retention of the requirement that every Bar member must file an annual statement certifying compliance of their trust account in accordance with the Rules.

**Alachua County v. Expedia, Inc., --- So.3d ----, 2015 WL 3618004 (Fla. 2015).**

Online hotel booking companies must pay local taxes only on the monies they receive from the hotel guest, and not the total amount the hotel guest pays.

**Jax Utilities Management, Inc. v. Hancock Bank, --- So.3d ----, 2015 WL 3622360 (Fla. 1st DCA 2015).**

The one year statute of limitations to enforce an equitable lien under Florida Statute section 95.11(5)(b) runs from the last furnishing of labor, materials or services to improve the project. Moreover and by its enactment, Florida Statute section 713.3471(2) eliminated common law remedies of contractors to sue lenders for improvements to projects by contractors and lienors.

**Sas v. Federal Nat. Mortg. Ass'n, --- So.3d ----, 2015 WL 3609508 (Fla. 2d DCA 2015).**

A testifying records custodian need not have personal knowledge of how the business records were created if the records are independently verified by the custodian.

**U.S. Bank Nat. Ass'n v. Rios, --- So.3d ----, 2015 WL 3609892 (Fla. 2d DCA 2015).**

A purchaser at a foreclosure sale buys “as is,” and cannot raise claims of fraud for failure of the foreclosing party’s failure to advise of the property’s condition.

**FINR II, Inc. v. Hardee County, --- So.3d ----, 2015 WL 3618521 (Fla. 2d DCA 2015).**

An owner of property adjacent to another property receiving governmental action can maintain a Bert Harris Act suit if the governmental action on the adjoining property inordinately burdens the property owner; conflict certified with *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015).

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 25**  
**June 20, 2015**  
**Manuel Farach**

**Plant Food Systems, Inc. v. Irely**, --- So.3d ----, 2015 WL 3793499 (Fla. 5th DCA 2015).

Claims against internet (as opposed to solely print) publications are subject to the defamation pre-suit notice requirements of Florida Statute section 770.01

**Kobi Karp Architecture & Interior Design, Inc. v. Charms 63 Nobe, LLC**, --- So.3d 2015 WL 3758154 (Fla. 3d DCA 2015).

A plaintiff in a breach of contract action may not request discovery of a defendant's contracts with defendant's third party clients in order to determine the custom and usage in defendant's industry when the contract is unambiguous.

**Wanda Dipaola Stephen Rinko General Partnership v. Beach Terrace Ass'n, Inc.**, - -- So.3d ----, 2015 WL 3759500 (Fla. 2d DCA 2015).

An award of costs under Florida Statute section 57.041, unlike an award of attorneys' fees, is based on who recovers a judgment and not on which party prevails on the significant issues in the case.

**Jarvis v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2015 WL 3760659 (Fla. 4th DCA 2015).

If plaintiff trust in mortgage foreclosure seeks to establish standing by arguing the note was transferred into the trust prior to suit being filed, plaintiff must prove physical possession of the note by the trustee together with the trustee being the named payee on the note, the note being bearer paper, or an indorsement to the trustee.

**Eyec Trucking, LLC. v. Santos**, --- So.3d ----, 2015 WL 3761419 (Fla. 4th DCA 2015).

There is no duty to produce a privilege log until an outstanding objection to production is ruled upon.

**Thompson v. Markham**, --- So.3d ----, 2015 WL 3777708 (Fla. 1st DCA 2015).

Upon the Clerk of Court receiving back an unopened letter that notifies of an upcoming tax deed, due process requires the Clerk take additional steps to give notice that are appropriate under the circumstances such as "checking the records of the taxing authorities for a change of address submitted by the legal titleholder; resending notice by regular mail so that no signature is required; posting notice on the property to be sold, not merely at the last known address of the titleholder; or sending a notice addressed to 'occupant' by regular mail."

**Green v. Lingle**, --- So.3d ----, 2015 WL 3777711 (Fla. 1st DCA 2015).

Discretion should generally be exercised in favor of allowing additional time to serve defendants if the statute of limitations has run.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 26**  
**June 27, 2015**  
**Manuel Farach**

**Letchworth v. Pannone**, --- So.3d ----, 2015 WL 3903536 (Fla. 5th DCA 2015).

Certiorari lies to review trial court orders compelling the disclosure of confidential or privileged information, including information of third parties.

**Nationstar Mortg., LLC v. Berdecia**, --- So.3d ----, 2015 WL 3903568 (Fla. 5th DCA 2015).

A witness must lay the foundation to testify as to business records, but witnesses in mortgage foreclosure cases need not be the person who entered the information into the records nor need they identify the person who entered the data into the records.

**Eagles Master Ass', Inc. v. Bank of America, N.A.**, --- So.3d ----, 2015 WL 3915871 (Fla. 2d DCA 2015).

A lender can prove standing, even if it has lost the note, by filing a copy of the indorsement or assignment together with a copy of the lost note when filing suit.

**HJH, L.L.C. v. Volusia County**, --- So.3d ----, 2015 WL 3915930 (Fla. 5th DCA 2015).

Appellate review of a trial court's decision on boundary lines is *de novo* when the trial court decision is based on interpretation of plats and deeds.

**ATC Logistics Corp. v. Jackson**, --- So.3d ----, 2015 WL 3917424 (Fla. 1st DCA 2015).

Disqualification of opposing appellate counsel is required if counsel represented the other side in the trial court as an associate.

**Blue Lagoon Development, LLC v. Maury**, --- So.3d ----, 2015 WL 3875437 (Fla. 3d DCA 2015).

Unless solely for the payment of money or time is the material part, a contract lacking a "time of the essence" provision is not breached by failure to perform on its due date.

**Double Park, LLC v. Kaine Parking 125, LLC**, --- So.3d ----, 2015 WL 3875457 (Fla. 3d DCA 2015).

The trial court must hold an evidentiary hearing to determine dollar amounts that might be due if a triple-net lease requires additional payments for monies received by the tenant from subtenants in excess of those owed to the main landlord

**Teitelbaum v. South Florida Water Management Dist.**, --- So.3d ----, 2015 WL 3875464 (Fla. 3d DCA 2015).

"Condemnation blight" is relevant to the valuation of property that has already been taken but does not apply to *de facto* takings claims; any diminution in value due to condemnation blight is awarded at the time of the actual taking.

**Loper v. Weather Shield Mfg., Inc.**, --- So.3d ----, 2015 WL 3875549 (Fla. 1st DCA 2015).

An oral promise to not sue in exchange for new house windows reaching the end of their warranty period is enforceable and not illusory as it supported by consideration (an agreement to not sue) and definite in time (the upcoming end of the warranty period). Any application of the Statute of Frauds is limited by equitable estoppel.

**Silver Shells Corp. v. St. Maarten at Silver Shells Condominium Ass'n, Inc.**, --- So.3d ----, 2015 WL 3875556 (Fla. 1st DCA 2015).

The five-year statute of limitations for condominium associations to bring actions to recover property improperly removed by the developer begins to run on turnover of the association, not the date of removal of the property.

**Channell v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2015 WL 3875949 (Fla. 2d DCA 2015).

A foreclosing lender's mere reliance on a previous servicer's records is, without more, insufficient to establish the predicate for the Business Records Exception to the Hearsay Rule. A subsequent lender may lay the foundation by independently establishing the accuracy of the records (per *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So.2d 230 (Fla. 2d DCA 2005)) or reviewing the records for accuracy prior to integrating the prior records into the lender's own records (*Bank of N.Y. v. Calloway*, 157 So.3d 1064 (Fla. 4th DCA 2015)).

**Bennett v. Walton County**, --- So.3d ----, 2015 WL 3824197 (Fla. 1st DCA 2015).

Substantive due process challenges to zoning regulations are reviewed under the rational basis test. Prohibiting the use of residential property for paid events is "facially" permissible, and "as applied" permissible as the term "non-residential" sufficiently conveys the restriction imposed by the local government.

**Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.**, --- S.Ct. ----, 2015 WL 2473449 (2015).

Disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C.A. §§ 3604(a), 3605(a).

**Kimble v. Marvel Entertainment, LLC**, --- S.Ct. ----, 2015 WL 2473380 (2015).

A patent holder cannot charge royalties after the patent term expires.

**Horne v. Department of Agriculture**, --- S.Ct. ----, 2015 WL 2473384 (2015).

The Taking Clause of the United States Constitution applies to personal as well as real property.

**Tartell v. South Florida Sinus and Allergy Center, Inc.**, --- F.3d ----, 2015 WL 3857338 (11th Cir. 2015).

There is no Lanham Act violation for cybersquatting and unfair competition arising out the use of a name in a website unless the name has acquired secondary meaning.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 27**  
**July 4, 2015**  
**Manuel Farach**

**Braham v. Branch Banking and Trust Co.**, --- So.3d ----, 2015 WL 4002385 (Fla. 5th DCA 2015).

Florida Statute section 655.85 (check-cashing fee is permissible) is not preempted by 12 U.S.C. § 1831a(j)(2) (2012) (out of state banks may conduct business in same manner as state banks). Moreover, section 655.85 does not grant parties a private right of action.

**TD Bank, N.A. v. Graubard**, --- So.3d ----, 2015 WL 4002478 (Fla. 5th DCA 2015).

A foreclosure judgment sets the “validity, priority and extent of [the] debt, so introduction into evidence of the final judgment of foreclosure is not necessary when a deficiency judgment is entered in the same action as the foreclosure judgment.

**Gawker Media, LLC v. Bollea**, --- So.3d ----, 2015 WL 4031705 (Fla. 2d DCA 2015).

Dismissing an objecting party from the lawsuit does not cure the objection of failure to comply with the mandatory requirement of Florida Rule of Civil Procedure 1.440 that a matter be “at issue” for 20 days prior to setting the matter for trial.

**Land Co. of Osceola County, LLC v. Genesis Concepts, Inc.**, --- So.3d ----, 2015 WL 3999510 (Fla. 4th DCA 2015).

*Quantum meruit* is not available when the parties enter into an express contract.

**San Pedro v. Law Office of Paul Burkhardt**, --- So.3d ----, 2015 WL 4001966 (Fla. 4th DCA 2015).

An order awarding a charging lien must comply with lodestar requirements and set forth the number of hours expended and a reasonable hourly rate.

**Wright v. JPMorgan Chase Bank, N.A.**, --- So.3d ----, 2015 WL 4002319 (Fla. 4th DCA 2014).

A corporate parent is a different legal entity than its subsidiary, so a parent’s standing to bring suit is not automatically transferred to its subsidiary.

**Culverhouse v. Paulson & Co. Inc.**, --- F.3d ----, 2015 WL 3953290 (11th Cir.).

The Eleventh Circuit certifies to the Delaware Supreme Court the question of when is a claim direct or derivative in nature for recovery of losses.

**Miljkovic v. Shafritz and Dinkin, P.A.**, --- F.3d ----, 2015 WL 3956570 (11th Cir. 2015).

Representations made by an attorney in court papers are subject to the requirements and protections of the Fair Debt Collection Practices Act.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 28**  
**July 11, 2015**  
**Manuel Farach**

**Blue Infiniti, LLC v. Wilson**, --- So. 3d ---, 2015 WL 4098895 (Fla. 4th DCA 2015).

A defendant is not a prevailing party if she pays substantially all the lawsuit asked for, and as a result, the lawsuit is voluntarily dismissed by the plaintiff.

**Residential Mort. Servicing Corp. v. Winterlakes Property Owners Ass'n**, --- So. 3d ---, 2015 WL 4098868 (Fla. 4th DCA 2015).

An equity of redemption may be assigned to a third party.

**Michael Anthony Co. v. Palm Springs Townhomes**, --- So. 3d ---, 2015 WL 4095243 (Fla. 4th DCA 2015).

Contract documents executed at the same time by the same parties for the same transaction and concerning the same subject matter are to be read together. Accordingly, a party cannot enforce one provision of one document (a lease) when it has waived that provision by proceeding to closing under a different document (the purchase and sale agreement) notwithstanding an apparent violation of the lease.

**Todd v. Citimortgage**, --- So. 3d ---, 2015 WL 4128864 (Fla. 5th DCA 2015).

An order denying a motion to set aside a default is not an appealable non-final order.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 29**  
**July 18, 2015**  
**Manuel Farach**

**Ciprian-Escapa v. City of Orlando**, --- So. 3d ----, 2015 WL 4366551 (Fla. 5th DCA 2015).

A later-filed affidavit of proof cannot convert a previously unliquidated sum into a liquidated sum such that notice of the final hearing on damages need not be given.

**Fischer v. Debrincat**, --- So. 3d ---, 2015 WL 4269259 (Fla. 4th DCA 2015).

The Litigation Privilege does not bar an action for malicious prosecution; conflict certified with *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013).

**Reddy v. Zurita**, --- So. 3d ----, 2015 WL 4366570 (Fla. 5th DCA 2015).

A defendant that does not object to plaintiff's changing his claims (without amending his complaint) cannot argue after judgment (or on appeal) that the claims changed.

**Central Park A Metrowest Condominium Assoc., Inc. v. AmTrust REO I, LLC**, --- So. 3d ----, 2015 WL 4366573 (Fla. 5th DCA 2015).

Unless the final judgment expressly retains such jurisdiction, a trial court's inherent retention of jurisdiction does not include the jurisdiction to determine the amounts due for condominium assessments under Florida Statute section 718.116's "safe harbor."

**St. Clair v. U.S. Bank Nat. Ass'n**, --- So. 3d ----, 2015 WL 4379738 (Fla. 2d DCA 2015).

Under the "shelter rule," a non-holder in possession may enforce a promissory note it receives from a holder entitled to enforce the note even if the note was transferred to the non-holder without the intention to pass title.

**Amelio v. Marilyn Pines Unit II Condominium Association, Inc.**, --- So.3d ----, 2015 WL 4249923 (Fla. 2d DCA 2015).

A condominium unit owner is entitled to a mandatory injunction to force their association to repair a leaking slab since the association's failure repair violates a clear legal right (enforcement of the association documents), irreparable harm is threatened (Florida Statute section 718.303(1) holds that a violation of the association documents establishes irreparable harm), there is no adequate remedy at law (the owners cannot repair the leaking slab themselves) and award of money damages will be inadequate.

**Smith v. Reverse Mortg. Solutions, Inc.**, --- So.3d ----, 2015 WL 4257632 (Fla. 3d DCA 2015).

A reverse mortgage may not be foreclosed until the death of all borrowers; a wife who does not sign the promissory note (signed only by husband) but signs the mortgage itself is a "borrower" whose homestead may not be foreclosed until her death.

**Peugnero v. Bank of America, N.A.**, --- So.3d ----, 2015 WL 4268796 (Fla. 4th DCA 2015).

A loan payment history identified and testified to by a witness (but not admitted into evidence) is not sufficient to support an award of damages as set forth in the statement.

**Fairbanks Contracting and Remodeling, Inc. v. Hopcroft**, --- So.3d ----, 2015 WL 4269624 (Fla. 4th DCA 2015).

Forum selection clauses apply to Florida Deceptive and Unfair Trade Practices claims.

**Barnsdale Holdings, LLC v. PHH Mortg. Corp.**, --- So.3d ----, 2015 WL 4269918 (Fla. 3d DCA 2015).

Judge Shepherd, writing a concurring opinion to a *per curiam affirmance*, states that a party acquiring an interest after the filing of a *lis pendens* is barred from participating in the suit unless it moves to intervene within thirty days of date of filing of *lis pendens*.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 30**  
**July 25, 2015**  
**Manuel Farach**

**Shamrock-Shamrock, Inc. v. City of Daytona Beach**, --- So.3d ----, 2015 WL 4486501 (Fla. 5th DCA 2015).

A trial court's incorrect interpretation of a municipal code on first stage certiorari review is addressable on second stage certiorari review as a "violation of a clearly established principle of law resulting in the miscarriage of justice."

**Fi-Evergreen Woods, LLC v. Estate of Robinson**, --- So.3d ----, 2015 WL 4486504 (Fla. 5th DCA 2015).

An agent can, under ordinary contract principles, enter into an arbitration agreement so long as the third party's reliance on the agent's representations is reasonable.

**Bornstein v. Marcus**, --- So.3d ----, 2015 WL 4461117 (Fla. 4th DCA 2015).

An individual's complaint seeking credit for a \$50,000 law firm retainer paid by the individual is not a "sham pleading" merely because the \$50,000 was entered as a capital contribution on the financial books of the individual's company.

**Kenney v. HSBC Bank USA, Nat. Ass'n**, --- So.3d ----, 2015 WL 4461138 (Fla. 4th DCA 2015).

Florida Statute section 673.3011 holds that a "person entitled to enforce" a negotiable instrument means the holder of the instrument, a non-holder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument. If plaintiff seeks to establish standing through an assignment, plaintiff must prove the assignment was executed before the suit was filed. If plaintiff seeks to establish standing as a non-holder in possession, plaintiff must produce proof that it has the rights of a holder. If plaintiff seeks to establish standing without possession, it must produce evidence that it was entitled to enforce the instrument.

**Three Lions Const., Inc. v. Namm Group, Inc.**, --- So.3d ----, 2015 WL 4464494 (Fla. 3d DCA 2015).

A motion to extend time to accept or reject settlement offer, which offer is not agreed to by the offeror nor granted by the trial court, does not extend the time to accept or reject.

**In re McLean**, --- F.3d ----, 2015 WL 4480920 (11th Cir. 2015).

A creditor filing a proof of claim seeking payment of a debt previously discharged in a prior bankruptcy proceeding is properly sanctioned.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 31**  
**August 1, 2015**  
**Manuel Farach**

**Gardner v. Wolfe & Goldstein, P.A.**, --- So. 3d ---, 2015 WL 4549471 (Fla. 4th DCA 2015).

A mediated settlement agreement must be signed by the party to be charged in order to be enforced against that party.

**Department of Transportation v. Mid-Peninsula Realty Investment Group, LLC**, --- So. 3d ---, 2015 WL 4549196 (Fla. 2d DCA 2015).

Holding title to and “using” real property do not constitute “possession” for purposes of invoking the exception to extinguishment under Florida Statute section 712.03(3) of the Marketable Record Title Act.

**Green Tree Servicing, LLC v. Milam**, --- So. 3d ---, 2015 WL 4549200 (Fla. 2d DCA 2015).

Conditions precedent are examined for substantial, not perfect technical, compliance; the Fifth District’s opinion in *Samaroo v. Wells Fargo Bank, N.A.*, 137 So. 3d 1127 (Fla. 5th DCA 2014), is distinguished.

**De Sousa v. JP Morgan Chase**, --- So. 3d ---, 2015 WL 4549593 (Fla. 4th DCA 2015).

A purchaser at foreclosure sale purchases subject to pending litigation associated with an earlier filed *lis pendens*. A party may not intervene post-judgment absent extraordinary circumstances such as lack of alternatives procedures to protect that party’s interests.

**Snyder v. JP Morgan Chase**, --- So. 3d ---, 2015 WL 4549529 (Fla. 4th DCA 2015).

The plaintiff in a mortgage foreclosure action must be in “possession” of the promissory note, either as a holder or as having the rights of a holder.

**Publix Supermarkets, Inc. v. Conte**, --- So. 3d ---, 2015 WL 4546946 (Fla. 4th DCA 2015).

A trial court may not enter final judgment while an interlocutory appeal is pending. Additionally, Judge Klingensmith specially concurs with an opinion holding that Florida Statutes Chapter 44 arbitrations are subject to the provisions of Florida Statutes Chapter 682, including Chapter 682’s arbitrator disclosure provisions.

**Schmidt and Messina v. Deutsche Bank**, --- So. 3d ---, 2015 WL 4577287 (Fla. 5th DCA 2015).

A dated allonge which predates the filing of a foreclosure complaint does not, by itself, establish standing especially when the lender’s witness cannot testify as to when lender acquired the note and lender initially filed a lost note count.

**Vasilevskiy v. Wachonia Bank, N.A.**, --- So. 3d. ---, 2015 WL 4577415 (Fla. 5th DCA 2015).

Giving only 28 days notice of default and right to cure (when 30 days is contractually called for) is not a material breach of the right to cure covenant under certain circumstances; *Samaroo v. Wells Fargo Bank, N.A.*, 137 So.3d 1127 (Fla. 5th DCA 2014), is distinguished as not requiring strict compliance with conditions precedent.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 32**  
**August 8, 2015**  
**Manuel Farach**

**Hall v. Animals.com, L.L.C.**, --- So.3d ----, 2015 WL 4660127 (Fla. 5th DCA 2015).

A party seeking transfer of a case under *forum non conveniens* must submit timely affidavits so that the trial court can determine the witnesses and the significance of their testimony and so that party opposing has adequate opportunity to counter the evidence.

**Arrasola v. MGP Motor Holdings, LLC**, --- So.3d ----, 2015 WL 4634686 (Fla. 3d DCA 2015).

The change in Florida Statute section 682.03(1)(b) from “hear” to “decide” indicates that a trial court may summarily dispose, without hearing, a motion to compel arbitration.

**Moreno v. First Intern. Title, Inc.**, --- So.3d ----, 2015 WL 4637238 (Fla. 3d DCA 2015).

A party to a contract cannot claim she signed it without reading it unless she can prove circumstances that prevented her reading the contract. Accordingly, a party who signs a disclosure at closing attesting to code enforcement liens on the property she is buying cannot later sue the title agent for breach of fiduciary duty regarding the liens.

**Conde & Cohen, P.L. v. Grandview Palace Condominium Ass'n, Inc.**, --- So.3d ----, 2015 WL 4637285 (Fla. 3d DCA 2015).

Unlike a charging lien, an attorney’s retaining lien “covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter [in which the property is held].” The attorney under a retaining lien may retain the property until the attorney is paid, the client can demonstrate a compelling need for the property, or the client posts adequate security in place of the lien.

**Balch v. LaSalle Bank N.A.**, --- So.3d ----, 2015 WL 3759716 (Fla. 4th DCA 2015).

Evidence that a lender transferred a note into a pooling service agreement (PSA) is, by itself, insufficient to establish standing as the lender must also introduce evidence that the transfer into the PSA likewise included a transfer of the interest in the note to the trustee of the pool.

**CitiMortgage, Inc. v. Turner**, --- So.3d ----, 2015 WL 4623656 (Fla. 1st DCA 2015).

A co-tenant who does not sign the promissory note for a loan but co-signs the mortgage encumbering the entire property (not just the co-tenant’s interest) may be foreclosed of his interest upon default by the borrowers even if he signed the mortgage with a “Limited Purpose Execution” notation under his signature.

**Snowden v. Wells Fargo Bank**, --- So.3d ----, 2015 WL 4623731 (Fla. 1st DCA 2015).

A borrower seeking to overturn a judgment (after trial) of foreclosure claiming lack of standing must provide a transcript of the lender’s testimony or evidence of standing, even if the pleadings might raise a question of standing.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 33**  
**August 15, 2015**  
**Manuel Farach**

**Andrews v. Bayview Loan Servicing, LLC**, --- So. 3d ----, 2015 WL 4768981 (Fla. 5th DCA 2015).

A junior lienor can require a foreclosing plaintiff prove its case at trial even if the plaintiff and the principal defendant have agreed to a settlement without trial.

**TD Bank, N.A. v. Graubard**, --- So. 3d ----, 2015 WL 4769264 (Fla. 5th DCA 2015).

A foreclosure judgment sets the “validity, priority and extent of [the] debt,” so introduction into evidence of the final judgment of foreclosure is not necessary when a deficiency judgment is entered in the same action as the foreclosure judgment.

**Boumarate v. HSBC Bank USA, N.A.**, --- So. 3d ----, 2015 WL 4769304 (Fla. 5th DCA 2015).

In order to re-establish a lost negotiable instrument, a lender must prove it was entitled to enforce the instrument at the time of its loss (but not more than the statute requires).

**Borden Dairy Co. of Alabama, LLC v. Kuhajda**, --- So. 3d ----, 2015 WL 4774629 (Fla. 1st DCA 2015).

An offer of judgment is ineffective if it fails to state whether the offer includes attorneys’ fees even if the underlying suit does not claim attorneys’ fees. Conflict certified with *Bennett v. American Learning Systems of Boca Delray, Inc.*, 857 So. 2d 986 (Fla. 4th DCA 2003).

**Woodbridge Holdings, LLC v. Prescott Group Aggressive Small Cap Master Fund**, --- So. 3d ----, 2015 WL 4747174 (Fla. 4th DCA 2015).

In order to constitute a “fair offer” to dissenting shareholders under Florida’s dissenting shareholder statute, Florida Statute section 607.1322, the offer must use “customary and current valuation concepts and techniques.”

**Michele K. Feinzig, P.A. v. Deehl & Carlson, P.A.**, --- So. 3d ----, 2015 WL 4747876 (Fla. 3rd DCA 2015).

An oral contract for one law firm to assist another law firm through trial and appeal is not subject to the Statute of Frauds if the contract was intended to last less than one year.

**Prime Group, LLC v. Abbo**, --- So. 3d ----, 2015 WL 4750832 (Fla. 4th DCA 2015).

A trial court cannot determine that a party has waived a privilege without first giving the party an opportunity to object, and if contested, an evidentiary hearing.

**OneWest Bank, FSB v. Cummings**, --- So. 3d ----, 2015 WL 4758342 (Fla. 2d DCA 2015).

Testimony at trial and the introduction of the lender’s business records can establish that a non-holder of a promissory note is entitled to enforce the note.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 34**  
**August 22, 2015**  
**Manuel Farach**

**Fowler v. TD Bank**, --- So.3d ----, 2015 WL 4945008 (Fla. 5th DCA 2015).

A conflict between the legal descriptions and street addresses on two disputed mortgages requires the trial court to make factual findings as to the intent of the parties and requires that a motion for summary judgment be denied.

**Bank of America v. The Enclave at Richmond Place Condominium Ass'n, Inc.**, --- So.3d ----, 2015 WL 4965912 (Fla. 2d DCA 2015).

An association's answer to a mortgage foreclosure complaint which demands the amounts due under the "safe harbor" provisions of Florida Statute section 718.116 (1)(b) estops the association from claiming greater amount post-judgment.

**Grand Central at Kennedy Condominium Ass'n, Inc. v. Space Coast Credit Union**, --- So.3d ----, 2015 WL 4923677 (Fla. 2d DCA 2015).

Upon entry of the final judgment, a trial court loses jurisdiction to determine the amounts due under the "safe harbor" provisions of Florida Statute section 718.116 (1)(b) unless the final judgment reserved jurisdiction for that specific purpose.

**Santa Rosa Investors, Inc. v. Wilson**, --- So.3d ----, 2015 WL 4925217 (Fla. 1st DCA 2015).

The phrase "liquidated or liquidated" in a durable power of attorney is ambiguous, and requires the trial court make factual findings regarding the intent of the parties.

**Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.**, --- So.3d ----2015 WL 4926551 (Fla. 4th DCA 2015).

Notwithstanding that it was not raised in opening statements nor in the preliminary instructions to the jury, a specific defense is preserved and may be presented to the jury if it is raised in the pleadings and the pretrial stipulation.

**Perez v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----2015 WL 4930749 (Fla. 4th DCA 2015).

A foreclosing lender who is not the original lender and who does not have the original note indorsed to it at the time of filing suit must establish that it had the note at the time of filing suit.

**Donado v. PennyMac Corp.**, --- So.3d ----2015 WL 4930873 (Fla. 4th DCA 2015).

The verification requirements of Florida Rule of Civil Procedure 1.110 (b) became effective upon the issuance of the original Florida Supreme Court opinion, not the revised opinion issued several months later.

**Infinity Home Care, L.L.C. v. Amedisys Holding, LLC**, --- So.3d ----2015 WL 4927257 (Fla. 4th DCA 2015).

Referral sources are a legitimate business interests subject to protection by covenants not to compete under Florida Statute section 542.335; conflict certified *with Florida Hematology & Oncology v. Tummala*, 927 So.2d 135 (Fla. 5th DCA 2006).

**Federal Home Loan Mortg. Corp. v. Beekman**, --- So.3d ----2015 WL 4926956 (Fla. 4th 2015).

A trial court errs by entering a judgment enforcing a loan modification when such relief was not requested in the pleadings, was not tried by consent, and there was no evidence that the modification was agreed to by the parties.

**Lamb v. Nationstar Mortg., LLC**, --- So.3d ----2015 WL 4930268 (Fla. 4th DCA 2015).

A foreclosing bank seeking to enforce a note which is specially indorsed to another may prove standing “ through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.”

**Cardona v. Nationstar Mortg., LLC**, --- So.3d ----2015 WL 4931354 (Fla. 4th DCA 2015).

A witness may not testify as to the contents of business records without personal knowledge of the records or without the records being first introduced into evidence.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 35**  
**August 29, 2015**  
**Manuel Farach**

**In re Amendments to Florida Rule of Appellate Procedure 9.210**, --- So.3d ----, 2015 WL 5036335 (Fla. 2015).

The page limitations for appeals in certain types of cases are revised.

**In re Amendments to Florida Rule of Appellate Procedure 9.210**, --- So.3d ----, 2015 WL 5036340 (Fla. 2015).

The rule is revised to state that briefs filed in paper format must be unstapled.

**A & A Elec. Services, Inc. v. Jurado**, --- So.3d ----, 2015 WL 5023126 (Fla. 2d DCA 2015).

The party seeking to prove the existence of a joint venture must prove that “(1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits[,] and (5) a duty to share in any losses.” A single letter from one shareholder of purported joint venturer to the sole shareholder of the other purported joint venture does not establish an agreement to enter into the joint venture.

**Ball v. Genesis Outsourcing Solutions, LLC**, --- So.3d ----, 2015 WL 5023447 (Fla. 3d DCA 2015).

An order granting summary judgment is not an appealable order. A final judgment granting summary judgment should read along the lines of “. . . [t]he motion for summary judgment is granted. Final judgment is entered as follows. The plaintiff [name and address] shall recover from defendant [name and address] the sum of \$ ... that shall bear interest at the rate of ... % per year for which let execution issue. The court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.” Likewise, a final summary judgment in favor of a defendants should read along the lines of “. . . “[t]he motion for summary judgment is granted. Final judgment is entered for defendant [name] and against plaintiff [name]. The court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.” The traditional phrase of finality for a defendant is “plaintiff shall take nothing by this action and defendant shall go hence without day.”

**Fiorito v. JP Morgan Chase Bank, Nat. Ass'n**, --- So.3d ----, 2015 WL 5026181 (Fla. 4th DCA 2015).

A lender at trial need only present competent, substantial evidence of its standing at time of filing suit; a bank employee's testimony that the lender owned the note at time of filing suit is sufficient. If standing derives from an indorsement on the note, the lender must prove the indorsement was placed on the note prior to filing suit.

**Donovan Marine, Inc. v. Delmonico**, --- So.3d ----, 2015 WL 5026795 (Fla. 4th DCA 2015).

A trial court must make factual findings regarding attorneys' fees hours not awarded.

**Donovan Marine, Inc. v. Delmonico**, --- So.3d ----, 2015 WL 5026795 (Fla. 4th DCA 2015).

Upon request by the plaintiff, a trial court must enter a directed verdict against those defendants the court has previously defaulted.

**Nationstar Mortg., LLC v. Brown**, --- So.3d ----, 2015 WL 4999017 (Fla. 1st DCA 2015).

Dismissal of a mortgage foreclosure suit without prejudice does not continue the running of the statute of limitations; conflict certified with *Deutsche Bank Trust Co. Americas v. Beauvais*, 40 Fla. L. Weekly D1, 2014 WL 7156961 (Fla. 3d DCA Dec. 17, 2014).

**Real Property and Business Litigation**  
**Volume VIII, Issue 36**  
**September 5, 2015**  
**Manuel Farach**

**Tomlinson v. GMAC Mortgage**, --- So.3d ----, 2015 WL 5124763 (Fla. 2d DCA 2015).  
Taking judicial notice of a court file does not automatically admit the documents in the court file; they are still subject to objection and challenge.

**Strazzulla v. Riverside Banking Company**, --- So.3d ----2015 WL 5125454 (Fla. 4th DCA 2015).

The Fourth District adopts the Third District's *Dinuro Investments, LLC v. Camacho*, 141 So.3d 731 (Fla. 3d DCA 2014), two-prong test and holds that shareholders must allege both a direct harm and a special injury in order to bring a direct action against the company in their individual capacity.

**Market Tampa Investments, LLC v. Stobaugh**, --- So.3d ----2015 WL 5131679 (Fla. 2d DCA 2015).

One who purchases property during a pending foreclosure case in which a *lis pendens* has been filed is generally not entitled to intervene.

**Pacific Nat. Bank, N.A. v. Home Tower Condominium, Inc.**, --- So.3d ----2015 WL 5131556 (Fla. 4th DCA 2015).

Unless there is lack of "actual consent" or failure of subject matter jurisdiction, a party loses the right to an appeal if it agrees to a final judgment without reserving the right to appeal an issue or the matter.

**Key West Seaside, LLC v. Certified Lower Keys Plumbing, Inc.**, --- So.3d ----2015 WL 5132383 (Fla. 3d DCA 2015).

The fact that the successful offeror of a proposal for settlement may claim its attorney's fees from another co-defendant is not a basis for denying the request for fees.

**Wells Fargo Bank, N.A. v. Clavero**, --- So.3d ----2015 WL 5132447 (Fla. 3d DCA 2015).

A non-signer's receipt of mortgage funds (or receipt of the benefit of the funds) may supply a missing signature to a mortgage under equitable subrogation principles. However, ratification of an agent's prior mortgage may occur only when the principal has full knowledge of the details surrounding the mortgage.

© Manuel Farach 2015

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 37**  
**September 12, 2015**  
**Manuel Farach**

**McCone v. Pitney Bowes**, --- So.3d ----, 2015 WL 5278967 (Fla. 5th DCA 2015).

Failure to serve a motion to disqualify a trial judge per Florida Rule of Judicial Administration 2.330 (c) renders the automatic grant under Rule 2.330 (j) inapplicable.

**Harris v. HSBC Bank USA, National Association**, --- So.3d ----, 2015 WL 5240549 (Fla. 4th DCA 2015).

A backdated assignment of a note does not establish standing as filing date as required to file a mortgage foreclosure action.

**Rivernider v. Meyer**, --- So.3d ----, 2015 WL 5244635 (Fla. 4th DCA 2015).

The litigation privilege does not apply when all the elements of the tort of malicious prosecution are satisfied. However, a more lenient standard applies to attorneys as attorneys have a duty of representation that requires certain actions.

**Dadd v. Houde**, --- So.3d ----, 2015 WL 5245138 (Fla. 3d DCA 2015).

Although she must do so by clear and convincing evidence, an adverse possessor's burden is only to prove the property is possessed "under claim of right or color of title, and [that the adverse possession was] actual, open, visible, notorious, continuous and hostile to the true owner and to the world at large." A party gaining property through adverse possession passes title to the property to her successors in title.

**CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.**, --- So.3d ----, 2015 WL 5247160 (Fla. 3d DCA 2015).

There are three possible forms of challenges to arbitration agreements: (1) a challenge to the arbitration provision itself; (2) a challenge to the contract as a whole that the contract, although reached, is not valid on other legal or public policy grounds, and (3) a challenge to the contract as a whole that alleges there was never an agreement between the parties in the first place. The third category of challenge is decided by the trial court, and an evidentiary hearing to decide the issue is necessary only when a "substantial issue" is raised as to contract formation.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 38**  
**September 19, 2015**  
**Manuel Farach**

**Caribbean Condominium Ltd. Partnership v. City of Flagler Beach**, --- So.3d ----, 2015 WL 5456819 (Fla. 5th DCA 2015).

A landowner claiming her land has been taken by inverse condemnation is entitled to attorneys' fees only if her inverse condemnation claim is successful.

**In re Amendments to Rule Regulating The Florida Bar 4-1.5-Fees and Costs for Legal Services**, --- So.3d ----, 2015 WL 5445616 (Fla. 2015).

The Florida Supreme Court has revised Rule Regulating the Florida Bar 4-1.5 (e) to define "retainer," "advance fee," and "flat fee."

**The Bank Of New York Mellon v. Condominium Association Of La Mer Estates, Inc.**, --- So.3d ----, 2015 WL 5445645 (Fla. 2015).

A default based on a complaint which fails to state a cause of action is voidable, not void, and thus actions to vacate default judgments based on improperly pled complaints must, pursuant to the requirements of Florida Rule of Civil Procedure 1.540, be brought within one year of date of judgment.

**Dominguez v. Hayward Industries, Inc.**, --- So.3d ----, 2015 WL 5438782 (Fla. 3d DCA 2015).

The components of a system (such as a pool filter) do not constitute "improvements" to real property for purposes of Florida Statute section 95.031.

**Katz v. Google Inc.**, --- F.3d ----, 2015 WL 5449883 (11th Cir. 2015).

A blogger's use of an unflattering copyrighted photograph can be protected as "fair use" under the Copyright Act, 17 U.S.C.A. § 107, if the photo was taken in a public setting, published elsewhere before its use in the blog, and its use in the blog was unaltered, primarily factual, and without conveying ideas or emotions.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 39**  
**September 26, 2015**  
**Manuel Farach**

**Sugar v. Estate of Stern**, --- So.3d ----, 2015 WL 5603469 (Fla. 3d DCA 2015).  
After claiming dishonesty in representations that culminated in the prior settlement agreement, a party cannot justifiably rely on oral representations in subsequent settlement discussions that culminate in an agreement.

**BMCL Holding LLC v. Wilmington Trust, N.A.**, --- So.3d ----, 2015 WL 5603490 (Fla. 3d DCA 2015).  
The Doctrine of After Acquired Title applies to mortgages, and runs with the land to bind successors of both the grantor and the grantee.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 40**  
**October 5, 2015**  
**Manuel Farach**

**Jones v. Golden**, --- So. 3d ----, 2015 WL 5727788 (Fla. 2015).

The claim of a known (or reasonably known) creditor – which creditor is not served with a notice to creditors - is not barred notwithstanding creditor filed its claim more than three months after publication of the opening of the estate. However, the claim must be filed within two years after publication under all circumstances otherwise it is barred.

**Thomas v. Clean Energy Coastal Corridor**, --- So. 3d ----, 2015 WL 5727810 (Fla. 2015).

A municipal bond may not provide for judicial foreclosure of unpaid assessments, i.e., the bond may not contain a method of collecting assessments other than the process set forth in Florida Statutes Chapter 197 of collecting tax liens.

**YHT & Associates, Inc. v. Nationstar Mortg. LLC**, --- So. 3d ----, 2015 WL 5710054 (Fla. 2d DCA 2015).

A non-party in the trial court proceedings cannot appeal a judgment, even if the non-party is the property owner which purchased the property after the lis pendens was filed.

**Wells Fargo Bank, N.A. v. Palm Beach Mall, LLC**, --- So. 3d ----, 2015 WL 5712341 (Fla. 4th DCA 2015).

Applying New York law, the Fourth District holds that a guarantee operative only when the mortgagor engages in “gross negligence or willful misconduct” requires a “deliberate act beyond a party merely acting out of its economic self-interest,” and that an intentional non-payment of the mortgage or the “de-leasing” (e.g., seeking short-term “Mom and Pop” stores instead of long-term credit-worthy tenants) is not sufficient to call into operation the guarantee. Moreover, New York law defines “insolvency” as inability to make payments when due and not “equity-insolvency” of the property.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 41**  
**October 12, 2015**  
**Manuel Farach**

**Davidian v. JP Morgan Chase Bank**, --- So. 3d ----, 2015 WL 5827124 (Fla. 4th DCA 2015).

Returns of service are hearsay, but admissible under Florida Statute section 90.803 (8); the public records exception to the hearsay rule. Moreover, a served party needs to be read the contents of the service only when it is substitute (and not personal) service.

**Wright v. Guy Yudin & Foster, LLP**, --- So. 3d ----, 2015 WL 5827944 (Fla. 4th DCA 2015).

An agreement with a law firm to pay attorney's fees that are already due is not a contingency fee agreement, even if payment is conditioned upon a triggering event.

**Phoenix Asset Management LLC v. GCCFC 2005-GG5 Route 33 Indus., LLC**, --- So. 3d ----, 2015 WL 5829782 (Fla. 3d DCA 2015).

A broker licensed in a state other than Florida may nonetheless enforce a Florida commission agreement if non-Florida broker "co-brokers" with a licensed Florida broker.

**Garcia v. Dyck-O'Neal, Inc.**, --- So. 3d ----, 2015 WL 5829818 (Fla. 3d DCA 2015).

Notwithstanding that a claim for deficiency was alleged in the original action, Florida Statute section 702.06 provides that a mortgagee may sue for a deficiency in a second and separate action so long as the first court did not rule on the claim for deficiency.

**CQB, 2010, LLC v. Bank of New York Mellon**, --- So. 3d ----, 2015 WL 5797617 (Fla. 1st DCA 2015).

An entire claim or defense must be "eviscerated" before an order denying discovery can be reviewed by certiorari. Standing to foreclose is determined by the plaintiff possessing the note at time of filing suit, so discovery of the chain of ownership of the promissory note prior to plaintiff filing suit is not necessary, and certiorari will not lie to review.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 42**  
**October 19, 2015**  
**Manuel Farach**

**Federal National Mortgage Association v. Legacy Parc Condominium Ass'n, Inc.**, --- So.3d ----, 2015 WL 6023164 (Fla. 5th DCA 2015).

A lender suing — post-judgment — to establish its entitlement to the “safe harbor” protections of Florida Statute section 718.116 need only attach the declaration of condominium (and not portions of prior foreclosure suit) to the complaint.

**Atlantica One, LLC v. Adragna**, --- So.3d ----, 2015 WL 6023402 (Fla. 5th DCA 2015).

A trial court does not abuse its discretion by approving a special jury instruction for breach of contract based on Johnson v. Davis (instead of the standard contract jury instruction for breach of contract) when suit is based on misrepresentations arising out of a real estate sales contract containing a Johnson v. Davis requirement.

**Florida Bankers Ass'n v. Florida Development Finance Corp.**, --- So.3d ----, 2015 WL 5996764 (Fla. 2015).

A litigant which is not one of the original parties in the dispute may not appear in the appeal of the dispute unless it successfully intervened in the trial court.

**Rodriguez v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2015 WL 5948169 (Fla. 4th DCA 2015).

A servicing bank that brings a foreclosure action in its own name must prove it had authority to proceed as a non-holder in order to establish standing.

**Peoples v. Sami II Trust 2006-AR6**, --- So.3d ----, 2015 WL 5948218 (Fla. 4th DCA 2015).

A successor obligee on a note establishes standing by demonstrating that it had, at the time suit was filed, possession and either a blank indorsement or a special indorsement in its name.

**General Commercial Properties, Inc. v. State Dept. of Transp.**, --- So.3d ----, 2015 WL 5948530 (Fla. 4th DCA 2015).

A government authority with condemnation powers has the ability to purchase real property outside of the condemnation process, and any offers it makes outside of the process are not considered written “first offers” for determining attorneys’ fees pursuant to Florida Statute section 73.015(1).

**Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta v. Florida Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem, Knights of Malta, The Ecumenical Order**, --- F.3d ----, 2015 WL 6000633 (11th Cir. 2015).

The Eleventh Circuit maintains its minority view that incontestability affects the strength of a mark for purposes of confusion.

**Kearney Partners Fund, LLC ex rel. Lincoln Partners Fund, LLC v. U.S.**, --- F.3d ----  
, 2015 WL 5944308 (11th Cir. 2015).

The Internal Revenue Service's "Economic Substance" test holds that transactions that lack economic effect or substance (other than generating tax losses) or that have no business purpose will not be recognized. While both must be satisfied, the first prong — economic effects — is objective and the second prong — business purpose — is subjective.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 43**  
**October 26, 2015**  
**Manuel Farach**

**Haines V. Black Diamond Properties, Inc.**, --- So. 3d ----, 2015 WL 6393808 (Fla. 5<sup>th</sup> DCA 2015).

A motion seeking attorneys' fees after issuance of the appellate mandate must be filed within thirty (30) days of the issuance of the mandate otherwise it is untimely under Florida Rule of Civil Procedure 1.525.

**Segalis v. Roof Depot USA, LLC**, --- So. 3d ----, 2015 WL 6160673 (Fla. 4th DCA 2015).

A notice of appearance by counsel does not waive the party's objections to personal jurisdiction; the party must seek affirmative relief in order to consent to jurisdiction.

**City of Miami v. Diocese of Newton Melkite Church**, --- So. 3d ----, 2015 WL 6161352 (Fla. 3d DCA 2015).

On second-tier certiorari review, an appellate court may only inquire whether the circuit court afforded procedural due process and applied the correct law.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 44**  
**October 31, 2015**  
**Manuel Farach**

**HFC Collection Center, Inc. v. Alexander**, --- So.3d ----, 2015 WL 6554404 (Fla. 5th DCA 2015).

A defendant who prevails on her defense that the contract sued upon was never properly assigned to plaintiff establishes that there is no contract between her and plaintiff, and as a result, is not entitled to contractual prevailing party attorneys' fees.

**Ensler v. Aurora Loan Services, LLC**, --- So.3d ----, 2015 WL 6496304 (Fla. 4th DCA 2015).

General testimony of a prior business's record-keeping practices, without describing details, is not sufficient to lay the predicate for the Business Records Exception to the Hearsay Rule. However, the proponent of the evidence may testify as to the prior business records if the proponent has sufficient procedures in place to check the accuracy of the prior business's records.

**100 Lincoln Rd SB, LLC v. Daxan 26 (FL), LLC**, --- So.3d ----, 2015 WL 6499331 (Fla. 3d DCA 2015).

Review of orders regarding *lis pendens* is by certiorari, and a recorded declaration of condominium is a "duly recorded instrument" under Florida Statute section 48.23.

**Daniels v. Sorriso Dental Studio, LLC**, --- So.3d ----, 2015 WL 6504461 (Fla. 2d DCA 2015).

The "lower tribunal" that determines the amount of appellate attorneys' fees is the court whose order or judgment has been reviewed.

**RREF SNV-FL SSL, LLC. v. Shamrock Storage, LLC**, --- So.3d ----, 2015 WL 6446074 (Fla. 1st DCA 2015).

Under Florida Statute section 56.29 (proceedings supplementary), it is the judgment debtor's burden to prove transfers to third party for no consideration were not done in an attempt to hinder, delay or defraud creditors.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 45**  
**November 7, 2015**  
**Manuel Farach**

**5730 Lake Underhill, LLC v. Smith-Horner, LLP**, --- So.3d ----, 2015 WL 6757518 (Fla. 5th DCA 2015).

A party claiming a prescriptive easement must demonstrate the use was adverse; use of another's land is presumed to be with the consent of the owner and subordinate to the rights of the owner and use by patrons is not adverse if pursuant to a written lease.

**Joseph B. Doerr Trust v. Central Florida Expressway Authority**, --- So.3d ----, 2015 WL 6748858 (Fla. 2015).

Florida Statute section 73.092(2), not the straight "benefits achieved" method of section 73.092(1), is employed to determine the landowner's attorneys' fees when the condemning authority engages in excessive litigation.

**Rogers v. U.S.**, --- So.3d ----, 2015 WL 6749915 (Fla. 2015).

The estate conveyed by a deed and the actual property conveyed is determined by the intent of the grantor, and not by whether the consideration was nominal or whether "strips and gores" are created.

**Florida Digestive Health Specialists, LLC v. Colina**, Case No. 2D14-4561 (Fla. 2d DCA November 4, 2015).

A court may not consider factors outside of Florida Statute section 542.335 in determining whether to enforce restrictive covenants, and specifically may not consider whether the harm to the restricted party outweighs the benefit to the restricting party.

**Deutsche Bank Trust Co. Americas v. Frias**, --- So.3d ----, 2015 WL 6735332 (Fla. 4th DCA 2015).

A prior servicer's business records are admissible so long as the witness has some knowledge of how the prior records were maintained and created.

**Jelic v. BAC Home Loans Servicing, LP**, --- So.3d ----, 2015 WL 6735353 (Fla. 4th DCA 2015).

An undated indorsement that appears for the first time after suit is filed is insufficient, by itself, to confer standing on the holder of the note.

**Bank of New York Mellon v. Nunez**, --- So.3d ----, 2015 WL 6735856 (Fla. 3d DCA 2015).

Parties need only substantially comply with conditions precedent in mortgages.

**Straub v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2015 WL 6738732 (Fla. 4th DCA 2015).

For purposes of claiming surplus foreclosure proceeds under Florida Statute section 45.031, a foreclosure sale is completed upon the issuance of the certificate of title by the clerk of the court. Thus, a claim for surplus proceeds filed more than sixty days after judicial sale but less than sixty days after issuance of certificate of title is timely.

**Dana's R.R. Supply v. Attorney General, Florida**, --- F.3d ----, 2015 WL 6725138 (11th Cir. 2015).

Florida Statute section 501.0117 (surcharges not permitted on credit card transactions) is an unconstitutional abridgement of free speech.

**Parnell v. CashCall**, No. 4:14-cv-00024-HLM (11th Cir. October 28, 2015).

A party seeking to challenge the validity of a “delegation provision” in an arbitration agreement (the arbitrator decides challenges to arbitration) must challenge the delegation provision directly.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 46**  
**November 14, 2015**  
**Manuel Farach**

**Pottinger v. City of Miami**, Case No. 14-13287 (11th Cir. November 10, 2015).

A settlement agreement which provides for an award of prevailing party attorneys' fees upon enforcement of the settlement agreement does not entitle movant to attorney's fees for successfully opposing modification of the settlement agreement.

**In re Amendments to Rule of Appellate Procedure 9.200**, --- So. 3d ----2015 WL 7009490 (Fla. 2015).

The rule regarding the appellate record is revised on technical grounds, including requiring the pages in the record to match the pagination in the PDF reader.

**Zander v. Cima**, Case No. 2D14-5866 (Fla. 2nd DCA November 13, 2015).

The balloon mortgage statute (Florida Statute section 697.05) does not apply to seller-financed mortgages and typically not to first mortgages.

**Nationstar Mortg., LLC v. Prine**, --- So. 3d ---- 2015 WL 7008151 (Fla. 3d DCA 2015).

A presumption of good service arises from the certificate of service on a court order, but the presumption is rebuttable where the email address on the court order is incorrect and there is no evidence that the intended recipients received the order.

**Sena v. Periera**, Case No. 4D14-2790 (Fla. 4th DCA November 12, 2015).

A tenant is barred by *res judicata* from raising, in a second suit, specific performance and fraudulent inducement claims based on a purported option contract when the tenant unsuccessfully raised the option contract issue in a prior eviction suit.

**Hicks v. Wells Fargo**, --- So. 3d ---- 2015 WL 7017440 (Fla. 5th DCA 2015).

A subsequent and different default allows a lender to file a new mortgage foreclosure suit so long as the second suit is filed within the statute of limitations.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 47**  
**November 21, 2015**  
**Manuel Farach**

**HSBC Bank, USA v. Cook**, No. 1D14-3054, slip op. (Fla. 1st DCA November 19, 2015).

A court need not list the *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), factors if the order on appeal demonstrates the factors were considered and ruled upon.

**Surloff v. Regions Bank**, No. 4D14-842, slip op. (Fla. 4th DCA November 18, 2015).

A bank that communicates loan denial information to an applicant is not responsible for the applicant's suicide, notwithstanding the "Undertaker's Doctrine" and notwithstanding the bank knew the applicant's unstable mental condition, as the bank has no special duty to the applicant and legal duty requires more than foreseeability alone.

**PLCA Condominium Association v. Amtrust-NP SFR Venture, LLC**, Case No. 4D14-2186, slip op. (Fla. 4th DCA November 18, 2015).

Unless jurisdiction to do so is specifically retained, a trial court has no jurisdiction to determine Florida Statute section 718.116 (1)(b) "safe harbor" amounts after final judgment of foreclosure.

**Environ Towers I Condominium Association, Inc. v. Virginia Hokenstrom And Holly Hokenstrom**, Case No. 4D14-3376, slip op. (Fla. 4th DCA November 18, 2015).

There can be more than one "prevailing party" for attorneys' fees purposes in litigation between a condominium association and a unit owner.

**Infinity Home Care, L.L.C. v. Amedisys Holding, LLC**, Case No. 4D14-3872, slip op. (Fla. 4th DCA November 18, 2015).

Referral sources are a legitimate business interests subject to protection by covenants not to compete under Florida Statute section 542.335; conflict certified with *Florida Hematology & Oncology v. Tummala*, 927 So.2d 135 (Fla. 5th DCA 2006).

**Udick v. Harbor Hills Development, L.P.**, Case No. 5D14-2876, slip op. (Fla. 5th DCA November 20, 2015).

Homeowners bind all other homeowners under *res judicata* principles when they conclude a derivative action against an association.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 48**  
**November 28, 2015**  
**Manuel Farach**

**Crusaw v. Crusaw**, --- So. 3d ---- 2015 WL 7444186 (Fla. 1st DCA 2015).

A court cannot order the sale of portioned property if no party requested a sale.

**Gordin v. Estate of Maisel**, --- So. 3d ---- 2015 WL 7566353 (Fla. 4th DCA 2015).

A trial court cannot appoint a curator of an estate without revoking or suspending letters issued to the personal representatives.

**Sanchez v. SunTrust Bank**, --- So. 3d ---- 2015 WL 7568555 (Fla. 4th DCA 2015).

A witness must be familiar with how the particular business records sought to be introduced were created in order to satisfy the Business Records Exception.

**Guzman v. Deutsche Bank Nat. Trust Co.**, -- So. 3d ---- 2015 WL 7568558 (Fla. 4th DCA 2015).

Standing is determined at time of filing suit, and an amended complaint does not relate back for standing purposes.

**Mia Real Holdings, LLC v. Nolan**, --- So. 3d ---- 2015 WL 7571468 (Fla. 4th DCA 2015).

An estimate prepared in anticipation of trial testimony is not a business record as it is not kept in the ordinary course of business.

**Bank of New York v. Von Houtman**, --- So. 3d ---- 2015 WL 7571489 (Fla. 4th DCA 2015).

A motion for attorneys' fees under Florida Rule of Appellate Procedure 9.100 (k) must be filed within twenty days after responding to a petition for original jurisdiction otherwise the claim for fees is waived.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 49**  
**December 5, 2015**  
**Manuel Farach**

**Dyck-O'Neal, Inc. v. Duffy**, --- So. 3d ---- 2015 WL 7750066 (Fla. 2d DCA 2015).

A trial court is not required to dismiss an action when an out of state plaintiff fails to file a non-resident costs bond within twenty days after motion to dismiss is filed as required by Florida Statute section 57.011.

**Mederi Caretenders Visiting Services Of Southeast Florida, LLC v. White**, --- So. 3d ---- 2015 WL 7752751 (Fla. 4th DCA 2015).

The Fourth District reaffirms its holding in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, Case No. 4D14-3872, slip op. (Fla. 4th DCA November 18, 2015), that referral sources are protected under Florida Statute section 542.335.

**McMillan v. Bank of New York Mellon**, --- So. 3d ---- 2015 WL 7752810 (Fla. 4th DCA 2015).

A witness cannot testify from a document (a proposed final judgment) not admitted into evidence.

**U.S. Bank, N.A. v. Grant**, Case No. 4D14-979, slip op. (Fla. 4th DCA December 2, 2015).

A bank's mortgage lien takes priority over a later filed community association lien; the association lien does not relate back to the declaration of the community association unless the declaration reflects it will have priority over later filed mortgage liens.

**Mauro v. Wells Fargo Bank, N.A.**, --- So. 3d ---- 2015 WL 7752675 (Fla. 4th DCA 2015).

Returns of service are not excluded hearsay grounds.

**Transunion Risk and Alternative Data Solutions, Inc. v. Reilly**, --- So. 3d ---- 2015 WL 7740421 (Fla. 4th DCA 2015).

Once a party enforcing a restrictive employment covenant shows it had a legitimate business interest covered by the covenant, it is entitled to a rebuttable presumption of irreparable injury and the employee must prove the absence of injury. Likewise, a continued breach of the covenant establishes an inadequate remedy at law, substantial likelihood on the merits, and the public interest in entering an injunction.

**Daniel v. Morris**, --- So. 3d ---- 2015 WL 7782828 (Fla. 5th DCA 2015).

A creditor has a non-delegable duty to ensure that a self-help repossession does not breach the peace.

**Gonzalez v. BAC Home Loans Servicing, L.P.**, --- So. 3d ---- 2015 WL 7781746 (Fla. 5th DCA 2015).

Business records must be moved into evidence if trial testimony on standing is based on business records.

**Figuroa v. Federal National Mortgage Ass'n**, --- So. 3d ---- 2015 WL 7780850 (Fla. 5th DCA 2015).

A party seeking to reestablish a lost note must prove the statutory factors either through direct testimony or through an affidavit, and must establish the terms of the note itself.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 50**  
**December 12, 2015**  
**Manuel Farach**

**Dunes Of Seagrove Owners Association, Inc. v. Dunes of Seagrove Development, Inc.**, Case No. 1D15-1248, slip op. (Fla. 1st DCA December 11, 2015).

Florida recognizes easements in gross (personal interests in land not supported by a dominant estate) even if the easement holder is not a utility.

**SE Property Holdings, LLC v. Blue Mountain Beach Master Owners Ass'n, Inc.**, Case No. 1D15-4849, slip op. (Fla. 1st DCA December 11, 2015).

An easement is nonpossessory, so an order determining an easement is not an order determining the immediate right to possession of property and is therefore not immediately appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii).

**Bank of America, N.A. v. Kipps Colony Condominium Ass'n, Inc.**, --- So.3d --- 2015 WL 8321268 (Fla. 2d DCA 2015).

A junior lienor cannot foreclose a superior lienor and a judgment purporting to do so is void under Florida Rule of Civil Procedure 1.540 (b) (5). Priority of real estate interests under Florida law is determined Florida Statutes sections 28.222(2) (which requires the Clerk of Court to record instruments and keep records of the recorded instrument), 695.11 (which states the sequence of recorded instruments shall determine priority), and 695.01 (which states that first in time is first in right).

**Akin Bay Company, LLC v. Von Kahle**, --- So.3d --- 2015 WL 8345357 (Fla. 3d DCA 2015).

An assignee under Florida Statute section 727.104 (the Florida Assignment for Benefit of Creditors statutes) is bound by a mediation and arbitration clause in an assignor's agreement with a third-party.

**Deutsche Bank National Trust Company on behalf of LSF MRA Pass-Through Trust v. Perez**, --- So.3d --- 2015 WL 8347002 (Fla. 3d DCA 2015).

A witness listed in a general fashion is sufficient unless the party opposing the substitution of the general listed witness with a specific witness can demonstrate prejudice.

**Statewide Homeowners Solutions, LLC v. Nationstar Mortgage, LLC**, --- So.3d --- 2015 WL 8292186 (Fla. 4th DCA 2015).

Movant for summary judgment before a defendant has answered must meet a heightened level of demonstrating no answer could ever be filed that could defeat summary judgment, including with regard to standing.

**Ocwen Loan Servicing, LLC v. Delvar**, --- So.3d --- 2015 WL 8347300 (Fla. 4th DCA 2015).

A purported oral modification of a mortgage cannot be enforced as it violates the Statute of Frauds, and the Statute of Frauds cannot be circumvented by claims of promissory estoppel.

**E&Y Assets, LLC v. Sahadeo**, --- So.3d ---- 2015 WL 8295569 (Fla. 4th DCA 2015). Involuntary dismissal is the proper remedy when the foreclosure plaintiff fails to prove damages at trial; reversal and remand is required when the court erroneously admits evidence.

**Aboumahboub v. Honig**, --- So.3d ---- 2015 WL 8347628 (Fla. 4th DCA 2015). Strict compliance with notice provisions is required for *ex parte* enforcement of defaults under settlement agreements.

**Nikolits v. Neff**, --- So.3d ---- 2015 WL 8348320 (Fla. 4th DCA 2015). A homeowner has a strict jurisdictional time limit under Florida Statute section 194.171(2) to appeal the valuation of their property, and this limitation cannot be circumvented by enveloping a challenge to last year's assessment in the challenge to the current year assessment.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 51**  
**December 19, 2015**  
**Manuel Farach**

**DIRECTV, Inc. v. Imburgia**, --- U.S. ---, 2015 WL 8546242 (2015).

Contract provisions that apply the “law of your state” do not permit application of state law that was valid at time of contract but later ruled invalid.

**In re Nica Holdings**, Case No. 14-14685, slip op. (11th Cir. December 17, 2015).

An assignee under Florida Statute 727.01(Assignment for Benefit of Creditors) may not, absent specific authorization, file a bankruptcy on behalf of its assignor.

**JYSK Ben'n Linen v. Dutta-Roy**, Case No. 13-15309, slip op. (11th Cir. December 16, 2015).

Re-registrations (not just initial registrations) in bad faith are prohibited under the Anticybersquatting Consumer Protection Act, § 43(d) of the Lanham Act, 15 U.S.C. § 1125(d).

**Heiskell v. Morris**, Case No. 1D15-364, slip op. (Fla. 1st DCA December 18, 2015).

The words “trustee” or “as trustee” added to the name of deed grantee do not automatically vest title in the trustee, despite the language of Florida Statute section 689.071 (1). Subsection (1), which is meant to protect bona fide third party purchasers from secret trusts, must be read in conjunction with subsection (4), which allows proof of the trust’s existence to be established before or after the deed is recorded.

**Portalp International SAS v. Zuloaga**, Case No. 2D15-1676, slip op. (Fla. 2d DCA December 18, 2015).

Service by mail, specifically by Federal Express, is permitted under Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters article 10(a).

**Mesa v. Bank of New York**, Case No. 3D14-762, slip op. (Fla. 3d DCA December 16, 2015).

An attorney’s Notice of Appearance, without more, does not constitute a general appearance that waives objections to service of process.

**Marriott International, Inc. v. American Bridge Bahamas, Ltd.**, Case No. 3D14-1817, slip op. (Fla. 3d DCA December 16, 2015).

Joint control of a separate corporation, which separate corporation is not part of the alleged joint venture, cannot be used to establish the existence of a joint venture.

**Alvey v. City of North Miami Beach**, Case No. 3D14-2935, slip op. (Fla. 3d DCA December 16, 2015).

Second-tier certiorari, although rarely granted, will be issued when the local government's decision to rezone conflicts with its own code and the local government decision results in a miscarriage of justice.

**Benedetto v. U.S. Bank. N.A.**, Case No. 4D14-1811, slip op. (Fla. December 16, 2015).

A trial court errs when it fails to grant an evidentiary hearing if the allegations of the motion to quash service of process, if true, would entitle the movant to relief.

**Cramer v. Bank of America, N.A.**, Case No. 4D15-1242, slip op. (Fla. 4th DCA December 16, 2015).

The rule providing immunity from service of process for an out-of-state resident while attending a court proceeding in a related matter does not apply to in-state residents, nor does it apply to proceedings closely related to the issues and the parties for the court proceeding attended.

**Dickerson v. Senior Home Care, Inc.**, Case No. 5D14-4123, slip op. (Fla. 5th DCA December 18, 2015).

A trial court errs when it enters a temporary injunction prohibiting competition without affording the parties an opportunity to present evidence on the amount of a proper bond.

**Brevard County, Florida v. Morehead**, Case No. 5D15-2872, slip op. (Fla. 5th DCA December 18, 2015).

The Florida Legislature has waived sovereign immunity for written contract claims, but not for implied claims such as breach of contract implied in law.

**Real Property and Business Litigation Report**  
**Volume VIII, Issue 52**  
**December 26, 2015**  
**Manuel Farach**

**Leichester Trust, Trust Number 1920 v. Federal National Mortgage Ass'n**, --- So.3d ----, 2015 WL 9311434 (Fla. 2d DCA 2015).

A trial court's or clerk's failure to serve parties with an order or judgment, which failure inhibits the right to appeal, warrants relief under rule 1.540(b) even if the only purpose of the order granting relief is to provide an opportunity to appeal.

**Keane v. The President Condominium Association, Inc.**, --- So.3d ----, 2015 WL 9315730 (Fla. 3d DCA 2015).

Failure of a garnishor to controvert the garnishee's claims of exemption by way of a sworn statement within the time frame set forth in the statute results in the exemption being recognized; an unsworn statement is insufficient to controvert.

**Thriving Investments, LLC v. Chao**, --- So.3d ----, 2015 WL 9319144 (Fla. 3d DCA 2015).

A third-party purchaser at a foreclosure sale is a stranger to the action, and as a result, cannot move to vacate the final judgment of foreclosure.

**City of Miami Beach, Florida v. Deutzman**, --- So.3d ---- 2015 WL 9319145 (Fla. 3d DCA 2015).

Attorney's fees cannot be awarded as a matter of equity, but instead must be based on a contractual or statutory provision that awards fees.



## Manuel Farach

### MEMBER

With three decades of both transactional and litigation experience, including as outside general counsel for a savings and loan association, Manny approaches his clients' legal challenges with a perspective that combines legal knowledge with a practical understanding of the financial services industry. Manny focuses on transactional matters (with an emphasis on real estate), business litigation, debtor-creditor law, creditor representation in bankruptcy, and appellate law. He is board certified by The Florida Bar in both Real Estate Law and Business Litigation.

Throughout his career, Manny has counseled businesses in numerous industries and of varying sizes, including lenders and government agencies such as the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Federal Savings and Loan Insurance Corporation (FSLIC), as well as numerous borrowers in complex transactions. Manny has also provided counsel in corporate mergers and acquisitions; financial and debtor-creditor matters to creditors and lenders (including bankruptcy and complex foreclosure litigation); landlord/tenant disputes; Internet law; and construction and real estate development matters.

For more than 20 years, Manny has served as an arbitrator for the American Arbitration Association, has significant FINRA (Financial Industry Regulatory Authority, formerly NASDR) arbitration experience, and is certified as a Florida Supreme Court approved mediator. He also previously served as a Foreclosure Commissioner for the United States Department of Housing and Urban Development (HUD). Manny served as a law clerk for the Honorable C. McFerrin Smith of the Ninth Judicial Circuit Court of Florida while in law school and to Judges James T. Downey and Bobbi Gunther of the Florida Fourth District Court of Appeal following law school.

Manny has authored numerous legal publications, including Florida Real Estate Law (Thomson-West), the real estate component of West's Florida Practice Series, and publishes the (Florida) Real Property and Business Litigation Report, a highly read weekly compilation of Florida real estate and business cases. The Florida Supreme Court appointed Manny the Chair of its committee on business jury instructions, and he is a regular speaker on topics as diverse as real estate law, business litigation, technology law, and professionalism.

### Service Areas

Appellate  
Banking Counsel  
Bankruptcy, Reorganization & Creditors' Rights  
Commercial Litigation  
Construction  
Intellectual Property  
Labor and Employment  
Real Estate  
Wills, Trusts & Estates

### Education

Florida State University  
College of Law, J.D.,  
1985, *cum laude*  
  
Stetson University, B.S.,  
English and Business,  
1981

### Admissions

Florida  
U.S. Supreme Court  
U.S. Court of Appeals  
for the Eleventh Circuit  
U.S. District Court for  
the Northern District of  
Florida  
U.S. District Court for  
the Middle District of  
Florida  
U.S. District Court for  
the Southern District of  
Florida

### Office

Fort Lauderdale  
1 East Broward Blvd  
Suite 1400  
Fort Lauderdale, FL 33301

### Email

mfarach@mcglinchey.com

### Telephone

(954) 356-2528

### Fax

(954) 333-3847