Florida Real Property and Business Litigation Report
Volume XI, Issue 1
January 6, 2018
Manuel Farach

Vibe Micro, Inc. v. Shabanets, Case No. 16-15276 (11th Cir. 2018).
A district court must *sua sponte* give a litigant that files a shotgun pleading, is represented by counsel, and fails to request leave to one chance to replead before dismissing his case with prejudice on non-merits shotgun pleading grounds.

US Bank National Association v. Tranumn, Case No. 1D16-4911 (Fla. 1st DCA 2018).
A party may use certiorari as a vehicle to seek appellate review of an order denying a motion to sever counterclaim so long as irreparable injury is demonstrated.

Greenberg Traurig, P.A v. Starling, Case No. 2D17-772 (Fla. 2d DCA 2018).
A party must perfect its charging lien by filing in the court file the communications demanding payment before the lawsuit is dismissed.

Lowe v. Nissan Of Brandon, Inc., Case No. 2D17-1104 (Fla. 2d DCA 2018).
Documents executed contemporaneously with each other should be interpreted as a whole, including therein arbitration provisions.

Sun 'N Lake of Sebring Improvement District v. Ayala, Case No. 2D17-2440 (Fla. 2d DCA 2018).
The State of Florida has not waived sovereign immunity for claims under the Florida Deceptive and Unfair Trade Practices Act, Florida Statute sections 501.201-.23.

Jockey Club Condominium Apartments, Inc. v. B.V.K., LLC, Case No. 3D17-0038 (Fla. 3d DCA 2018).
A motion for rehearing from an order deciding a Florida Rule of Civil Procedure 1.540(b) motion.

Queiroz v. Bentley Bay Retail, LLC, Case No. 3D17-1604 (Fla. 3d DCA 2018).
Witnesses and parties in attendance in court outside of the territorial jurisdiction of their residence are immune from service of process while attending court and for a reasonable time before and after going to court and in returning to their homes, except only when there is (1) identity of parties and (2) identity of issues.

Wells Fargo Bank National Association v. Bird, Case No. 5D16-669 (Fla. 5th DCA 2018).
There is no right to contractual prevailing party attorney's fees when the instrument containing the contractual provision is void for lack of a valid signature.

Florida Real Property and Business Litigation Report
Volume XI, Issue 2
January 13, 2018
Manuel Farach

Commodores Entertainment Corporation v. McClary, Case No. 16-15794 (11th Cir. 2018).
A performer who leaves a musical group that has established a common-law trademark leaves behind his or her rights to the group's trademark and may not use the mark.

Spicer v. Ocwen Loan Servicing, LLC, Case No. 4D16-2335 (Fla. 4th DCA 2018).
A substituting plaintiff acquires the standing of the substituted plaintiff.

Velden v. Nationstar Mortgage, LLC, Case No. 5D16-3628 (Fla. 5th DCA 2018).
While a lender may foreclose even if there exist missed payments outside the statute of limitations, it is not entitled to an award of damages for missed payments outside the statute.

Florida Real Property and Business Litigation Report
Volume XI, Issue 3
January 20, 2018
Manuel Farach

Inlet Beach Capital Investments, LLC v. The Enclave at Inlet Beach Owners Association, Inc., Case Nos. 1D16-2282/1D16-2283/1D16-3833 (Fla. 1st DCA 2018).
Applying *Debrincat v. Fischer*, 217 So. 3d 68 (Fla. 2017), the First District holds that a party can allege malicious prosecution claims for maintaining a foreclosure suit even though the foreclosure plaintiffs knew there was no valid cause of action.

Ashear v. Sklarey, Case No. 3D16-888 (Fla. 3d DCA 2018).
A party that is successful in reversing a tax deed sale is required to reimburse the purchaser for all sums the purchaser paid to acquire the tax deed and twelve percent interest on that amount.

DePrince v. Starboard Cruise Services, Inc., Case No. 3D16-1149 (Fla. 3d DCA 2018).
The Third District recognizes differences among the districts regarding the elements of unilateral mistake but re-affirms its prior holdings that unilateral mistake is determined by a four-part test as follows: "(1) [T]he mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo, (3) denial of release from the agreement would be inequitable, and (4) the position of the opposing party has not so changed that granting the relief would be unjust."

The Sampson Farm Limited Partnership v. Parmenter, Case No. 3D16-1820 (Fla. 3d DCA 2018).
So long as the defendant timely asserts a trial court challenge to jurisdiction that is denied by the trial court, the defendant may defend on the merits in the trial court without waiving its jurisdictional challenge on appeal.

14269 BT LLC v. Village of Wellington, Case No. 4D17-2376 (Fla. 4th DCA 2018).
Florida Statute section 604.50(1) exempts non-residential farm buildings from “any county or municipal code or fee . . . ,” including municipal zoning codes.

Florida Real Property and Business Litigation Report
Volume XI, Issue 4
January 27, 2018
Manuel Farach

District of Columbia v. Wesby, No. 15–1485 (2018).
The totality of the circumstances (the condition of the home, condition of partygoers, activities at the party, etc.) may give police officers probable cause to arrest people for unlawful entry at "pop-up" parties where owner has not given permission to use the home.

Artis v. District of Columbia, Case No. 16–460 (2018).
The meaning of "tolled" within 28 U. S. C. section 1367(d) (the period of limitations for refiling in state court a pendent state claim that is dismissed when the federal claim is dismissed is "tolled" for 30 days after dismissal) is that the time period stopped running due to the federal suit but recommences running from the point stopped upon dismissal of the federal suit with attached pendent state claims.

Banco de los Trabajadores v. Moreno, Case No. 3D17-730 (Fla. 3d DCA 2018).
The connexity requirement of Florida's long-arm statute section 48.193(1)(a) (a cause of action must arise from an enumerated act and that enumerated act must occur in Florida) is not satisfied when the only tort relied upon to confer jurisdiction is civil conspiracy to commit a tort, and no element of the underlying tort is alleged to have occurred in Florida.

Goldman v. Lustig, Case No. 4D16-1933 (Fla. 4th DCA 2018).
A party that has the right to use a dock attached to an adjoining party's land is not entitled to an easement of necessity across the neighbor's land to access the dock; the party seeking to use the dock must build a separate access dock or access the dock from the water.

DFG Group v. Heritage Manor of Memorial Park, Inc., Case No. 4D16-2972 (Fla. 4th DCA 2018).
A party that affirms a contract upon prevailing on a tort claim arising out of a contract is entitled to the profit plaintiff would have earned had the agreement been performed but not for the cost of preparing to perform.

Longo v. Associated Limousine Services, Inc., Case No. 4D17-516 (Fla. 4th DCA 2018).
A plaintiff seeking Florida Statute section 56.29 proceedings supplementary against a third party based on alter ego need not describe the property of the third party sought to be executed (as required by the text of section 56.29(2)), but instead may simply state the third party is the alter ego of the defendant.

Penton Business Media Holdings, LLC v. Orange County, Florida, Case No. 5D16-3935 (Fla. 5th DCA 2018).

The Doctrine of Avoidable Consequences is not a duty to mitigate, and states that a plaintiff is responsible only for damages it could have avoided using "ordinary and reasonable care."

Florida Real Property and Business Litigation Report
Volume XI, Issue 5
February 3, 2018
Manuel Farach

United States of America v. Stein, Case No. 16-10914 (11th Cir. 2018).
The Eleventh Circuit overrules its prior precedent and holds that while an affidavit cannot be conclusory, "an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated."

In Re: Standard Jury Instructions in Civil Cases — Report No. 17-03, Case No. SC17-1060 (Fla. 4th DCA 2018).
The Florida Supreme Court authorizes changes to Florida Standard Jury Instructions – Civil 202.3 (Note-Taking by Jurors), 401.21 (Burden of Proof on Main Claim), 401.23 (Burden of Proof on Defense Issues), 402.13 (Burden of Proof on Main Claim), 402.15 (Burden of Proof on Defense Issues), 409.12 (Burden of Proof on Defense Issues), 412.8 (Issues on Claim and Burden of Proof), 412.9 (Defense Issue), 501.4 (Comparative Negligence, Non-Party Fault and Multiple Defendants), 502.5 (Comparative Negligence, Non-Party Fault and Multiple Defendants), Section 700 — Closing Instructions, Model Instruction Nos. 1-6, and Model Verdict Forms 1 and 5(c).

Bank of America, N.A. v. Mirabella Owners' Association, Inc., Case No. 1D16-1079 (Fla. 1st DCA 2018).
The First District adopts the holding of *Jallali v. Knightsbridge Village Homeowners Ass'n*, 211 So. 3d 216, 217 (Fla. 4th DCA 2017), and permits an association to foreclose liens independent of the first mortgage so long as the association's covenants were recorded prior to the mortgage. Moreover, First District follows the general rule that a purchase pendent lite during a foreclosure where a *lis pendens* has been recorded is not entitled to intervene in the action.

Jackson v. Household Finance Corp III, Case No. 2D15-2038 (Fla. 2d DCA 2018).
A party may introduce documents into evidence using the Business Records Exception to the Hearsay Rule in three ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility. A testifying records custodian need not be the person who created the business records; the witness may be any qualified person with knowledge of each of the elements so long as the witness uses the "magic words" of Florida Statute section 90.803(6); conflict with *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016), is certified.

Inlet Marina of Palm Beach, Ltd. v. Sea Diversified, Inc., Case No. 4D17-1406 (Fla. 4th DCA 2018).
The statute of limitations for actions against construction engineers begins to run from the time the defect is or should have been discovered.
Fielding v. PNC Bank National Association, Case No. 5D16-440 (Fla. 5th DCA 2018).

A lender seeking to establish standing through successive mergers of lenders from the original lender must connect the lenders in an unbroken chain.

PNC Bank, National Association v. MDTR, LLC, Case No. 5D16-2887 (Fla. 5th DCA 2018).
A party that purchases real property after the *lis pendens* but is not a party to the mortgage is not entitled to prevailing party attorney's fees under the mortgage.

Pelican Creek Homeowners, LLC v. Pulverenti, Case No. 5D16-4046 (Fla. 5th DCA 2018).
A common-law dedication of lands does not, in the absence of contrary intent, divest the dedicating party of ownership in the lands while a statutory dedication under Florida Statute section 95.361 does. Moreover, dedicated property that is abandoned on the edge of the plat is an exception to the general rule of "halfway to the street" and gives the abutting property owners title to the full width of the publicly dedicated property.

Rollas v. Department of Business and Professional Regulation, Case No. 5D17-1526 (Fla. 5th DCA 2018).
So long as the applicant meets the requirements of Florida Statute section 475.482(1) (recovery against the Florida Real Estate Recovery Fund), it does not matter that claimant was also in a joint venture or business with the defalcating real estate agent.

Florida Real Property and Business Litigation Report
Volume XI, Issue 6
February 10, 2018
Manuel Farach

Salinas v. Ramsey, Case No. 16-10552 (11th Cir. 2018).
Relying on the Florida Supreme Court's opinion, the Eleventh Circuit rules that post-judgment discovery is not an "action" under Florida law and is not limited by the Florida Statute of Limitations and discovery may be employed during the life of the judgment.

Grimes v. Lottes, Case No. 2D16-5557 (Fla. 2d DCA 2108).
Whether a sales agent's statement that there are no other procuring brokers involved in a transaction is fraudulent involves factual determinations, including whether the statement was one of opinion or fact.

DeJesus v. A.M.J.R.K. Corp., Case No. 2D17-2374 (Fla. 2d DCA 2018).
Property owned by a corporation is not entitled to homestead exemption from forced levy, even if the person residing on the property is the president and owner of the corporation.

HSBC Bank USA v. Buset, Case No. 3D16-1383 (Fla. 3d DCA 2018).
Experts, including those on "securitization" issues, may not testify on legal issues. Additionally, securing a note with a mortgage does not render the note a non-negotiable note under Article 3.

Sabido v. The Bank Of New York Mellon, Case No. 4D16-2944 (Fla. 4th DCA 2018).
Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017), is broader than the issue of standing and holds that that a party that is not entitled to enforce a contract cannot be burdened with the obligations under the contract.

Restoration 1 CFL, LLC v. ASI Preferred Insurance Corporation, Case No. 5D17-755 (Fla. 5th DCA 2018).
Contracts, including mortgages, may not have anti-assignment language that prohibit post-loss assignments.

Florida Real Property and Business Litigation Report
Volume XI, Issue 7
February 17, 2018
Manuel Farach

CRI-LESLIE, LLC v. Commissioner of Internal Revenue, Case No. 16-17424 (11th Cir. 2018).
A taxpayer that contracts to sell property used in its trade or business is not entitled to treat as capital gain an advance deposit that it rightfully retains when its would-be buyer defaults and cancels the deal.

Knight v. GTE Federal Credit Union, Case No. 2D16-3241 (Fla. 2d DCA 2018).
A witness that has little to no connection or knowledge of a third-party vendor cannot lay the predicate for introduction of records under the Business Records Exception to the Hearsay Rule, even if the witness uses the "magic words."

C&J Global Investments, Inc. v. JVS Contracting, Inc., Case No. 2D16-4857 (Fla. 2d DCA 2018).
A party may not intervene in a declaratory action regarding the validity of deeds unless it has an interest such that it stands to directly and immediately gain or lose an interest it might have in the property.

Catalo v. Llano Financing Group, LLC, Case No. 4D16-4348 (Fla. 4th DCA 2018).
A trial court need not rule on a motion for trial court attorney's fees before an appellate court can rule on a request for appellate attorney's fees.

Le v. Tralongo, LLC, Case No. 4D17-1325 (Fla. 4th DCA 2018).
The contracting to perform and actual performance of extensive "back office" processes through technology may be enough to satisfy long-arm jurisdictional requirements.

Florida Real Property and Business Litigation Report
Volume XI, Issue 8
February 24, 2018
Manuel Farach

Digital Realty Trust, Inc. v. Somers, Case No. 16–1276 (2018).
Individuals who fail to report alleged securities violation to the Securities and Exchange Commission do not fall within the Dodd-Frank Act's definition of "whistleblower" and thus are not protected by the Act's anti-retaliation provisions.

Asset Management Holdings, LLC v. Assets Recovery Center Consolidated Investments, LLC, Case Nos. 2D16-341 and 2D16-3599 (Fla. 2d DCA 2018).
A trial court errs by failing to allow a "setoff" in favor of a party that has breached a contract as such improperly inflates the claimant's damages.

Liork, LLC v. BH 150 Second Avenue, LLC, Case No. 3D16-1881 (Fla. 3d DCA 2018).
Subscription agreements are not subject to lack of mutuality attacks because they are different from ordinary bilateral contracts where one party promises to perform a specific action directly in exchange for the other party performing another specific action. Moreover, the fact that real estate values fluctuate generally supports liquidated damages provisions.

Coconut Grove Acquisition, LLC v. S&C Venture, Case No. 3D17-434 (Fla. 3d DCA 2018).
Failure to make payments to a new servicer, even after the old servicer sent a "goodbye letter" advising the loan had been sold, is not an act of default when the new servicer fails to timely advise mortgagor where to send payments.

Mack v. Repole, Case No. 4D16-3595 (Fla. 4th DCA 2018).
An order enforcing a settlement agreement is final and must be appealed where there is “nothing whatever left for the court to do in the pending action, other than to enforce what the order required of the parties"; a subsequent formal order of dismissal is not necessary to terminate the action.

Clayton v. Poggendorf, Case No. 4D17-488 (Fla. 4th DCA 2018).
An attorney may have apparent authority to receive notices of default under a settlement agreement such to bind his principal.

Florida Real Property and Business Litigation Report
Volume XI, Issue 9
March 3, 2018
Manuel Farach

U. S. Bank N. A. v. Village at Lakeridge, LLC, Case No. 15–1509 (2018).
A bankruptcy court's determination of a mixed question of law and fact (such as who is a non-statutory "insider" under the Bankruptcy Code) is reviewed under a "clear" error" and not a *de novo* standard of review.

Heyward v. Wells Fargo Bank, N.A., Case No. 2D16-339 (Fla. 2d DCA 2018).
The successor national bank from a merger becomes the owner of the assets of the target bank under 12 U.S.C. § 215a(e).

Ferk Family, LP v. Frank, Case No. 3D16-448 (Fla. 3d DCA 2018).
The Third District re-affirms *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014), and holds that a direct (as opposed to derivative) action may be brought by one member of a LLC against another member if "(1) there is a direct harm to the shareholder or members such that the alleged injury does not flow subsequently from an initial harm to the company and (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members," or as in this case, the operating or shareholder's agreement provides for such action.

Hemingway Villa Condominium Owners Association, Inc. v. Wells Fargo Bank, N.A., Case No. 3D17-926 (Fla. 3d DCA 2018).
The Third District adopts *Beltway Capital, LLC v. Greens COA, Inc.*, 153 So. 3d 330 (Fla. 5th DCA 2014) and holds that a "first mortgagee" for the purposes of the Safe Harbor provision regarding association fees “is simply one who holds the first mortgage, whether that be the original lender or a subsequent holder.”

Niagara Industries, Inc. v. Giaquinto Electric LLC, Case No. 4D17-1473 (Fla. 4th DCA 2018).
On rehearing, the Fourth District re-affirms trade secrets are protected by Florida Statute section 90.506, and that a trial court must engage in a two-step analysis before requiring that trade secrets be disclosed: 1) determine whether the information is truly a trade secret, and 2) shift the burden to the party requesting disclosure to demonstrate that disclosure is reasonably necessary.

Meyrowitz v. Andrew M. Schwartz, P.A., Case No. 4D17-1983 (Fla. 4th DCA 2018).
The "tried on the following docket" exception of the requirement Florida Rule of Civil Procedure 1.442's requirement that a Proposal for Settlement is timely only if made 45 days before the beginning of the trial docket or the date of trial, whichever is earlier, is if all parties know the case is to be tried on a following docket.

Deutsche Bank Trust Company Americas v. Merced, Case No. 5D16-3486 (Fla. 5th DCA 2018).
Proof of contractual authority to testify is not required for a witness to lay the predicate to testify under the Business Records Exception to the Hearsay Rule because a witness may testify to matters within his or her personal knowledge.

Florida Real Property and Business Litigation Report
Volume XI, Issue 10
March 10, 2018
Manuel Farach

Tobinick v. Novella, Case No. 16-16210 (11th Cir. 2018).
The "exceptional case" standard for awarding attorney's fees in Patent Act cases as set forth in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. ___, (2014), also applies to Lanham Act cases.

Ashear v. Sklarey, Case No. 3D16-888 (Fla. 3d DCA 2018).
A prevailing party in a tax deed contest is not entitled to an award of prevailing party fees and costs unless the claim arose under the current (not prior) version of Florida Statute section 197.602.

Fincantieri-Cantieri Navali Italiani S.p.A. v. Yuzwa, No. 3D16-1015 (Fla. 3d DCA 2018).
Florida courts do not have long-arm jurisdiction over a lawsuit brought by a Canadian citizen against an Italian shipbuilder for injuries sustained in international waters in the Pacific Ocean on a cruise ship built in Italy which was owned by a Washington corporation when the injuries occurred.

Nationstar Mortgage, LLC v. Yesenia Silva, Case No. 3D16-1936 (Fla. 3d DCA 2018).
A foreclosing lender is not required to send a new notice of default if the default date in the foreclosure complaint is changed, and substantial compliance with a condition precedent is sufficient unless the party to whom the notice is directed can demonstrate prejudice, e.g., attempts to pay in a mortgage foreclosure context.

Mesnikoff v. FQ Backyard Trading, LLC, No. 3D17-2803 (Fla. 3d DCA 2018).
County courts do not have subject matter jurisdiction to hear ejectment claims.

Citigroup Mortgage Loan Trust Inc. v. Scialabba, Case No. 4D17-401 (Fla. 4th DCA 2018).
Substantial compliance with a condition precedent is sufficient unless the party to whom the notice is directed can demonstrate prejudice, e.g., attempts to pay in a mortgage foreclosure context.

Desai v. Bank Of New York Mellon Trust Company, Case No. 4D17-0890 (Fla. 4th DCA 2018).
Defaults subsequent to a previously accelerated but dismissed foreclosure allow action a lender to foreclose all sums due under the note and mort so long as all subsequent defaults are properly pled.

CSC Serviceworks, Inc. v. Boca Bayou Condominium Association, Inc., Case No. 4D17-0974 (Fla. 4th DCA 2018).

An association disconnecting, but not removing, a prior servicer's laundry equipment from a condominium association laundry room does not constitute an unlawful detainer by the association.

Florida Real Property and Business Litigation Report
Volume XI, Issue 11
March 17, 2018
Manuel Farach

Palisades Owners' Association, Inc. v. Browning, Case No. 1D17-2129 (Fla. 1st DCA 2018).
A dispute between a property owner and an association alleging breaches of fiduciary duty by the association is more complex than garden-variety community association disagreements and falls outside the arbitration requirements of Florida Statute section 718.1255(1).

Ocean Concrete, Inc. v. Indian River County, Board of County Commissioners, Case No. 4D16-3210 (Fla. 4th DCA 2018).
A determination whether inordinate government regulation violates the anticipated use provision of the Bert Harris Act, Florida Statute section 71.001, must be made without considering the economic viability of the anticipated use.

McMichael v. Deutsche Bank National Trustee Company, Case No. 4D16-3879 (Fla. 4th DCA 2018).
A party who fails to read a contract before signing it cannot claim "unclean hands" with regard to the provisions contained in the contract.

Balva v. Ontario Wealth Management Corporation, Case No. 4D17-1126 (Fla. 4th DCA 2018).
A successor trial court judge may not correct the final judgments and final orders of a predecessor judge.

Florida Real Property and Business Litigation Report
Volume XI, Issue 12
March 24, 2018
Manuel Farach

Baker v. Economic Research Services, Inc., Case No. 1D16-4139 (Fla. 1st DCA 2018).
A forum selection clause survives termination of the contract which contains the clause.

Mullen v. Bal Harbour Village, Case No. 3d17-1144 (Fla. 3d DCA 2018).
A development order may not, according to the dictates of Florida Statute section 163.167(8)(a), be subject to the will of the voters through referenda and must instead be reviewed under a quasi-judicial process.

Central Carillon Beach Condominium Association, Inc. v. Garcia, Case Nos. 3D17-1198 & 3D17-1197 (Fla. 3d DCA 2018).
While associations may object to their ad valorem assessments as a class, each individual taxpayer within the association must be the individual defendant in a suit brought by the property appraiser that objects to a decision of the Valuation Adjustment Board.

Whynes v. American Security Insurance Company and Wells Fargo Bank, N.A., Case Nos. 4D16-2862 and 4D16-3668 (Fla. 4th DCA 2018).
There is no violation under Florida Statute section 626.9551(1)(d) (solicitations regarding forced-placed insurance must be directed to a borrower) when information (not a solicitation) is transferred to a third party.

Waverly 1 and 2, LLC v. Waverly At Las Olas Condominium Association, Inc., Case No. 4D16-2866 (Fla. 4th DCA 2017).
On rehearing, the Fourth District re-affirms that language in a condominium declaration that "[a]nything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units" means that the landscaping requirements of section 9.1 of the condominium declaration does not apply to commercial unit owners.

Stein v. BBX Capital Corp., Case No. 4D16-4309 (Fla. 4th DCA 2018).
Absent specific allegations of fraud or material misrepresentations in the appraisal or sale process, an aggrieved shareholder is limited to her appraisal rights under Florida Statute section 607.1302 when a company sells its shares.

Rouffe v. CitiMortgage, Inc., Case No. 4D16-3583 (Fla. 4th DCA 2018).
A third party to the note and mortgage may contest the amounts due but may not contest liability under the note and mortgage.

Florida Real Property and Business Litigation Report
Volume XI, Issue 13
March 31, 2018
Manuel Farach

Hall v. Hall, Case No. 16–1150 (2018).
The losing party in cases consolidated under Federal Rule of Civil Procedure 42 has a right to an immediate appeal.

Chiu v. Wells Fargo Bank, N.A., Case No. 3D17-997 (Fla. 3d DCA 2018).
A trial court's *sua sponte* entering summary judgment, i.e., without a hearing, constitutes fundamental error subject to reversal on appeal.

Liukkonen v. Bayview Loan Servicing, LLC, Case No. 4D16-4193 (Fla. 4th DCA 2018).
A modification agreement is not a negotiable instrument like a promissory note, and thus the original need not be introduced into evidence to satisfy the Best Evidence Rule; *Rattigan v. Central Mortgage Co.*, 199 So. 3d 966 (Fla. 4th DCA 2016), is distinguished.

Trigeorgis v. Trigeorgis, Case No. 4D17-0262 (Fla. 4th DCA 2018).
The filing of a "Notice of Interest" (not a lis pendens associated with an action) is not a disparagement of title if the statement contained in the Notice is true or if plaintiff cannot prove that the alleged falsehood induced others to not deal with plaintiff.

HSBC Bank USA v. Magua, Case No. 4D17-1685 (Fla. 4th DCA 2018).
Confession of error on an appeal that has multiple issues without listing the precise error confessed leaves a later appellate court unable to determine the basis of error confessed.

Florida Real Property and Business Litigation Report
Volume XI, Issue 14
April 7, 2018
Manuel Farach

Cadwell v. Kaufman, Englett & Lynd, PLLC, Case No. 17-10810 (11th Cir. 2018).
An attorney violates Bankruptcy Coe Section 526(a)(4) if he instructs a client to pay his bankruptcy-related legal fees using a credit card.

Spencer v. Ditech Financial, LLC, Case No. 2D16-4817 (Fla. 2d DCA 2018).
To establish a routine practice that a letter was mailed, the witness must be employed by the entity drafting the letters and must have firsthand knowledge of the company's routine practice for mailing letters.

Finest Known LLC v. Weiss Research, Inc., Case No. 4D16-3667 (Fla. 4th DCA 2018).
A party joining a third party under Florida Rule of Civil Procedure 1.170(h) does not need to allege the third party is responsible under theories of indemnity, contribution, or subrogation as one would need to do under Ruel 1.180(a).

Emerald Estates Community Association v. U.S. Bank National Association, Case No. 4D17-1278 (Fla. 4th DCA 2018).
A lender is not required to pay attorney's fees and costs incurred prior the "safe harbor" amounts.

National American Home, LLC v. Deutsche Bank National Trust Company, Case No. 4D17-2614 (Fla. 4th DCA 2018).
A mortgage foreclosure is founded on a duly recorded instrument and therefore a lis pendens for the foreclosure does not expire one year from recording.

Florida Real Property and Business Litigation Report
Volume XI, Issue 15
April 14, 2018
Manuel Farach

City of Dunedin v. Pirate's Treasure, Inc., Case No. 2D17-3017 (Fla. 2d DCA 2018).
Local government does not owe a duty to advise an applicant regarding the development code, and thus, cannot be sued for negligent misrepresentation.

First Equitable Realty III, Ltd. v. Grandview Palace Condominium Association, Inc., Case No. 3D17-669 (Fla. 3d DCA 2018).
Interest on outstanding assessments may not be reduced for "equitable considerations."

J**PMorgan Chase Bank, National Association v. Villacorta**, Case, No. 3D17-1051 (Fla. 3d DCA 2018).
A party may not file successive Rule 1.540 motions.

Bloom v. Ironhorse Property Owners Association Inc. v. Litner, Case No. 4D17-1985 (Fla. 4th DCA 2018).
Parties who agree to binding arbitration under Chapter 44 are limited to review at the circuit court unless a constitutional issue is raised.

Florida Real Property and Business Litigation Report
Volume XI, Issue 16
April 21, 2018
Manuel Farach

United States v. Microsoft Corporation, Case No. 17–2 (2018).
The Clarifying Lawful Overseas Use of Data Act (CLOUD Act) amended the Stored Communications Act, 18 U. S. C. §2701 et seq., such that the United States may, by subpoena, reach electronic communications whether stored inside or outside the country.

Tank Tech, Inc. v. Valley Tank Testing, L.L.C., Case No. 2D16-2100 (Fla. 2d DCA 2018).
Parties who are not in contractual privity do not owe a duty to each other on negligence principles; *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1228 (Fla. 2010), distinguished.

OneWest Bank, FSB v. Palmero, Case No. 3D14-3114 (Fla. 3d DCA 2018).
A trial court may not issue a ruling on a basis not raised as an affirmative defense, e.g., holding that foreclosure of a reverse mortgage is prohibited by the federal reverse mortgage statute, 12 U.S.C. § 1715z-20(j) (". . . the repayment of a reverse mortgage loan is deferred until the death of both the borrowing homeowner and the homeowner's spouse" when the statute was not raised by the pleadings.

Villamorey, S.A. v. BDT Investments, Inc., Case No. 3D17-1952 (Fla. 3d DCA 2018).
A party that seeks to dissolve a writ of garnishment has consented to the court's jurisdiction over it; an affidavit under Florida Statute section 77.16(1) is not necessary for the court to acquire jurisdiction.

The Waves of Hialeah, Inc. v. Machado, Case No. 3D18-300 (Fla. 3d DCA 2018).
Florida Statute section 45.045(2) permits a trial court, under appropriate circumstances and when there is no policy of insurance, to reduce the amount of a superseadeas bond filed to stay execution of a money judgment pending appeal.

Florida Real Property and Business Litigation Report
Volume XI, Issue 17
April 28, 2018
Manuel Farach

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, Case No. 16–712 (2018).
Patents are public rights granted by franchise, and accordingly, *inter partes* review by the United States Patent Office does not violate the Constitution.

Webb v. Blue, Case No. 1D17-1510 (Fla. 1st DCA 2018).
A decedent survived by heirs (but no spouse or minor children) may pass his homestead to a non-heir by general devise; a specific devise is not required.

HSBC Bank USA, National Association v. Nelson, Case No. 2D17-740 (Fla. 2d DCA 2018).
A mortgage foreclosure complaint which alleges an initial default outside the statute of limitations but also alleges "all subsequent defaults," some of which subsequent defaults occurred within the statute of limitations, is not barred by the statute of limitations.

Fersom Mortgage, Inc. v. Moreno, Case No. 3D17-509 (Fla. 3d DCA 2018).
A pending cross-claim survives the dismissal of the main claim.

Blok Builders, LLC v. Katryniok, Case No. 4D16-1811 (Fla. 4th DCA 2018).
On rehearing, the Fourth District re-affirms that the indemnification requirements of Florida Statute section 725.06 do not apply to projects whose scope of work is exclusively excavation.

Smulders v. Thirty-Three Sixty Condominium Association, Inc., Case No. 4D17-1138 (Fla. 4th DCA 2018).
An association's having spent a special assessment does not render moot declaratory actions filed to contest the special assessment.

North Shore Medical Center, Inc. v. Accredited Health Solutions, Inc., Case No. 4D17-2229 (Fla. 4th DCA 2018).
A successor entity is bound by the arbitration agreement entered into by its predecessor entity.

Custom Marine Sales, Inc. v. Boywic Farms, LTD., Case No. 4D17-2828 (Fla. 4th DCA 2018).
A Florida Statute section 83.232 deposit into court registry is not required when lease payments have not yet begun according to the terms of the lease.

Guy v. Plaza Home Mortgage, Inc., Case No. 4D17-3335 (Fla. 4th DCA 2018).

A court clerk may not backdate judgments for docketing purposes as doing so improperly affects the date of rendition for appellate purposes.

PNC Bank National Association v. Roberts, Case No. 5D16-3341 (Fla. 4th DCA 2018). Failure to respond to discovery may waive a party's affirmative defenses.

Florida Real Property and Business Litigation Report
Volume XI, Issue 18
May 5, 2018
Manuel Farach

Golfrock, LLC v. Lee County, Florida, Case No. 2D15-2105 (Fla. 2d DCA 2017).
Upon rehearing, the Second District re-affirms that a party cannot use a declaratory action to divorce the determination whether an aggrieved party needs to take further action to ripen a takings claim from the takings claim itself, i.e., both must be done at the same time.

Muchnick v. Goihman, Case No. 3D17-122 (Fla. 3d DCA 2018).
A sales agent, in addition to his or her broker, may be individually liable for misrepresentations made to contracting parties.

GSK Hollywood Development Group, LLC v. City of Hollywood, Case No. 4D16-3453 (Fla. 4th DCA 2018).
The 2010 version of the Bert Harris Act, Florida Statute section 71.001, required "action of a governmental entity," and there can be no violation of the Act if the landowner did not seek a permit, variance, waiver, or other governmental action.

Florida Real Property and Business Litigation Report
Volume XI, Issue 19
May 12, 2018
Manuel Farach

Johnson v. Deutsche Bank National Trust Company Americas, Case No. 2D16-4262 (Fla. 2d DCA 2018).
The de novo standard of review on appeal, absent fundamental error, still does not permit the argument on appeal of error not preserved in the trial court.

Obsessions in Time, Inc. v. Jewelry Exchange Venture, LLLP, Case No. 3D16-2620 (Fla. 3d DCA 2018).
The following exculpatory clause in a lease is ambiguous, and therefore, unenforceable:

> In making this lease, it is hereby agreed that lessor does not assume the relations and duty of bailee and shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever, but that the entire risk of such loss or damage is assumed by the lessee. The lessor shall not be liable for any delay caused by failure of the vault doors to lock, unlock or otherwise operate and the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

Sammie Investments, LLC, v. Strategica Capital Associates Inc., Case No. 3D17-2052 (Fla. 3d DCA 2018).
The inability to recover money damages does not amount to an inadequate remedy at law for purposes of issuing a temporary injunction.

Florida Real Property and Business Litigation Report
Volume XI, Issue 20
May 19, 2018
Manuel Farach

Chmielewski v. The City of St. Pete Beach, Case No. 16-16402 (11th Cir. 2018).
A local government's encouragement of the public's use of a private parcel constitutes a compensable taking; a physical invasion is sufficient and exclusive dominion and control is not necessary to support a jury verdict of damages for the taking.

Koppel v. Ochoa, Case No. SC16-1474 (Fla. 2018).
The mere filing of a motion under Florida Rule of Civil Procedure 1.090 does not automatically enlarge the 30-day time frame to respond to a proposal for settlement; an order must be granted within the 30 days for the period to be extended.

Third Federal Savings & Loan Association of Cleveland v. Koulouvaris, Case No. 2D17-773 (Fla. 2d DCA 2018).
A Home Equity Line of Credit agreement is not a negotiable instrument, and thus must be authenticated before it can be admitted into evidence.

Perlberg v. Lubercy Asia Holdings, LLC, Case No. 3D17-2404 (Fla. 3d DCA 2018).
An order granting summary judgment on a fraudulent lien claim is not appealable as a final order because final judgment has not been entered and is not appealable as a non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii) because it does not determine an immediate right to possession of the property.

Florida Research Institute for Equine Nurturing, Development and Safety, Inc. v. Dillon, Case No. 4D17-605 (Fla. 4th DCA 2018).
A Florida not-for-profit corporation may terminate a person's membership without notice and without hearing as the current version of Florida Statute section 617.0607(1) does not require notice and hearing.

Madl v. Wells Fargo Bank, N.A., Case No. 5D16-53 (Fla. 5th DCA 2018).
Upon rehearing, the Fifth District clarifies that a lender that fails to prove standing through its promissory note may still have a contractual relationship through the mortgage that allows an award of attorney's fees to a prevailing borrower.

Florida Real Property and Business Litigation Report
Volume XI, Issue 21
May 26, 2018
Manuel Farach

Epic Systems Corp. v. Lewis, Case No. 16–285 (2018).
The Federal Arbitration Act requires that individualized proceedings in an arbitration agreement must be enforced.

CareFirst of Maryland, Inc. v. Recovery Village at Umatilla, LLC., Case No. 4D17-2247 (Fla. 4th DCA 2018).
Purposeful availment of the forum state's laws and benefits, not foreseeability of being haled into the jurisdiction, is the test as to whether minimum contacts exists.

Bank of New York Mellon v. Burgiel, Case No. 5D17-1152 (Fla. 5th DCA 2018).
A lender that introduces into evidence at trial the original note and demonstrates the original is the same as the copy attached to the complaint establishes standing to foreclose; a power of attorney is not necessary unless the service is seeking to foreclose.

Florida Real Property and Business Litigation Report
Volume XI, Issue 22
June 2, 2018
Manuel Farach

Lagos v. United States, Case No. 16–1519 (2018).
The words "investigation" and "proceedings" in subsection (b)(4) of the Mandatory Victims Restitution Act, 18 U. S. C. §3663A(b)(4), are limited to government investigations and criminal proceedings and funds spent by private parties are not covered under the Act.

In Re: Amendments to Florida Rule of Civil Procedure, 1.570 and Form 1.914, Case No. SC17-1533 (Fla. 2018).
New subdivision (e) is added to Florida Rule of Civil Procedure 1.570 and consistent therewith, new forms 1.914(b) (Notice to Appear) and 1.914(c) (Affidavit of Claimant in Response to Notice to Appear) are added. The new subdivision reads as follows:

> (e) Proceedings Supplementary. Proceedings supplementary to execution and related discovery shall proceed as provided by chapter 56, Florida Statutes. Notices to Appear, as defined by law, and supplemental complaints in proceedings supplementary must be served as provided by the law and rules of procedure for service of process.

McCampbell v. Federal National Mortgage Association, Case No. 2D16-177 (Fla. 2d DCA 2018).
On rehearing, the Second District clarifies that admission of copy of a loan modification agreement without explanation as to failure to produce the original is error; no conflict certified with *Liukkonen v. Bayview Loan Servicing, LLC*, No. 4D16-4193 (Fla. 4th DCA Mar. 28, 2018).

P & S & Co. LLC v. SJ MAK, LLC, Case No. 3D16-1585 (Fla. 3d DCA 2018).
Supplementary proceedings that do not seek to void fraudulent transfers through a bankruptcy debtor do not extend to the non-bankrupt codefendants and do not violate the automatic stay.

Wolentarski v. Anchor Property & Casualty Insurance Company, Case No. 3D17-2405 (Fla. 3d DCA 2018).
The failure of a non-movant to timely submit any evidence or filings in opposition to a motion for summary judgment establishes there is no record of a material issue or a disputed fact.

Florida Real Property and Business Litigation Report
Volume XI, Issue 23
June 9, 2018
Manuel Farach

Lamar, Archer & Cofrin, LLP v. Appling, Case No. 16–1215 (2018).
The statutory language of Bankruptcy Code section 11 U.S.C. 523 (a)(2)(b) makes clear that a statement about a single asset can be a "statement respecting the debtor's financial condition," and also that the debt can be discharged if the statement was not in writing (even if the statement was false).

Azalea Trace, Inc. v. Matos, Case No. 1D17-753 (Fla. 1st DCA 2018).
An assignment agreement between two parties regarding funds held by a third party does not make the third party bound to the provisions of the agreement, notwithstanding the third party may be an intended third-party beneficiary of the agreement.

The Bank of New York Mellon v. HOA Rescue Fund, LLC, Case No. 2D17-3291 (Fla. 2d DCA 2018).
A purchaser who bought real property after a lis pendens was recorded is generally not entitled to intervene in pending litigation, and if permitted to intervene as a junior lienor, may only participate to the extent of protecting any redemption rights.

City of Miami v. Fraternal Order of Police Lodge #20, Case No. 3D17-729 (Fla. 3d DCA 2018).
A trial court's role in determining arbitrability under the revised Florida Arbitration Code is limited to examining "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived."

Rowe v. Macaw Holdings I, LLC, Case No. 4D17-2645 (Fla. 4th DCA 2018).
A trial court errs if it fails to hold an evidentiary hearing to determine the amount of rent due for deposit into the court registry pursuant to Florida Statute section 83.232(2).

Florida Real Property and Business Litigation Report
Volume XI, Issue 24
June 16, 2018
Manuel Farach

Cassady v. Hall, Case No. 18-10667 (11th Cir. 2018).
A garnishment proceeding is a "suit" from which a state has sovereign immunity.

The National Center for Construction Education and Research Ltd., Corp. v. Crapo, Case No. 1D17-765 (Fla. 1st DCA 2018).
Only institutions that qualify as "educational" under Florida Statute section 196.012(5) are entitled to educational exemption from ad valorem taxation, even if the institution has educational and charitable purposes.

Stubbs v. Federal National Mortgage Association, Case No. 2D17-1929 (Fla. 2d DCA 2018).
A Rule 1.540 motion cannot be directed to non-final orders such as a writ of possession.

Eduartez v. Federal National Mortgage Association, Case No. 3D17-1448 (Fla. 3d DCA 2018).
The Third District agrees with the Second District Court of Appeal and holds that a request for surplus foreclosure sale proceeds must be filed within sixty days after the foreclosure sale, not sixty days after issuance of the certificate of title; conflict certified with *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878, 881 (Fla. 4th DCA 2016).

Premier Compounding Pharmacy, Inc. v. Larson, Case No. 4D17-1318 (Fla. 4th DCA 2018).
Contractual provisions which do not got to the essence of the contract are severable, and the remaining portions remain enforceable. Accordingly, the fact that a bond waiver provision is stricken does not affect the attorney's fees provision of the contract.

Florida Real Property and Business Litigation Report
Volume XI, Issue 25
June 23, 2018
Manuel Farach

South Dakota v. Wayfair, Inc., Case No. 17–494 (2018).
Physical presence of an internet seller in a state is not necessary for the state to tax the transaction.

Haynes v. Hooters of America, LLC, Case No. 17-13170 (11th Cir. 2018).
A defendants' remediation agreement with a third party does not moot the claims of a plaintiff of violations of existing laws.

Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC, Case No. 1D17-2242 (Fla. 1st DCA 2018).
A non-signatory to an arbitration agreement cannot, despite equitable estoppel principles, compel a signatory to join the non-signatory in a pending arbitration when to do so exceeds the scope of the arbitration agreement.

Magnolia Florida Tax Certificates, LLC v. Florida Department of Revenue, Case No. 1D17-2094 (Fla. 1st DCA 2018).
Charters counties may impose additional tax deed sale bidding requirements on business entities than on individuals, e.g., affidavits requiring the business to name its owners, when such additional requirement is rationally related to a legislatively-perceived need.

Rozanski v. Wells Fargo Bank, N.A., Case No. 2D16-3800 (Fla. 2d DCA 2018).
A lender awarded an equitable lien is not entitled to foreclose the lien unless it can show the equitable lien (or the underlying obligations which gave rise to the equitable lien) is in default.

City of Clearwater v. Bayesplanade.Com, LLC, Case No. 2D17-2006 (Fla. 2d DCA 2018).
A deed that is unambiguous and sufficient on its face to show the grantor's intent as to the property described and the estate conveyed, is not subject to parol evidence. Additionally, parol evidence regarding a deed may only be employed as to latent ambiguities as patent ambiguities result in a void deed.

Bayview Loan Servicing, LLC v. Dzidzovic, Case No. 2D17-3608 (Fla. 2d DCA).
An evidentiary hearing with appropriate notice must be conducted when a party raises a colorable Rule 1.540 issue in a motion for relief from judgment.

ASA College, Inc. v. Dezer Intracoastal Mall, LLC, Case No. 3D16-1381 (Fla. 3d DCA 2018)
A party seeking to enforce a restrictive covenant in a Reciprocal Easement Agreement need not establish irreparable injury to enforce the restriction.

Lenzi v. The Regency Tower Association, Inc., Case No. 4D17-2507 (Fla. 4th DCA 2018).

Terms in a declaration of condominium should be given their ordinary meaning, and accordingly, use of the word "alteration" applied to common elements means all alterations and not just material alterations.

Florida Real Property and Business Litigation Report
Volume XI, Issue 26
June 30, 2018
Manuel Farach

Weakley v. Eagle Logistics, Case No. 17-14022 (11th Cir. 2018).
Dismissal of a Chapter 13 case in which the Debtor took positions inconsistent with those taken in another case does not moot judicial estoppel considerations.

Felts v. Wells Fargo Bank, N.A., Case No. 16-16314 (11th Cir. 2018).
A lender's reporting a debtor as delinquent during a forbearance plan does not violate the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

RREF SNV-FL SSL, LLC v. Shamrock Storage, LLC, Case No. 1D16-2045 (Fla. 1st DCA 2018).
The transfer of a valueless asset, by definition, is not a fraudulent conveyance.

Chrzuszcz v. Wells Fargo Bank, N.A., Case No. 1D16-3239 (Fla. 1st DCA 2018).
The burden to prove an issue shifts back to the plaintiff when the defendant specifically denies a plaintiff's general allegations of compliance with conditions precedent. Accordingly, plaintiff must prove a "face-to-face" meeting under HUD regulations took place to foreclose a HUD loan.

Green Emerald Homes, LLC v. Residential Credit Opportunities Trust, Case No. 2D17-4410 (Fla. 2d DCA 2018).
A mortgage that defines "borrower" as the individuals signing the mortgage (and not subsequent property owners or successors of "borrower") does not require subsequent owners to sequester rents despite the existence of an assignment of rents clause in the mortgage.

Florida Real Property and Business Litigation Report
Volume XI, Issue 27
July 7, 2018
Manuel Farach

Dyck-O'Neal, Inc. v. Lanham, Case No. SC17-975 (Fla. 2018).
Resolving a conflict between the district courts of appeal, the Florida Supreme Court rules that reserving jurisdiction in a final judgment of foreclosure to award a deficiency judgment does not prohibit a lender from later seeking a deficiency judgment under Florida Statute section 702.06.

Fischer v. HSBC Bank USA, Case No. 2D16-5307 (Fla. 2d DCA 2018).
A former Chapter 13 debtor may contest standing in a state foreclosure action even if he promised in his Chapter 13 proceedings to surrender the property to the creditor.

The Bank of New York Mellon v. Garcia, Case No. 3D17-2041 (Fla. 3d DCA 2018).
A duplicate of a modification agreement may properly be introduced into evidence over a Best Evidence Rule objection.

Yampol v. Turnberry Isle South Condominium Association, Inc., No. 3D17-2752 (Fla. 3d DCA 2018).
An order denying a motion for attorney's fees is an appealable, non-final order when the trial court intends there be no further judicial labor.

JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc., Case Nos. 4D16-1925 & 4D16-3974 (Fla. 4th DCA 2018).
The fact that a title agent, and not the closing attorney, prepared the defective legal description attached to the mortgage does not exculpate the attorney from malpractice.

Webber v. D'Agostino, Case No. 4D17-3007 (Fla. 4th DCA 2018).
A contractual prevailing party fees provision does not merge into the final judgment and can provide the basis for an award of post-judgment attorney's fees.

Florida Real Property and Business Litigation Report
Volume XI, Issue 28
July 14, 2018
Manuel Farach

Soule v. U.S. Bank National Association, Case No. 2D16-3231 (Fla. 2d DCA 2018).
A successor service's introduction into evidence of a default letter written by a prior servicer does not constitute evidence that the letter was mailed.

Gibson v. Wells Fargo Bank, N.A., Case No. 2D16-5632 (Fla. 2d DCA 2018).
A tax refund resulting from a tax return filed by husband and wife is property rebuttably presumed to be owned as tenants by the entireties.

Griffith v. Quality Distribution, Inc., Case No. 2D17-3160 (Fla. 2d DCA 2018).
In a case of first impression for Florida courts, the Second District adopts the *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), standard for analyzing disclosure settlements in class action litigation, and holds that supplemental disclosures "must address and correct a plainly material misrepresentation or omission and the subject matter of the proposed release must be narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process" in order for settlement to be approved.

Desulme v. Rueda, Case No. 3D17-1652 Fla. 3d DCA 2018).
A party must obtain permission from the court appointing the receiver before suing the receiver; the only exception is where the receiver has acted outside his or her authority.

Bluefield Ranch Mitigation Bank Trust v. South Florida Water Management District, Case No. 4D16-3023 (4th DCA 2018).
An economic injury combined with something more, e.g., a requirement that a competitor comply with a statute, is sufficient to confer standing the Florida Administrative Procedure Act.

Florida Real Property and Business Litigation Report
Volume XI, Issue 29
July 21, 2018
Manuel Farach

Presley v. United States, No. 17-10182 (11th Cir. 2018).
A taxpayer has no expectation of privacy in bank records sought by the I.R.S., even if the records belong to a lawyer and may contain third party (including client) information.

Sachse Construction and Development Corporation v. Affirmed Drywall, Corp., Case No. 2D17-4276 (Fla. 2d DCA 2018).
The Federal Arbitration Act preempts Florida Statute section 47.025 (actions against contractors may only be brought where the action accrues or contractor resides) when the action is truly interstate, and arbitration need not be conducted where contractor resides in an interstate arbitration.

Morris v. MGZ Properties, LLC, Case No. 4D17-3587 (Fla. 4th DCA 2018).
The undefined word "sale" in a contract means any sale, including a foreclosure sale.

Goersch v. City of Satellite Beach, Case No. 5D17-386 (Fla. 5th DCA 2018).
A Florida Statute section 57.105 motion must be served in strict accordance with Rule of Judicial Administration 2.516, even if it is not served until after the "safe harbor" period expires. Conflict certified with *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014).

Florida Real Property and Business Litigation Report
Volume XI, Issue 30
July 28, 2018
Manuel Farach

In Re: Daughtrey, Case No. 15-14544 (11th Cir. 2018).
A bankruptcy court's approval of a compromise or settlement under 11 U.S.C. § 9023 is reviewed for abuse of discretion.

NE 32nd Street, LLC v. U.S., Case No. 17-11908 (11th Cir. 2018).
The Quiet Title Act, 28 U.S.C. § 2409a contains a twelve-year statute of limitations, and a 2013 building permit (with strict conservations conditions) is consistent with a 1938 spoilage easement granted by the government, and thus, the landowner's title claims are barred by not bringing suit in 1950, i.e. based on the 1938 easement.

Sowell v. Faith Christian Family Church of Panama City Beach, Inc., Case No. 1D17-3365 (Fla. 1st DCA 2018).
A landowner's failure to pay assessed ad valorem taxes deprives the trial court, under Florida Statute section 194.171, of subject matter jurisdiction to entertain a challenge to the tax assessment.

Super Products, LLC v. Intracoastal Environmental, LLC, Case No. 2D17-3769 (Fla. 2d DCA 2018).
A trial court may not dismiss an action brought by a foreign limited liability company for fraudulently obtaining a certificate of authority from the Department of State as determining whether a certificate was fraudulently obtained is an executive function.

Hawks v. Libit, Case No. 2D17-4526 (Fla. 2d DCA 2018).
A party seeking to recover costs under Florida Statute section 57.041(1) must meet the "party recovering judgment," and not the "prevailing party," standard to be entitled to an award of costs.

Essenson v. Bloom, Case No. 2D16-4994 (Fla. 2d DCA 2018).
Aligning itself with the Fourth District, the Second District holds that an appellate court may, in advance, prohibit a trial court from awarding appellate costs.

Abt v. Metro Motors Ventures, Inc., Case No. 4D17-1960 (Fla. 4th DCA 2018).
An attorney is not entitled to an award of attorney's fees for enforcing a charging lien previously awarded for unpaid attorney's fees.

Schneider v. First American Bank, Case No. 4D17-2239 (Fla. 4th DCA 2018).
A judgment containing both foreclosure and money judgments may permit execution upon the money judgment if the foreclosure sale is stayed but may not authorize both execution and foreclosure sale to proceed simultaneously.

Newman v. Mayer Brown, LLP, Case No. 4D17-3416 (Fla. 4th DCA 2018).
An assignee of claims against a party is subject to discovery by the party on the claims; it may not use its assignee status as both sword and shield.

Florida Real Property and Business Litigation Report
Volume XI, Issue 31
August 4, 2018
Manuel Farach

Internaves de Mexico S.A. de C.V. v. Andromeda Steamship Corporation, Case No. 17-12164 (11th Cir. 2018).
Contracts, including arbitration agreements are interpreted according to five basic principles: the actual language used is the best evidence of the intent of the parties, a contract should be read to give effect to all of its provisions, a contract's internal conflict resolution method should be employed if provisions conflict with each other, specific provisions generally control over general provisions, and contracts must be interpreted with sensitivity to the reality that parties occasionally err or misprint in the course of contract drafting.

Jackson v. Bank of America, N.A., Case No. 16-16685 (11th Cir. 2018).
Eleventh Circuit precedent holds that a trial court may strike a shotgun pleading and impose sanctions if the deficiencies are not cured by the amended pleading.

Taylor, Bean & Whitaker Mortgage Company v. Wright, Case No. 1D17-1432 (Fla. 1st DCA 2018).
A successor-in-interest plaintiff may dismiss a lawsuit without a court order substituting itself as the plaintiff, and if so, will not be responsible for any suit fees.

Iezzi Family Limited Partnership v. Edgewater Beach Owners Association, Inc., Case No. 1D16-5878 (Fla. 1st DCA 2018).
Members of not-for-profit condominium associations may not avoid pre-suit requirements for derivative actions.

DePrince v. Starboard Cruise Services, Inc., Case No. 3D16-1149 (Fla. 3d DCA 2018).
On rehearing, the Third District holds that a party seeking rescission of a contract based on a unilateral mistake does not have to prove that she was induced into making the mistake by the other party.

Rahimi v. Global Discoveries, Ltd., LLC, Case No. 3D16-2756 (Fla 3d DCA 2018).
The determination of who is entitled to a tax deed sale surplus is made at the time of the tax deed sale.

Gonzalez v. Federal National Mortgage Association, Case No. 3D17-1246 (Fla. 3d DCA 2018).
A foreclosing lender may recover payments due outside of the five-year statute of limitations.

Florida Real Property and Business Litigation Report
Volume XI, Issue 32
August 11, 2018
Manuel Farach

Hernandez v. Acosta Tractors Inc., Case Nos. 17-13057; 17-13673 (1nly 1th Cir. 2018).
While not appropriate in this case because the only failure was to pay arbitration fees (without a showing the party had the ability to pay), a district court retains the power to sanction parties for failure to participate in an arbitration in good faith or for using the arbitration process as a method of forum shopping.

Pettway v. City of Jacksonville, Case No. 1D17-2279 (Fla. 1st DCA 2018).
The mailing of the final order of a local administrative agency may, under the rules of the local agency and the municipality, constitute the "filing with the clerk of the lower tribunal" as required for rendition under Florida Rule of Appellate Procedure 9.020(i).

Pijuan v. Bank of America, N.A., Case No. 3D16-1553 (Fla. 3d DCA 2018).
A lender must plead and prove a default under a loan modification agreement in order to foreclose if the court finds that the loan modification agreement was entered into by the parties.

Dimitri v. Commercial Center of Miami Master Association, Inc., Case No. 3D16-2549 (Fla. 3d DCA 2018).
A master association of a development made up of smaller sub-associations is not a condominium “association” subject to the requirements of the 1981 version of Florida Statutes chapter 718 it is not “the corporate entity responsible for the operation of a condominium” under § 718.103(2).

Jahangiri v. 1830 North Bayshore, LLC, Case No. 3D17-529 (Fla. 3d DCA 2018).
The following provision is too indefinite as to how future rent will be determined, and is thus unenforceable:

> RENEWAL OPTIONS: Upon six months (sic) notice and provided [lessee] is not in default of any provision of this Lease, LESSOR agrees that [lessee] may renew this Lease for two five-year renewal options, each renewal at the then prevailing market rate for comparable commercial office properties.

Bankers Lending Company, LLC v. Jacobson, Case No. 5D17-542 (Fla. 5th DCA 2018).
Generally, a junior lienor cannot compel a redemption pro tanto and must pay the whole amount of the mortgage debt in order to redeem.

Bank of America, N.A. v. Eastridge, Case No. 5D17-2541 (Fla. 5th DCA 2018).
The 2013 amendments to Florida Statute section 95.18(1) (adverse possession without color of title) merely added a "tacking provision" and did not remove the requirement that claimant (including any "tacked on" predecessors) have adversely occupied the property for seven years in order to prevail on a claim of adverse possession.

Simon v. Waters, Case No. 5D17-3355 (Fla. 5th DCA 2018).
A court cannot circumvent the American Rule regarding the award of attorney's fees by granting an equitable lien for attorney's fees, especially when the party granted the equitable lien was not the prevailing party.

Florida Real Property and Business Litigation Report
Volume XI, Issue 33
August 18, 2018
Manuel Farach

Spirit Airlines, Inc. v. Maizes, Case No. 17-14415 (11th Cir. 2018).
Parties, by their choosing to adopt the Commercial Rules of the American Arbitration Association, indicate a "clear and unmistakable" intent to have an arbitrator decide whether their particular arbitration agreement permits class arbitration.

Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), No. 17-13588 (11th Cir. 2018).
"New value" does not need to remain unpaid to constitute a defense under 11 U.S.C. § 547(c)(4) against a preference action; the statement to the contrary in *Charisma Investment Company, N.V. v. Airport Systems, Inc.* (In re Jet Florida System, Inc.), 841 F.2d 1082 (11th Cir. 1988), is *dictum* and is not binding precedent.

XIP Technologies, LLC v. Ascend Global Services, LLC, Case No. 2D17-3718 (Fla. 2d DCA 2018).
A court may not, by temporary injunction, order a party to continue performing a contract when the aggrieved party has an adequate remedy at law for damages, but may issue an injunction to prevent the total destruction of a business as that constitutes an inadequate remedy at law.

Aquasol Condominium Association, Inc. v. HSBC Bank USA, National Association, Case No. 3D17-352 (Fla. 3d DCA 2018).
A lender need prove only that is the holder or owner of a note, i.e., it does not have to prove it is both owner and holder, in order to have standing.

Bank of America, N.A. v. Graybush, Case No. 4D17-1256 (Fla. 4th DCA 2018).
A lender suing for foreclosure which alleges an "all subsequent payments" default can collect all payments due on the note, including those outside of the statute of limitations; conflict certified with *Velden v. Nationstar Mortgage, LLC*, 234 So.3d 850 (Fla. 5th DCA 2018).

Winfield Investments, LLC v. Pascal-Gaston Investments, LLC, Case No. 5D17-1304 (Fla. 5th DCA 2018).
A defendant cannot be held liable for fraudulently misrepresenting that a property is free of mortgages if the existence of the mortgage is obvious to him, i.e., can be ascertained through a search of the public records. Moreover, the Fifth District again certifies the following question to the Florida Supreme Court:

> DID THE COURT IN BUTLER OVERRULE THE DECISIONS IN BESETT, JOHNSON, AND SCHOTTENSTEIN BY HOLDING THAT JUSTIFIABLE RELIANCE IS NOT AN ESSENTIAL ELEMENT OF FRAUDULENT MISREPRESENTATION?

Florida Real Property and Business Litigation Report
Volume XI, Issue 34
August 25, 2018
Manuel Farach

McGinnis v. American Home Mortgage Servicing, Inc., Case No. 17-11494 (11th Cir. 2018).
An award of $3,506,000 in damages ($6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages) for a wrongful foreclosure where the jury found intentional conduct, including placing disputed mortgage payments into a suspense account, is not excessive.

Derouin v. Universal American Mortgage Company, LLC, Case No. 2D17-1002 (Fla. 2d DCA 2018).
The appellate record must clearly show a "face to face" meeting under 24 C.F.R. § 203.604 when the failure to conduct the meeting is properly raised under the pleadings.

Chakra 5, Inc. v. The City of Miami Beach, Case No. 3D16-2569 (Fla. 3d DCA 2018).
Accrual of a landowner's 42 U.S.C. § 1983 claim against a government is determined by federal, not state law, and the statute of limitations begins to run when plaintiffs know or should have known "(1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury."

Torres v. Bank Of New York, Case No. 4D17-1625 (Fla. 4th DCA 2018).
A borrower that successfully defends on the basis of failure to lender to prove entitlement to enforce the note is not entitled to an award attorney's fees but is entitled to an award of costs under Florida Statute section 57.041(1) and Florida Rule of Civil Procedure 1.420.

Sacks v. The Bank Of New York Mellon, Case No. 4D17-2122 (Fla. 4th DCA 2018).
The "trustworthiness" requirement of *Bank of N.Y. v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015), is not satisfied if the evidence (an affidavit in this case) does not reflect the steps taken by the affiant to verify the accuracy of the financial records.

Florida Real Property and Business Litigation Report
Volume XI, Issue 35
September 1, 2018
Manuel Farach

Outokumpu Stainless USA, LLC, v. Converteam SAS, Case No. 17-10944 (11th Cir. 2018).
District courts must conduct a bifurcated analysis when presented with questions of arbitrability on a case removed to federal court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: the court must first conduct a limited inquiry on the face of the pleadings and the removal notice to determine whether the suit "relates to" an arbitration agreement falling under the Convention, and upon motion to remand, must conduct a more rigorous analysis to determine whether the parties entered into or are bound by the agreement pursuant to the Convention.

Crapo v. Academy for Five Element Acupuncture, Inc., Case No. 1D17-1895 (Fla. 1st DCA 2018).
The principle that "each tax year's assessment must stand or fall on its own validity," i.e., that tax exemption status is determined each year, does not apply when a landowner has successfully litigated against the tax collector as to its educational tax exemption in the past and nothing has changed factually or legally with regard to the landowner.

Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC, Case No. 1D17-2090 (Fla. 1st DCA 2018).
It is an unreasonable interpretation of restrictive covenants to require a landowner to submit incomplete or non-final plans on which the landowner is not prepared to proceed.

Florida Real Property and Business Litigation Report
Volume XI, Issue 36
September 8, 2018
Manuel Farach

The Estate of Caldwell Jones, Jr. v. Live Well Financial, Inc., Case No. 17-14677 (11th Cir. 2018).
12 U.S.C. § 1715z-20, which states the HUD Secretary "may not insure" a reverse mortgage unless it defers repayment obligations until the borrowing "homeowner" either dies or sells the mortgaged property (and defines "homeowner" to include the borrower's spouse) does not limit a lender's ability to demand repayment immediately following a borrower's death, even if the non-borrowing spouse continues to live in the mortgaged property.

The Bank of New York Mellon v. Glenville, Case No. SC17-954 (Fla. 2018).
The 60-day time period for filing a petition for surplus foreclosure sale proceeds commences to run upon the Clerk of the Court filing the Certificate of Disbursements; *Bank of New York Mellon v. Glenville*, 215 So. 3d 1284, 1285 (Fla. 2d DCA 2017), and *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878, 881 (Fla. 4th DCA 2016), are disapproved.

Borowski v. Ferrer, Case No. 1D15-3358 (Fla. 1st DCA 2018).
An appellate court may reverse a final judgment which is internally inconsistent, including reversing a final judgment which removes a fence that causes an obstruction to a neighbor's access easement but places the fence in a new location which causes a new obstruction to the neighbor's access easement.

Sterling Breeze Owners' Association, Inc. v. New Sterling Resorts, LLC, Case No. 1D17-1553 (Fla. 1st DCA 2018).
A declaration of condominium may exclude some parcels of airspace from the condominium, and upon doing so, the excluded parcels are not subject to the Condominium Act nor to responsibility under the Act.

Forbes v. Prime General Contractors, Inc., Case No. 2D17-353 (Fla. 2d DCA 2018).
A nonbreaching party has the option to treat the breach as a breach of the entire contract, i.e., a total breach, and upon doing so may either treat the contract as void and seek the damages that will restore him to the position he was in prior to entering into the contract, or may instead affirm the contract and seek damages for the "benefit of the bargain." In breached construction contracts, the benefit of the bargain is "either the reasonable cost of completion, or the difference between the value the construction would have had if completed and the value of the construction that has been thus far performed." Likewise, there is no duty to mitigate damages, and the Doctrine of Avoidable Consequences only prevents parties from recovering damages they "could have reasonably avoided."

Inter American Coal, S.A. v. SHE DDF2-FL2, LLC, Case No. 3D18-1205 (Fla. 3d DCA 2018).
Seeking affirmative relief waives a party's objection to service of process through publication.

Wells Fargo Bank, N.A. v. Elkind, Case No. 4D17-1213 (Fla. 4th DCA 2018).
A lender that voluntarily dismisses a suit is not entitled to a *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896, 899 (Fla. 4th DCA 2017), determination of no attorney's fees being due the borrower as a voluntary dismissal is not a judicial determination of no standing.

Florida Real Property and Business Litigation Report
Volume XI, Issue 37
September 15, 2018
Manuel Farach

Bushnell v. Portfolio Recovery Associates, LLC, Case No. 2D17-429 (Fla. 2d DCA 2018).
An action for an account stated is sufficiently "with respect to a [credit card account] contract" such that the prevailing party is entitled to an award of attorney's fees under Florida Statute section 57.105(7).

Alvarez v. All Star Boxing, Inc., Case No. 3D17-925 (Fla. 3d DCA 2018).
Damages for unjust enrichment may be market value of the services or the value of the services to the party unjustly enriched, but nonetheless must be measurable and quantifiable even if rendered by a jury.

Gindel v. Centex Homes, Case No. 4D17-2149 (Fla. 4th DCA 2018).
The sending of the pre-suit notice of construction defects required under Florida Statute section 558.004(1)(a) qualifies as an "action" for purposes of satisfying the time requirements of Florida's Statute of Repose, Florida Statute section 95.11(3)(c).

Stankos v. Amateur Athletic Union of The United States, Inc., Case No. D17-3361 (Fla. 4th DCA 2018).
The filing of an amended complaint resurrects the right to compel arbitration only if the amended complaint materially differs from the initial complaint in substantive matters.

Florida Real Property and Business Litigation Report
Volume XI, Issue 38
September 22, 2018
Manuel Farach

JPay, Inc. v. Kobel, Case No. 17-13611 (11th Cir. 2018).
Whether the parties to a contract agreed to arbitrate the "gateway" issue of arbitrability is presumptively for a court to decide, but the parties may delegate that decision to an arbitrator in their agreement.

Abdulla Al Ghurair v. Zaczac, Case Nos. 3D16-2517; 3D17-1612 & 3D17-2014 (Fla. 3d DCA 2018).
Using writs of bodily attachment and the contempt power of the court to pressure a party to pay sums due under a settlement agreement is improper.

U.S. Bank National Association v. Rodriguez, Case No. 4D17-339 (Fla. 4th DCA 2018).
A stipulation regarding removal of documents from a court file cannot be interpreted to require original instruments to remain in the court file in perpetuity.

Avant Capital, LLC v. Gomez, Case No. 4D17-1014 (Fla. 4th DCA 2018).
Slight variations in the name of a company in legal instruments, including the omission of the word "Corporation" from an allonge, do not affect the validity of the instruments so long as the identity of the corporation can be established.

Florida Real Property and Business Litigation Report
Volume XI, Issue 39
September 29, 2018
Manuel Farach

Patel v. Specialized Loan Servicing, LLC, Case No. 16-12100 (11th Cir. 2018).
The Filled Rate Doctrine (judicial action cannot undermine agency rate-making authority) precludes suit by borrowers complaining force-placed insurance violated the Truth in Lending Act and the Florida Unfair and Deceptive Trade Practices Act.

Levy v. Ben-Shmuel, Case No. 3D17-2355 (Fla. 3d DCA 2018).
A party that fails to prove the proper measure of damages at trial is not, upon remand by the appellate court, entitled to a new trial on damages unless the failure was caused by judicial error.

Rodgers v. Deutsche Bank National Trust Company, Case No. 4D18-82 (Fla. 4th DCA 2018).
A foreclosure judgment which contains an error in the legal description can be corrected under Florida Rule of Civil Procedure 1.540(b), while errors caused upon the entry of the final judgment are corrected by 1.540(a).

National Millwork, Inc. v. ANF Group, Inc., Case No. 4D18-545 (Fla. 4th DCA 2018).
An arbitration agreement may not expand the scope of judicial review beyond that set forth in the Florida Arbitration Code.

Florida Real Property and Business Litigation Report
Volume XI, Issue 40
October 6, 2018
Manuel Farach

O'Halloran v. Harris Corporation (In re Teltronics, Inc.), Case No. 161140 (11th Cir. 2018).
A bankruptcy judge's *Daubert* decision on economic testimony regarding insolvency will not be disturbed on appeal absent the decision being "manifestly erroneous."

Allen v. Nunez, Case No. SC16-1164 (Fla. 2018).
Two codefendants who receive a proposal for settlement in which they are specifically and individually named, possess all the information necessary to determine whether to settle and an attachment which names both codefendants does not make the proposal ambiguous.

The Florida Bar re: Advisory Opinion – Shore v. Wall, Case No. SC17-1510 (Fla. 2018).
A non-lawyer company is engaged in the unlicensed practice of law when it holds itself out as having special knowledge on how to recover excess proceeds from tax deed sales held by the Clerk of Court under Florida Statutes Chapter 197.

Atlantic Civil, Inc. v. Swift, Case No. 3D15-1594 (Fla. 3d DCA 2018).
A joint proposal for settlement which does not differentiate between co-defendants and requires all co-defendants to execute the same general release which refers to another co-defendant is not enforceable.

Federal National Mortgage Association v. JKM Services, LLC, as Receiver for Cedar Woods Homes Condominium Association, Inc., Case No. 3D17-370 (Fla. 3d DCA 2018).
A lender is entitled to intervene in a proceeding where a receiver is appointed to collect unpaid condominium assessments under Florida Statute section 718.116(6)(c).

Ocean Bank v. Gato, Case No. 3D18-1608 (Fla. 3d DCA 2018).
A foreclosure sale should not be canceled to permit a defendant time to arrange a short sale because "[a] defendant's claim that they might be able to arrange for payment of the outstanding debt during an extended period of time does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other."

Darden Restaurants, Inc. v. Ostanne, Case No. 4D17-3590 (Fla. 4th DCA 2018).
A valid delegation clause such as "[t]he arbitrator has the sole authority to determine the eligibility of a dispute for arbitration and whether it has been timely filed" removes jurisdiction from a trial court to determine arbitrability.

Florida Real Property and Business Litigation Report
Volume XI, Issue 41
October 13, 2018
Manuel Farach

Provident Funding Associates v. MDTR, Case No. 2D17-337 (Fla. 2d DCA 2018).
The Second District adopts the reasoning of *Forero v. Green Tree Servicing, LLC,* 223 So. 3d 440 (Fla. 1st DCA 2017), and holds the phrase "and all subsequent payments" has a different meaning in a later action and can avoid a res judicata defense because the passage of time has caused the actual missed payments to be different.

5F, LLC v. Boca Grande Isle LLC, Case Nos. 2D17-949, 2D17-1155 (Fla. 2d DCA 2018).
Unless there is an express delegation of authority to a property owners association to amend restrictive covenants, restrictive covenants can only be amended by the consent of all the property owners in a subdivision.

Robles v. Federal National Mortgage Association, Case No. 3D17-2798 (Fla. 3d DCA 2018).
A court can enter a default without a hearing.

Florida Power & Light Company v. McRoberts, Case No. 4D17-2399 (Fla. 4th DCA 2018).
An agent's apparent authority to bind a principal to a real estate contract must be reasonable notwithstanding a jury's finding apparent agency existed.

Florida Real Property and Business Litigation Report
Volume XI, Issue 42
October 20, 2018
Manuel Farach

DeLisle v. Crane Co., Case No. SC16-2182 (Fla. 2018).
The Florida Supreme Court rejects the *Daubert* standard and continues its adoption of the *Frye* standard for the admission of scientific evidence.

Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC, Case No. 1D17-5241 (Fla. 1st DCA 2018).
A suit for declaratory relief may constitute an action seeking to enforce community association restrictive covenants, and as a result the prevailing party in such action may be entitled to an award of attorney's fees and costs under Florida Statute section 720.305.

Thorlton v. Nationstar Mortgage, LLC, Case No. 2D17-2328 (Fla. 2d DCA 2018).
A witness testifying as to routine practice of a company sending letters must "be employed by the entity drafting the letter," and also must "have firsthand knowledge of the company's routine practice for mailing letters."

Garcia v. Deutsche Bank National Trust Company, Case No. 3D17-1778 (Fla. 3d DCA 2018).
Removal of a case to federal court deprives the state court of jurisdiction, including the jurisdiction to enter a final judgment.

Antoniazzi v. Wardak, Case No. 3D17-2064 (Fla. 3d DCA 2018).
The following is a mandatory forum selection clause:

> The place of performance, the exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located.

Subic Bay Marine Exploratorium, Inc. v. JV China, Inc., Case No. 5D17-4030 (Fla. 5th DCA 2018).
A domestic Florida corporation is subject to the general jurisdiction of the Florida courts, notwithstanding that the corporation's principal place of business may be in another state.

Foley v. Azam, Case No. 5D18-145 (Fla. 5th DCA 2018).
The tolling provision of 28 USC § 1367(d) does not require the successful assertion of federal jurisdiction for tolling to be effective.

Florida Real Property and Business Litigation Report
Volume XI, Issue 43
October 27, 2018
Manuel Farach

In Re: Amendments to The Florida Rules of Appellate Procedure, Case No. SC17-152 (Fla. 2018).
The Rules of Appellate Procedure are amended to provide more uniform treatment of appeals from county court to circuit court, to permit non-final appeals regarding whether a settlement agreement is unenforceable or to disqualify counsel, but a rule requiring three judgment panels in all county to circuit court appeals is rejected.

In Re: Amendments to The Florida Rules of Civil Procedure, Case No. SC17-882 (Fla. 2018).
The Rules are amended to provide that service by email is the same as hand delivery.

Garcia-Mathies Interiors, Inc. v. Peré, Case No. 3D17-882 (Fla. 3d DCA 2018).
A party must be given an opportunity to contest the striking of pleadings, even when it appears obvious the party has not complied with previous court orders to produce digital discovery in native, non-altered format.

Villamizar v. Luna Capital Partners, LLC, Case No. 3D18-112 (Fla. 3d DCA 2018).
Just because an unrelated purchaser of real estate is aware the seller owes money to others is not indicative of a fraudulent scheme to convey away assets beyond the reach of the party seeking damages against the seller, and the fact that a prior lis pendens on the property was discharged does not change the conclusion.

Santiago v. U.S. Bank National Association, Case No. 5D18-2470 (Fla. 5th DCA 2018).
A party is not prohibited from seeking the release of original documents held in a court file and need not prove the merits of its underlying claim tied to the documents before obtaining the release.

Florida Real Property and Business Litigation Report
Volume XI, Issue 44
November 3, 2018
Manuel Farach

Dye v. Tamko Building Products, Inc., Case No. 17-14052 (11th Cir. 2018).
A shrink-wrap contract on a package of roof shingles purchased and opened by a homeowner's roofer binds a homeowner to the arbitration provisions contained in the shrink-wrap package when " (1) … the manufacturer's packaging … sufficed to convey a valid offer of contract terms, (2) that unwrapping and retaining the shingles was an objectively reasonable means of accepting that offer and (3) … the homeowners' grant of express authority to their roofers to buy and install shingles necessarily included the act of accepting purchase terms on the homeowners' behalf."

Deutsche Bank National Trust Company v. Noll, Case No. 2D16-5635 (Fla. 2d DCA 2018).
The Clerk of Court does not become the "holder" of a promissory note merely by possession of the note in the court file.

Santos v. HSBC Bank USA, National Association, Case No. 3D17-531 (Fla. 3d DCA 2018).
An appellate court has no jurisdiction to review trial court acts after the filing of the Notice of Appeal, even if the appellate court has relinquished jurisdiction.

Lovell v. Perez, Case No. 3D18-337 (Fla. 3d DCA 2018).
The following contract provision does not make a Buyer responsible for Seller's attorney's fees when Buyer sues Seller for a declaration that Buyer is not responsible for Seller's fees, i.e., Seller is not " be joined in any suit or subpoenaed as a witness or otherwise:

> If a real estate agent/broker claims a commission by virtue of having a listing agreement with the SELLERS, whether on or before the closing date, or by virtue of a verbal or other agreement, SELLERS will indemnify and hold the BUYERS harmless for all fees and costs, including the fee of BUYERS' attorney of choice should BUYERS or either of them be joined in any suit or subpoenaed as a witness or otherwise or if BUYERS must set forth BUYERS' position to such agent/broker by letter or otherwise upon contact by such agent/broker. If a real estate agent/broker claims a commission by virtue of showing the subject property to BUYERS or being a "procuring cause" of the purchase then BUYERS will indemnify and holder [sic] SELLERS harmless for all fees and costs, including the fee of SELLERS' attorney of choice should SELLERS or either of them be joined in any suit or subpoenaed as a witness or otherwise or if SELLERS must set forth SELLERS' position to such agent/broker by letter or otherwise upon contact by agent/broker. The terms of the Paragraph along with Paragraph 15 of the Contract will survive the closing for five (5) years.

Venezia v. Wells Fargo Bank, Case No. 3D18-516 (Fla. 3d DCA 2018).
The Third District agrees with the Second District that there is no right of non-final appeal nor certiorari review for merely scheduling a foreclosure sale pursuant to a valid judgment of foreclosure.

Torres v. Deutsche Bank National Trust Company, Case No. 4D17-2727 (Fla. 4th DCA 2018).
The Fourth District re-affirms its position that a "witness must have personal knowledge of the company's general practice in mailing letters" and that mere reliance on the boarding process to prove a letter was mailed in insufficient.

Santiago v. U.S. Bank National Association, Case No. 5D18-2470 (Fla. 5th DCA 2018).
A promissory note can be released from the court file to the party that placed the note into evidence or the court file.

Florida Real Property and Business Litigation Report
Volume XI, Issue 45
November 10, 2018
Manuel Farach

Wells Fargo Bank, N.A v. Moccia, Case No. 4D18-0479 (Fla. 4th DCA 2018).
A borrower that seeks to enforce a modification agreement with a lender which requires the borrower to pay is not a "prevailing party" and is not entitled to an award of attorney's fees under the mortgage.

Ware v. Citrix Systems, Inc., Case No. 4D18-1372 (Fla. 4th DCA 2018).
Employees that work remotely and not in Florida may, under certain circumstances, be haled into Florida under the Florida long-arm statute but the *Venetian Salami Co. v. Parthenais, 554 So. 2d 499* (Fla. 1989), test must be satisfied.

Florida Real Property and Business Litigation Report
Volume XI, Issue 46
November 17, 2018
Manuel Farach

Law Offices of Herssein and Herssein v. United Services Automobile Association, Case No. SC17-1848 (Fla. 2018).
Judges do not have to automatically recuse themselves from a case if they are "Facebook friends" with counsel for one of the parties.

Convergent Technologies, Inc. v. Stone, Case No. 1D18-389 (Fla. 1st DCA 2018).
Whether a party has proactively violated a restrictive covenant in an employment agreement is a question of fact for the trier of fact.

Sorenson v. The Bank Of New York Mellon, Case No. 2D16-273 (Fla. 2d DCA 2018).
While the privilege to amend diminishes the closer a case gets to trial, a defendant can still amend affirmative defenses in a 7-year-old case so long as the "justice factor" outweighs the prejudice to the party objecting to the amendment.

Home Title Company of Maryland, Inc. v. Lasalla, Case No. 2D17-998 (Fla. 2d DCA 2018).
One member of a Florida LLC may not sue the title company that improperly transferred the LLC's real property to the other LLC member as the right to sue the title company is derivative and belongs to the LLC; *Dinuro Invests., LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014), is distinguished.

Nationstar Mortgage, LLC v. Cullin, Case No. 4D17-84 (Fla. 4th DCA 2018).
A final judgment and trial transcript which contain no findings of facts, conclusions of law, or other indication of the basis for the trial court's decision makes effective appellate review impossible and will result in remand to make the necessary findings.

Richard v. Bank of America, N.A., Case No. 4D18-1581 (Fla. 4th DCA 2018).
A judgment is void when it is the product of the lack of due process, and an aggrieved party may move to set the judgment aside under Florida Rule of Civil Procedure 1.540 outside of the one-year limitation.

The City of Palm Beach Gardens v. Oxenvad, Case No. 4D18-1758 (Fla. 4th DCA 2018).
An appeal regarding a municipal annexation must be filed within thirty days of the passage of the annexation ordinance, and an aggrieved party may not wait until the voter referendum on the annexation to appeal.

Florida Real Property and Business Litigation Report
Volume XI, Issue 47
November 24, 2018
Manuel Farach

Wells Fargo Bank, N.A. v. Smith, Case No. 1D17-236 (Fla. 1st DCA 2018).
A "Motion to Find Void and/or Vacate, Rescind, Set Aside, Reconsider and/or Rehear" an order denying a motion for fees and subsequent order denying rehearing will be reviewed for its substance, not its title, and may be considered a Florida Rule of Civil Procedure 1.540(b) motion.

Florida Real Property and Business Litigation Report
Volume XI, Issue 48
December 1, 2018
Manuel Farach

Weyerhaeuser Co. v. United States Fish and Wildlife Service, Case No. No. 17–71 (2018).
The designation by the U.S. Fish and Wildlife Service of an area as a "critical habitat" for an endangered species requires that the property be presently "habitable" for the species.

Ham v. Portfolio Recovery Associates, LLC, Case No. 1D17-3112 (Fla. 1st DCA 2018).
An action for account stated is not "an action to enforce a contract," so a prevailing party is in such a suit not entitled to the reciprocity benefits of Florida Statute section 57.105(7).

Adkins v. Memorial Motors, Inc., Case No. 2D18-1596 (Fla. 2d DCA 2018).
The refusal of an arbitration service to accept an arbitration demand due to an outstanding bill, which refusal is subsequently withdrawn by payment of the bill, does not waive a party's right to arbitration.

D & E Real Estate, LLC v. Vitto, Case No. 3D18-376 (Fla. 3d DCA 2018).
Failure to deliver marketable title under paragraph 15(b) of the FAR-Bar form contract can constitute a breach of the contract entitling a buyer to seek specific performance:

> SELLER DEFAULT: If for any reason other than failure of Seller to make Seller’s title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller’s obligations under this Contract, Buyer may elect to receive return of Buyer’s Deposit without thereby waiving any action for damages resulting from Seller’s breach and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.

Benavente v. Ocean Village Property Owners Association, Inc., Case No. 4D18-1819 (Fla. 4th DCA 2018).
An affidavit of diligent search is inadequate when, among other factors, plaintiff seeking to serve defendant has an email address for defendant such that plaintiff can ask defendant through email their residence address.

Charterhouse Associates, Ltd., Inc. v. Valencia Reserve Homeowners Association, Inc., Case No. 4D17-2640 (Fla. 4th DCA 2018).
A personal trainer invited by a homeowner to train him at the clubhouse owned and maintained by the homeowner's association is an invitee under Florida law and is not a violation of the association restrictive covenants when the covenant permit owner's invitees onto the property; use of the "economic benefit" test to determine the legal status of the invitee on the property is rejected.

Greenshields v. Greenshields, Case Nos. 5D18-400 & 5D18-1218 (Fla. 5th DCA 2018). A court order requiring that certain disputed proceeds from a real estate closing be held in escrow and not disbursed to seller amounts to a temporary injunction, notwithstanding the disbursement of the funds were restricted by an agreement.

Florida Real Property and Business Litigation Report
Volume XI, Issue 49
December 8, 2018
Manuel Farach

Curtis Investment Company, LLC v. Commissioner of Internal Revenue, Case No. 17-14573 (11th Cir. 2018).
A Custom Adjustable Rate Debt Structure (CARDS) transaction lacks both economic substance and business purposes and thus is not a permissible vehicle for claiming losses for tax purposes.

Dukes v. Suncoast Credit Union (In re Dukes), Case No. 16-16513 (11th Cir. 2018).
Mortgages paid outside a Chapter 13 plan are not "provided for" in the plan under 11 U.S.C. § 1328(a), i.e., the plan must make a provision for or stipulate to the debt in the plan, and a borrower's personal liability under the mortgages is thus not discharged.

Transcontinental Gas Pipe Line Company, LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, Case No. 16-17503 (11th Cir. 2018).
A trial court may issue a preliminary injunction to a pipeline company to allow access to a landowner's property before the conclusion of condemnation proceedings so long as the pipeline company's right to condemn the property has been finally determined.

In re: Standard Jury Instructions in Contract and Business Cases—2018 Report, Case No. SC18-867 (Fla. 2018).
Standard jury instructions for 416.4 (Breach of Contract—Essential Factual Elements); 416.20 (Interpretation—Construction Against Drafter); 416.24 (Breach of Implied Covenant of Good Faith and Fair Dealing); 416.25 (Affirmative Defense—Mutual Mistake of Fact); and 416.26 (Affirmative Defense—Unilateral Mistake of Fact) are revised and the following new instructions are adopted: new instructions 416.41 (Misappropriation of Trade Secrets), 416.42 (Breach of Duty to Disclose— Residential), 416.43 (Piercing the Corporate Veil), 416.44 (Legal Status of Entities), 416.45 (Legal Cause), and 416.46 (Promissory Estoppel), 416.2 (Model Form of Verdict for Third-Party Beneficiary of Contract Claim); 416.3 (Model Form of Verdict for Formation of Contract); 416.4 (Model Form of Verdict for Breach of Contract); 416.5 (Model Form of Verdict for Oral or Written Contract Terms); 416.6 (Model Form of Verdict for Contract Implied in Fact); 416.7 (Model Form of Verdict for Contract Implied in Law); 416.8 (Model Form of Verdict for Formation of Contract—Offer); 416.10 (Model Form of Verdict for Contract Formation—Acceptance); 416.11 (Model Form of Verdict for Contract Formation—Acceptance by Silence or Conduct); 416.12 (Model Form of Verdict for Substantial Performance of Contract); 416.13 (Model Form of Verdict for Modification of Terms(s) of Contract); 416.14 (Model Form of Verdict for Interpretation—Disputed Term(s)); 416.15 (Model Form of Verdict for Interpretation—Meaning of Ordinary Words); 416.16 (Model Form of Verdict for Interpretation—Meaning of Disputed Technical or Special Words); 416.17 (Model Form of Verdict for Interpretation—Construction of Contract as a Whole); 416.18 (Model Form of Verdict for Interpretation—Construction by Conduct); 416.19 (Model Form of Verdict for Interpretation of Contract—Reasonable Time); 416.20 (Model Form of Verdict

for Interpretation—Construction Against Drafter); 416.21 (Model Form of Verdict for Existence of Conditions Precedent Disputed); 416.22 (Model Form of Verdict for Occurrence of Agreed Condition Precedent of Contract Claim); 416.24 (Model Form of Verdict for Breach of Implied Covenant of Good Faith and Fair Dealing); 416.25 (Model Form of Verdict for Affirmative Defense—Mutual Mistake of Fact); 416.32(a) (Model Form of Verdict for Affirmative Defense—Statute of Limitations); 416.32(b) (Model Form of Verdict for Statute of Limitations Defense in a Breach of Contract Case); 416.33 (Model Form of Verdict for Affirmative Defense—Equitable Estoppel); 416.35 (Model Form for Affirmative Defense of Contract Claim—Judicial Estoppel); 416.36 (Model Form of Verdict for Affirmative Defense—Ratification); 416.37 (Model Form of Verdict for Goods Sold and Delivered); 416.38 (Model Form of Verdict for Open Account); 416.39 (Model Form of Verdict for Account Stated); 416.42 (Model Form of Verdict for Breach of Duty to Disclose—Residential); 416.43 (Model Form of Verdict for Piercing the Corporate Veil in Contract Claim); 416.44 (Model Form of Verdict for Legal Status of Entities in a Contract Claim); and 416.46 (Model Form of Verdict for Promissory Estoppel).

City of Miami v. Airbnb, Inc., Case No. 3D17-1213 (Fla. 3d DCA 2018).
Florida Statute section 509.032(7)(b) ("A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals.") invalidates zoning laws prohibiting transient rentals which were not in place as of June 1, 2001.

Sayles v. Nationstar Mortgage, LLC, Case No. 4D17-1324 (Fla. 4th DCA 2018).
The Fourth District adopts *In re Failla*, 838 F.3d 1170 (11th Cir. 2016), and distinguishes *Fischer v. HSBC Bank USA, N.A.*, 2018 WL 3320860 at *2 (Fla. 2d DCA July 6, 2018).

Seaspray Resort, Ltd, v. UCF I Trust 1, Case No. 4D18-991 (Fla. 4th DCA 2018).
Hotel revenue can be "rents" for the purposes of an Assignment of Rents under Florida Statute section 697.07 and thus may sequestered in the Court Registry; *Orlando Hyatt Associates, Ltd. v. FDIC*, 629 So. 2d 975 (Fla. 5th DCA 1993), is distinguished.

Florida Real Property and Business Litigation Report
Volume XI, Issue 50
December 15, 2018
Manuel Farach

City of Jacksonville Beach v. BCEL 4, LLC, Case No. 1D18-1280 (Fla. 1st DCA 2018). Mandamus relief cannot be granted to compel a local government to approve or deny a concept plan for plat application unless the applicant proves the local government's decision is purely ministerial.

Rosen v. Harborside Suites, LLC, Case No. 3D16-2678 (Fla. 3d DCA 2018).
The following language does not constitute an "automatic release" from a guarantee of a loan as additional acts, e.g., approval of the delivered contracts by the lender, are required before a subsequent written release is delivered:

> Notwithstanding anything to the contrary contained herein, upon Borrower's satisfaction of the Pre-Sales Requirement in accordance with the terms and conditions of the Agreement, Guarantor shall thereafter be released from his obligations under this Guaranty with respect to matters occurring from and after the date of such release . . .

Florida Real Property and Business Litigation Report
Volume XI, Issue 51
December 22, 2018
Manuel Farach

Rodriguez V. Wilmington Savings Fund Society, FSB, Case No. 4D18-310 (Fla. 4th DCA 2018).
A voluntary dismissal by a lender plaintiff renders the holding of *Nationstar Mortg. LLC v. Glass*, 219 So. 3d
896, 899 (Fla. 4th DCA 2017), review granted, *Glass v. Nationstar Mortg.,LLC*, 2018 WL 2069328 (Fla. Feb. 13, 2018), inapplicable and subjects the dismissing plaintiff to a claim for attorney's fees from the borrower.

CB Contractors, LLC v. Allens Steel Products, Inc., Case No. 5D17-1384, 5D17-1606, and 5D17-2129 (Fla. 5th DCA 2018).
The following indemnification provision is in violation of Florida Statute section 726.06 and accordingly the "self-indemnification" is void:

> 11. Indemnity as to Liabilities. [Appellant] and the Owner shall not be liable or responsible for, and shall be saved and held harmless by [Appellees] from and against any and all suits, actions, losses, damages, claims, or liability of any character, type or description, including all expenses of litigation, court costs, and attorney fees arising out of, related to, directly or indirectly, the performance of the Subcontractor. Subcontractor's indemnity obligations hereunder shall apply regardless of whether or not the claims, damages, losses, and expenses or causes of action are caused in part by a party indemnified hereunder and regardless of whether or not the claim relates to a claim under the worker's compensation policy of Subcontractor. Such obligations to indemnify shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnification which would otherwise exist as to any party or person in any other portion of this Subcontract under law.

Florida Real Property and Business Litigation Report
Volume XI, Issue 52
December 29, 2018
Manuel Farach

Trial Practices, Inc. v. Hahn Loeser & Parks, LLP, Case No. SC17-2058 (Fla. 2018).
The Florida Supreme Court rules that "Rule 4-3.4(b) of the Rules Regulating the Florida Bar permits a party to pay a fact witness for the witness's assistance with case and discovery preparation that is directly related to the witness preparing for, attending, or testifying at proceedings."

D.R. Horton, Inc. – Jacksonville v. Heron's Landing Condominium Association of Jacksonville, Inc., Case No. 1d17-1941 (Fla. 1st DCA 2018).
The violation of building codes is sufficient "damages" to sustain a verdict for violation of Florida Statutes section 553.84.

Bailey v. James S. St. Louis, D.O., Case No. 2D17-895 (Fla. 2d DCA 2018).
A claim of disgorgement of wrongful gains is a remedy intended to deter wrongdoers and is not based on lost profits and a successful clamant need not prove lost profits.

Harris v. The Bank of New York Mellon, Case No. 2D17-2555 (Fla. 2d DCA 2018).
The Second District adopts *Madl v. Wells Fargo Bank, N.A*., 244 So. 3d 1134 (Fla. 5th DCA 2017) and holds that attorney's fees may be awarded to a borrower even when a foreclosing lender fails to establish standing.

MetroPCS Communications, Inc. v. Porter, No. 3D17-375 (Fla. 3d DCA 2018).
A booklet when purchasing a cellular phone and monthly text messages are sufficient to place a cellular service customer of his agreement to an arbitration provision.

Bank of New York v. Obermeyer, Case No. 3D18-700 (Fla. 3d DCA 2018).
Travel costs are typically not awarded as part of an award of attorney's fees but may be awarded as a sanction.

Grant v. Citizens Bank, N.A., Case No. 5D17-726 (Fla. 5th DCA 2018) (en banc).
The Fifth District recedes from *Velden v. Nationstar Mortgage, LLC*, 234 So. 3d 850 (Fla. 5th DCA 2018), and holds that plaintiffs are not limited to recovering more than five years of damages from date of breach in installment obligation cases.