

**Real Property and Business Litigation Report**  
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**Manuel Farach**

**Carden & Associates, Inc. v. C.O.D. Trees Partnership**, --- So.3d ----, 2012 WL 28279 (Fla. 5<sup>th</sup> DCA 2012).

An appellate court may issue sanctions for a party's failure to attend appellate mediation under Florida Rule of Appellate Procedure 9.720 (b).

**Alorda' v. Sutton Place Homeowners Ass'n, Inc.**, --- So.3d ----, 2012 WL 28710 (Fla. 2d DCA 2012).

If the covenants of a community association provide a legal remedy for a violation, then the association may not seek injunctive relief for the violation. Accordingly, an association which prevails on equitable relief to correct a violation when a legal remedy exists is not a prevailing party, and is not entitled to prevailing party attorneys' fees and costs.

**Breazeale v. GDC View, LLC**, --- So.3d ----, 2012 WL 28801 (Fla. 1<sup>st</sup> DCA 2012).

A condominium unit may not be conveyed until it is "substantially completed," and a unit is not "substantially completed" under Fla. Stat. § 718.104 (4) (e) until all common elements serving the unit are completed, and a surveyor and mapper files an affidavit attesting to this fact.

**Cox Enterprises, Inc. v. Pension Ben. Guar. Corp.**, --- F.3d ----, 2012 WL 11015 (11<sup>th</sup> Cir. 2012).

A court directing distributions of corporate assets to shareholders must make a determination that the distribution will not make the corporation insolvent in violation of Fla. Stat. § 607.1436 (8). Determination of insolvency is made on date of distribution.

**PNC Bank, Nat. Ass'n v. Colonial Bank, N.A.**, Slip Copy, 2012 WL 10877 (11<sup>th</sup> Cir. 2012).

A party may recover attorneys' fees for "no damages," waiver, and Economic Loss Doctrine defenses. Additionally, a party may recover attorneys' fees for losing arguments, so long as it ultimately prevails.

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**Manuel Farach**

**Perdido Key Island Resort Development, L.L.P. v. Regions Bank**, --- So.3d ----, 2012 WL 104464 (Fla. 1<sup>st</sup> DCA 2012).

Arbitration of personal guarantees not required when arbitration provision of note is narrowly drawn and does not require arbitration of disputes beyond promissory note. However, a mortgage which incorporates note with an arbitration provision must be arbitrated. Arbitration is compelled of some, but not all, claims even though possibility exists of inconsistent awards between arbitration and litigation.

**Jones v. Portofino Tower One Homeowners Ass'n**, --- So.3d ----, 2012 WL 104466 (Fla. 1<sup>st</sup> DCA 2012).

Notwithstanding the issue whether owners of improvements on leased land are deemed to be owners of underlying fee under the doctrine of equitable ownership, property appraiser and tax collector may not seek to tax at trial that property they originally valued as exempt from taxation.

**O'Connor v. Zane**, --- So.3d ----, 2012 WL 104505 (Fla. 1<sup>st</sup> DCA 2012).

A judgment creditor has standing to assert a claim under Fla. Stat. §717.124 against unclaimed property in the possession of the Department of Financial Services.

**Krock v. Rozinsky**, --- So.3d ----, 2012 WL 75145 (Fla. 4<sup>th</sup> DCA 2012).

A court should consider several factors in determining whether a continuance is mandated (e.g., whether the denial of the continuance creates an injustice for the movant; whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance), but a court does not abuse its discretion in denying a continuance when there has been a history of last minute continuance requests.

**Rodgers v. After School Programs, Inc.**, --- So.3d ----, 2012 WL 75184 (Fla. 4<sup>th</sup> DCA 2012).

A motion for post-trial interview of jurors should be granted only if the motion is sworn and also makes allegations that would require a new trial if true. Nonetheless, interview of jurors is not required if the information not disclosed during *voir dire* was the result of lack of diligence of the trial attorney.

**Keybank Nat. Ass'n, Inc. v. Passport Marine, Inc.**, --- So.3d ----, 2012 WL 75248 (Fla. 4<sup>th</sup> DCA 2012).

A trial court is not permitted to enter a final judgment upon on a preliminary hearing in a replevin action; the preliminary hearing only establishes whether plaintiff has proven the "probably validity" of its claim.

**CompuCredit Corp. v. Greenwood**, --- S.Ct. ----, 2012 WL 43514 (2012).

A party seeking redress under the Credit Repair Organization Act, 9 U.S.C.A. § 2, is required to arbitrate disputes in accordance with the contract between the parties even though the Act gives a party the right to “sue.”

**Lawrence v. Bank of America, N.A.**, Slip Copy, 2012 WL 89904 (11<sup>th</sup> Cir. 2012).

Florida law does not require banking institutions to investigate transactions, and thus, there is no requirement on bank to investigate whether an account holder is perpetrating a Ponzi scheme.

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**Manuel Farach**

**Deutsche Bank Nat. Trust Co. v. Lippi**, --- So.3d ----, 2012 WL 162023 (Fla. 5<sup>th</sup> DCA 2012).

Dismissal of mortgage foreclosure complaint for lack of standing is too severe a sanction unless the *Kozel v. Ostendorf*, 629 So.2d 817 (Fla.1993), factors are met.

**Barreau v. Peachtree Cas. Ins. Co.**, --- So.3d ----, 2012 WL 162035 (Fla. 5<sup>th</sup> DCA 2012).

An insurance company's "intuition" that a claim is fraudulent is insufficient to delay or deny a claim, and failure to promptly pay claim solely on this basis will result in award of fees to insured.

**Carolina Consulting Corp. v. Ajax Paving Industries, Inc. of Florida**, --- So.3d ----, 2012 WL 163927 (Fla. 2d DCA 2012).

A contractor in a bonded construction project cannot refuse to perform based on failure to be given adequate assurance of payment.

**Block and Stephens, Trustees v. Tosun**, --- So.3d ----, 2012 WL 126656 (Fla. 4<sup>th</sup> DCA 2012).

Trial court may not vacate existing judgment for lack of service without an evidentiary hearing to determine whether there was good service. A return of service is not the only way to prove effective service.

**Kimmick v. U.S. Bank, N.A.**, --- So.3d ----, 2012 WL 126774 (Fla. 4<sup>th</sup> DCA 2012).

A party may raise waiver as an affirmative defense to a mortgage foreclosure notwithstanding the existence of a "no waiver" clause in the mortgage.

**Sunbeam Television Corporation v. Mitzel**, --- So.3d ----, 2012 WL 126784 (Fla. 3d DCA 2012).

A party may not proceed to trial on a claim not plead in her complaint when objection has been timely made to the new claim.

**City of Key West v. Florida Keys Community College**, --- So.3d ----, 2012 WL 126858 (Fla. 3d DCA 2012).

The State of Florida has not waived sovereign immunity with respect to stormwater utility fees imposed by municipalities, and the state may not be sued for same.

**DRD Marine Corporation v. Byrd Technologies, Inc.**, --- So.3d ----, 2012 WL 127085 (Fla. 4<sup>th</sup> DCA 2012).

A trial court may not dismiss for failure to prosecute under Florida Rule of Civil Procedure 1.420 (e) if the notice under the rule has not been served first. Likewise, a court cannot order that a file be "closed" without first complying with Rule 1.420 (e).

**LPI/Key West Associates, Ltd. v. Beachcomber Jewelers, Inc.**, --- So.3d ----, 2012 WL 127318 (Fla. 3d DCA 2012).

A party may withdraw a pretrial stipulation upon motion that demonstrates good cause (such as fraud, misrepresentation or mistake of fact) why the stipulation should be withdrawn.

**Mims v. Arrow Financial Services, LLC**, --- S.Ct. ----, 2012 WL 125429 (2012).

Federal and state courts have concurrent jurisdiction over alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227.

**Golan v. Holder**, --- S.Ct. ----, 2012 WL 125436 (2012).

So long as the works were protected in their country of origin, works previously in the copyright “public domain” may become protected works under United States law pursuant to the Uruguay Round Agreements Act.

**Feldkamp v. Long Bay Partners, LLC**, Slip Copy, 2012 WL 163875 (11<sup>th</sup> Cir. 2012).

The relationship between a private club and its members is governed by contract, and a member who meets the requirements is entitled to a full refund of their membership deposit notwithstanding some of the deposit was paid by a third party.

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**Manuel Farach**

**Feltus v. U.S. Bank Nat. Ass'n**, --- So.3d ----, 2012 WL 246464 (Fla. 2d DCA 2012).

Pleadings that are in conflict with a motion for summary judgment create an issue of material fact that defeats summary judgment.

**McDonald v. Johnson**, --- So.3d ----, 2012 WL 246468 (Fla. 2d DCA 2012).

The value of stock in a decedent's revocable trust is to be considered when determining a spouse's elective share. Accordingly, a surviving spouse is entitled to discovery to determine the value of the revocable trust.

**Lespisto v. Senior Lifestyle Newport Limited Partnership**, --- So.3d ----, 2012 WL 204264 (Fla. 4<sup>th</sup> DCA 2012).

A party signing a contract as a "financially responsible party" and not as a "resident's representative" is not bound to arbitrate if the contract only states party representatives are compelled to arbitrate disputes.

**Baleanu v. Sandelescu**, --- So.3d ----, 2012 WL 204287 (Fla. 4<sup>th</sup> DCA 2012).

A corporate party that appears for trial without counsel may not be defaulted unless prior notice is given that failure to obtain counsel will result in a default.

**Brander v. Stoddard**, --- So.3d ----, 2012 WL 204299 (Fla. 4<sup>th</sup> DCA 2012).

If service may be invalid, a court should suspend jurisdiction and grant leave to permit submission of evidence of jurisdiction.

**Lake Charleston Homeowners Association, Inc. v. Haswell**, --- So.3d ----, 2012 WL 204469 (Fla. 4<sup>th</sup> DCA 2012).

A misnomer in a case style or judgment, i.e., a clerical mistake, may be corrected under Florida Rule of Civil Procedure 1.540.

**Arsali v. Chase Home Finance, LLC**, --- So.3d ----, 2012 WL 204480 (Fla. 4<sup>th</sup> DCA 2012) (en banc).

The Fourth District recedes from its prior precedent and holds that inadequacy of sale price does not always need to be proven in order to vacate a foreclosure sale. The Fourth District further certified the question to the Florida Supreme Court for determination.

**Gemini Investors III, L.P. v Nunez**, --- So.3d ----, 2012 WL 204722 (Fla. 3d DCA 2012).

The court grants rehearing and issues a new opinion which states the general and not the specific factual misrepresentation. The court's prior holding that failing to inform a purchaser of shares in a company that the company is at risk of losing 50% of its revenues is both a fraudulent inducement into a contract and securities violation under Florida Statute § 517.301 (1) (a) remains unchanged.

**Blue v. Covington County Bank**, --- So.3d ----, 2012 WL 178377 (Fla. 1<sup>st</sup> DCA 2012).

Reservation of jurisdiction in a final judgment to determine a setoff on a foreclosure sale indicates that judicial labor is not at an end and appellate review is therefore premature. Additionally, a mortgagee should not be entitled to execute on a promissory note following foreclosure sale and before entry of a deficiency judgment.

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**Manuel Farach**

**Irizarry v. Moore**, --- So.3d ----, 2012 WL 315844 (Fla. 5<sup>th</sup> DCA 2012).

Repeated instances of improper conduct by counsel may deprive parties of a fair trial, even when each instance, standing by itself, would not result in reversal.

**Orange County v. Buchman**, --- So.3d ----, 2012 WL 315869 (Fla. 5<sup>th</sup> DCA 2012).

A trial judge stating to the jury that a party is bound by a particular piece of evidence constitutes an improper comment on the weight of evidence in violation of Fla. Stat. § 90.106.

**Palm Bay 17, LLC v. First Bank of Puerto Rico**, --- So.3d ----, 2012 WL 315872 (Fla. 5<sup>th</sup> DCA 2012).

A person may only be served by mailing to a private mailbox under Fla. Stat. § 48.031 (6) if the only address discoverable through search of private records is the private mailbox.

**North Port Road And Drainage District, v. West Villages Improvement District**, --- So.3d ----, 2012 WL 300879 (Fla. 2012).

A municipality, despite having home rule powers, may not tax county or state properties.

**Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.**, --- So.3d ----, 2012 WL 301029 (Fla. 2012).

Florida's offer of judgment statute, Fla. Stat. § 768.79, is primarily a substantive statute, and thus is not applicable in situations where parties have agreed the substantive law of another state applies.

**Suntrust Banks, Inc. v. Cauthon & McGuigan, PLC**, --- So.3d ----, 2012 WL 301054 (Fla. 1<sup>st</sup> DCA 2012).

An escrow/trust account holder is not entitled to injunction against bank charging back against the account, even if the money in the account belongs to third parties and not the account holder.

**Micjo, Inc. v. Department of Business and Professional Regulation**, --- So.3d ----, 2012 WL 279670 (Fla. 2d DCA 2012).

"Wholesale sales price" under Fla. Stat. § 210.25 (13) does not include shipping costs, federal excise taxes and other charges imposed by domestic distributors.

**Toler v. Bank of America**, --- So.3d ----, 2012 WL 280379 (Fla. 4<sup>th</sup> DCA 2012).

Fla. Stat. § 702.07 and Florida Rule of Civil Procedure 1.540 are not in conflict, and the rule provides the method by which to effectuate the statute, i.e., the requirements of the rule must be met in order to vacate a foreclosure judgment.



**Cukierman v. BankAtlantic**, --- So.3d ----, 2012 WL 280408 (Fla. 3d DCA 2012).

A guarantor of a mortgage with no interest in the real property is a proper, but not necessary party to a mortgage foreclosure. Accordingly, a guarantor with no interest in the real property has no standing to contest a foreclosure sale.

**Rocca v. Boyansky**, --- So.3d ----, 2012 WL 280752 (Fla. 3d DCA 2012).

It is error to admit a will to probate prior to a challenge to the will being resolved.

**Rainess v. Estate of Machida**, --- So.3d ----, 2012 WL 283089 (Fla. 3d DCA 2012).

Florida Rule of Civil Procedure 1.240 supersedes prior common law and establishes there is only one requirement for a party to be permitted interpleader, i.e., that the stakeholder is or may be exposed to double or multiple liability. However, a stakeholder must establish that it is disinterested and did not cause the dispute in order to be entitled to attorneys' fees for the interpleader action.

**Waddington v. Baptist Medical Center of Beaches, Inc.**, --- So.3d ----, 2012 WL 254965 (Fla. 1<sup>st</sup> DCA 2012).

An appellate court may award Fla. Stat. § 57.105 fees, but is prohibited from awarding against a represented party if the offending argument was not based on then-existing law.

**Harbor Landing Condominium Owners Ass'n, Inc. v. Harbor Landing, L .L.C.**, --- So.3d ----, 2012 WL 254971 (Fla. 1<sup>st</sup> DCA 2012).

Fla. Stat. § 718.203 (2) imposes an implied warranty against "suppliers," but not manufacturers, of items used in condominium construction.

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**Manuel Farach**

**Hopewell, LLC v. Alarion Bank**, --- So.3d ----, 2012 WL 400449 (Fla. 1<sup>st</sup> DCA 2012).

A trial court may deem a motion to dismiss that has arbitration defenses as a motion to compel arbitration as may rule on the motion to dismiss. A ruling on a motion to dismiss which contains claims of arbitration issues is not immediately appealable under Florida Rule of Civil Procedure 9.130 (a) (3) (C) (iv) unless an order denies a motion to compel arbitration.

**Chacha v. Transport USA, Inc.**, --- So.3d ----, 2012 WL 385490 (Fla. 4<sup>th</sup> DCA 2012).

A trial court finding of fraud on the court must be supported by written findings of fact which demonstrate that movant has proven, by clear and convincing evidence, a deliberate scheme to subvert the judicial process, and that after balancing the equities, dismissal is the proper remedy.

**Bank of New York v. Moorings At Edgewater Condominium Ass'n, Inc.**, --- So.3d -- --, 2012 WL 385491 (Fla. 2d DCA 2012).

Any flat, unconditional fine, not meant to compensate the injured party and imposed after a finding of contempt, is criminal contempt if contemnor has no opportunity to reduce or avoid the fine through compliance. Accordingly, a contempt fine against a lender and its counsel for failure to pay association dues during litigation is indirect criminal contempt which must contain a purge provision.

**Duke v. HSBC Mortg. Services, LLC**, --- So.3d ----, 2012 WL 385512 (Fla. 4<sup>th</sup> DCA 2012).

On rehearing, the court further clarified its earlier opinion reversing entry of summary judgment and stated that that it is plaintiff's burden to provide an original note to the court or otherwise re-establish the note, even if the court papers demonstrate the original note was lost by the court.

**Jervis v. Tucker**, --- So.3d ----, 2012 WL 385518 (Fla. 4<sup>th</sup> DCA 2012).

Testamentary capacity is measured at the same time for trusts and wills.

**McLean v. JP Morgan Chase Bank Nat. Ass'n**, --- So.3d ----, 2012 WL 385532 (Fla. 4<sup>th</sup> DCA 2012).

The previous opinion at --- So.3d ----, 2011 WL 6183587, is withdrawn and superseded by this opinion. A party may show that it is the holder of the note and mortgage at the time of filing suit through various methods, but an evidentiary hearing must be held if the evidence is disputed on this point.

**Kalb v. Nack Holding, LLC**, --- So.3d ----, 2012 WL 385536 (Fla. 3d DCA 2012).

Failure to file a motion for attorneys' fees within thirty days of judgment is a bright line rule removing a party's right to attorneys' fees, notwithstanding that the party has filed a demand for attorneys' fees in its pleadings.

**Rosenkrantz v. Feit**, --- So.3d ----, 2012 WL 385599 (Fla. 3d DCA 2012).

A co-attorney under a power of attorney is permitted to file suit for declaratory relief to determine whether she is permitted to act without the concurrence of the co-trustee and to determine whether the co-trustee has defalcated with funds.

**Bellamy v. Langfitt**, --- So.3d ----, 2012 WL 385606 (Fla. 3d DCA 2012).

A court may not modify a trust to remove a corporate trustee when the trust contains a "no modification by court" provision.

**Phadael v. Deutsche Bank Trust Co. Americas**, --- So.3d ----, 2012 WL 385608 (Fla. 4<sup>th</sup> DCA 2012).

The defense of lack of standing at time of institution of foreclosure suit is waived if not raised in an answer, and may not be resuscitated through a motion under Florida Rule of Civil Procedure 1.540.

**Eldon v. Perrin**, --- So.3d ----, 2012 WL 385611 (Fla. 4<sup>th</sup> DCA 2012).

An order entering a temporary injunction which makes no factual findings but merely "parrots back" the elements of a temporary injunction is insufficient.

**Portfolio Investments Corp. v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 385616 (Fla. 3d DCA 2012).

Under the "unique circumstances of this case," a successor party may participate in a foreclosure action without a motion and order to intervene or be substituted.

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**Beaumont v. Bank of New York Mellon**, --- So.3d ----, 2012 WL 511288 (Fla. 5<sup>th</sup> DCA 2012).

Party seeking to re-establish a lost promissory note under Fla. Stat. § 673.3091 must prove who lost the note, when it was lost, who had right to enforce the note when lost, who owned the note, and provide adequate protection to the obligor on the note. Additionally, judgment cannot be entered on behalf a party who has been dropped from the litigation.

**Fernandez-Fox v. Reyes**, --- So.3d ----, 2012 WL 511326 (Fla. 5<sup>th</sup> DCA 2012).

Fla. Stat. § 64.081 requires each party to a partition action to pay a share of plaintiff's attorneys' fees, defendant's attorneys' fees or both. Applying equitable principles, fees should be normally paid in proportion to a party's interest.

**Bendross v. Readon**, --- So.3d ----, 2012 WL 469832 (Fla. 3d DCA 2012).

Religious organizations, like other non-profit organizations, are controlled by Florida Statutes Chapter 617, and the Ecclesiastical Abstention Doctrine is not violated when litigation involves applying neutral principles of law without inquiry into religious doctrine.

**In re Bullock**, --- F.3d ----, 2012 WL 446279 (11<sup>th</sup> Cir. 2012).

"Defalcation" under 11 U.S.C. § 523 (a) (4) refers to the failure of a fiduciary to produce entrusted funds. "Defalcation" need not rise to the level of fraud, embezzlement or misappropriation, but does require more than mere negligence and can be characterized as being objectively reckless.

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**Kiln PLC v. Advantage General Ins. Co., Ltd.**, --- So.3d ----, 2012 WL 555393 (Fla. 4<sup>th</sup> DCA 2012).

An insurance contract is ambiguous and subject to parol evidence when the policy offers no explanation for the disputed language.

**Zarate v. Deutsche Bank Nat. Trust Co. as Trustee**, --- So.3d ----, 2012 WL 555401 (Fla. 3d DCA 2012).

Appellant mortgagee has the burden on appeal to demonstrate error in the trial court, and failure to deliver record which demonstrates error results in affirmance of the trial court.

**Ernesto Fong v. Courvoisier Courts Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 555403 (Fla. 3d DCA 2012).

A party may not use an appeal from a motion to dismiss an injunction as a substitute for failing to appeal the order that granted an injunction after notice.

**Regions Bank v. Capital Square, Inc.**, --- So.3d ----, 2012 WL 555420 (Fla. 3d DCA 2012).

A bank sued for improperly depositing checks may claim third parties are at fault under *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), but such defense only affects apportionment of damages.

**Wexler v. Rich**, --- So.3d ----, 2012 WL 555482 (Fla. 4th DCA 2012).

A bank has no duty to explain to customers the legal ramifications of a bank account titled as joint tenants with rights of survivorship (JTROS) as opposed to a tenancy by the entireties. A bank account titled as JTROS will pass accordingly despite any adverse intentions of the parties.

**Haber v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 555484 (Fla. 4th DCA 2012).

Foreclosing lender must refute affirmative defense of failure of notice and opportunity to cure under loan instrument in order to be entitled to foreclosure.

**Best v. Education Affiliates, Inc.**, --- So.3d ----, 2012 WL 555490 (Fla. 4th DCA 2012).

Arbitrators are to determine whether an agreement violates public policy when the arbitration agreement delegates authority to the arbitrator to determine the enforceability of the arbitration agreement.

**Marmet Health Care Center, Inc. v. Brown**, --- S.Ct. ----, 2012 WL 538286 (2012).

A categorical prohibition against arbitration of certain types of claims (e.g., nursing home claims) violates the Federal Arbitration Act.

**In re Jennings**, --- F.3d ----, 2012 WL 555875 (11<sup>th</sup> Cir. 2012).

Transfer of property in order to avoid execution by perfected creditors constitutes willful and malicious “injury to property” under bankruptcy code section 11 U.S.C. § 523 (a) (6).

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**Harbor Communities, LLC v. Jerue**, --- So.3d ----, 2012 WL 634924 (Fla. 4th DCA 2012).

A final judgment that implicitly resolves issues raised by a counterclaim is a final judgment even though it does not explicitly reference treatment of the counterclaim.

**Siewert v. Casey**, --- So.3d ----, 2012 WL 635426 (Fla. 4th DCA 2012).

A lease that requires landlord consent for subleasing, without specific standards, is subject to a duty of good faith so that the landlord may not arbitrarily withhold approval of the sublease.

**Higgins v. Ryan**, --- So.3d ----, 2012 WL 637646 (Fla. 3d DCA 2012).

A final order determining the percentages of ownership of a business is not a final order determining immediate possession of property that is appealable under Florida Rule of Appellate Procedure 9.130 (a)(3)(C)(ii).

**Tafel v. Lion Antique Investments & Consulting Services**, Slip Copy, 2012 WL 653866 (11<sup>th</sup> Cir. 2012).

Past consideration will not support a promissory note.

**In re Checking Account Overdraft Litigation**, Slip Copy, 2012 WL 660974 (11<sup>th</sup> Cir. 2012).

An arbitration agreement is not unconscionable because it provides one party (a bank) attorneys' fees if it is the prevailing party, and further allows the bank to offset such fees against deposits the other party maintains at the bank.

**Solymar Investments, Ltd. v. Banco Santander S.A.**, --- F.3d ----, 2012 WL 612302 (11<sup>th</sup> Cir. 2012).

Questions relating to fraud in the inducement (fraudulently inducing a party to enter into a contract) are reserved for the arbitrator while questions relating to fraud in the factum (procuring a party's signature or agreement to a contract without knowledge of its true contents) are reserved for a court. A successful fraud in the inducement claim makes a contract voidable while a successful fraud in the factum claim makes the contract void.

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**Manuel Farach**

**Godshalk v. Countrywide Home Loans Servicing, L.P.**, --- So.3d ----, 2012 WL 751549 (Fla. 5th DCA 2012).

An overbroad affirmative defense of failure to meet conditions precedent (e.g., a general denial of transmission of “any notices” required under the mortgage without specifying which of the ten types of notices was not sent) will not defeat summary judgment.

**Springhill Health Care Associates, LLC v. Benlein**, --- So.3d ----, 2012 WL 751681 (Fla. 5th DCA 2012).

It is error for a trial court to compel production of documents over a privilege objection without first conducting an *in camera* review in order to determine whether a privilege applies.

**McDonald's Restaurants of Florida, Inc. v. Doe**, --- So.3d ----, 2012 WL 751965 (Fla. 2d DCA 2012).

It is error for a trial court to compel production of documents over a trade secrets objection without first conducting an *in camera* review in order to determine whether any requested items are, in fact, trade secrets. If the trade secrets are to be produced over objection, a detailed factual order must be produced explaining why it is necessary to produce the items.

**Nucci v. Storm Football Partners**, --- So.3d ----, 2012 WL 751966 (Fla. 2d DCA 2012).

A party that participates in an arbitration proceeding without asking a trial court to stop the arbitration proceedings cannot later argue that the arbitrator exceeded his authority under Fla. Stat. § 682.13 (1)(c) by conducting the arbitration proceedings. The fact that the prevailing party in the arbitration proceedings first instituted a suit for injunctive relief prior to commencing arbitration does not change the outcome.

**Delta Property Management v. Profile Investments, Inc.**, --- So.3d ----, 2012 WL 739193 (Fla. 2012).

If a certified notice of a tax deed sale is returned undeliverable, the notice of tax deed sale pursuant to Fla. Stat. § 197.522 is ineffective and the clerk must take additional steps to provide “notice reasonably calculated to apprise landowners of the pending deprivation of their property.” Additionally, an issue must be actually argued and decided on a prior appeal in order to constitute “law of the case.”



**Reiterer v. Monteil**, --- So.3d ----, 2012 WL 716048 (Fla. 2d DCA 2012).

Under the American Rule regarding awards of attorneys' fees, a purchaser of real property is not entitled to an award of fees against the seller for breach of the covenant against encumbrances. The narrow exception to the American Rule that provides purchasers/covenantees may recover fees against third parties that claim an interest in their real property does not apply in a direct action by purchaser against the convenator/seller. A defending title company is not considered a "third party" under this exception.

**Martinec v. Early Bird Intern., Inc.**, --- So.3d ----, 2012 WL 716073 (Fla. 4th DCA 2012).

Origination of one or more mortgages within a twelve-month period subjects the originator to the Truth In Lending Act (T.I.L.A.), notwithstanding that the originator is not a traditional lender.

**Crestview II, Ltd. v. TotalBank**, --- So.3d ----, 2012 WL 716081 (Fla. 3d DCA 2012).

It is not error for a trial court to grant a receiver the right to control the borrower's books and records (including electronic data), repair and maintain property, decline to enter into service contracts, seek and enter into governmental permits and entitlements and deal with the borrower's Community Development District rights when all these powers are granted to lender under the loan documents.

**Cool Guys, LLC v. Jomar Properties, LLC**, --- So.3d ----, 2012 WL 716084 (Fla. 4th DCA 2012).

Under Fla. Stat. § 712.24, a claim on security to which a construction lien was transferred (whether cash bond or surety bond) must be brought within one year after the transfer, whether the transfer of the lien to security occurred before or during the litigation.

**International Yacht Group, LLC v. Miami Yacht & Engine Works, LLC**, --- So.3d ----, 2012 WL 738570 (3d DCA 2012).

If membership in an LLC is in dispute, a defendant who claims plaintiff is not a member of a LLC and is therefore not entitled to obtain LLC records under Fla. Stat. § 608.4101 (members may view LLC records) may not withhold the disputed records until trial.

**Ward v. Ward**, --- So.3d ----, 2012 WL 695644 (Fla. 1st DCA 2012).

The fact that a party has been properly ejected from property is not a complete defense to a claim there was an earlier wrongful eviction.

**Rumbough v. Equifax Information Services, LLC**, Slip Copy, 2012 WL 752468 (11<sup>th</sup> Cir. 2012).

A trial court has inherent authority to require a *pro se* litigant to post a costs bond as a condition precedent to filing an amended complaint.

**Infante v. Bank of America Corp.**, Slip Copy, 2012 WL 744678 (11<sup>th</sup> Cir. 2012).

Citing Florida Supreme Court law on the subject, the Eleventh Circuit rules that a corporation that purchases the assets of another corporation does not automatically assume the liabilities of the selling corporation unless “(1) the successor expressly or impliedly assumes obligations of the predecessor; (2) the transaction is a de facto merger; (3) the successor is a mere continuation of the predecessor; or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor.”

**126th Ave. Landfill, Inc. v. Pinellas County, Fla.**, Slip Copy, 2012 WL 739387 (11<sup>th</sup> Cir. 2012).

Under Eleventh Circuit precedent, a Florida plaintiff must first exhaust administrative remedies and then must seek inverse condemnation in state court before bringing suit in federal court under the Takings Clause of the Fifth Amendment. However, doing so puts the plaintiff at risk that certain issues in the state court litigation will become *res judicata* in the federal action.

**Solutia Inc. v. McWane, Inc.**, --- F.3d ----, 2012 WL 695007 (11<sup>th</sup> Cir. 2012).

Parties subject to a consent decree with the United States or state government may not file cost recovery claims under C.E.R.C.L.A.

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**Washington County v. Northwest Florida Water Management Dist.**, --- So.3d ----, 2012 WL 879284 (Fla. 1st DCA 2012).

Fla. Stat. § 373.709 (5) permits an administrative challenge under Chapter 120 of the Florida Statutes to a regional water management plan if the proposed plan affects a party's substantial interests.

**Airan2 v. Cadence Bank, N.A.**, --- So.3d ----, 2012 WL 880651 (Fla. 2d DCA 2012).

Fla. Stat. § 57.105 fees not proper against co-counsel who filed a pleading that was superseded by a subsequent pleading upon which the case was tried.

**Bennett v. Berges**, --- So.3d ----, 2012 WL 832730 (Fla. 4th DCA 2012).

A petition for writ of certiorari arising from an order requiring *in camera* review of purportedly privileged materials is premature if the materials have not yet been reviewed by the trial court.

**Byers v. FIA Card Services, N.A.**, --- So.3d ----, 2012 WL 832758 (Fla. 4th DCA 2012).

Filing a motion for enlargement of time does amount to participating in litigation, and therefore, does not waive the defense of lack of jurisdiction.

**Parris v. Silveira**, --- So.3d ----, 2012 WL 832760 (Fla. 4th DCA 2012).

Party is not subject to civil contempt of court for filing false documents in a case unless the party is under order of court to file the documents.

**Trucap Grantor Trust 2010-1 v. Pelt**, --- So.3d ----, 2012 WL 832784 (Fla. 2d DCA 2012).

Florida Rule of Civil Procedure 1.110 (b) providing that foreclosure complaints may be "verified" by a party swearing to their "best knowledge and belief" does not require a party to swear that allegations are "true" without qualification under Fla. Stat. § 95.525 (4) (b).

**DiGiovanni v. BAC Home Loans Servicing, L.P.**, --- So.3d ----, 2012 WL 832790 (Fla. 2d DCA 2012).

Titling a pleading a "general appearance" does not create a general appearance unless the pleading seeks affirmative relief.

**Beach Community Bank v. First Brownsville Co.**, --- So.3d ----, 2012 WL 832794 (Fla. 1st DCA 2012).

In deficiency judgment proceedings, a trial court may not reject uncontroverted expert witness testimony concerning technical evidence unless it is palpably unreasonable or so illogical that it is unworthy of belief. On the other hand, non-expert testimony may be refuted by lay testimony.

**Lance Block, P.A. v. Searcy, Denney, et al.**, --- So.3d ----, 2012 WL 832795 (Fla. 1st DCA 2012).

Orders entered simultaneously with or subsequent with a trial judge's recusal are void.

**Drury v. National Auto Lenders, Inc.**, --- So.3d ----, 2012 WL 832813 (Fla. 3d DCA 2012).

Constructive service of process under Fla. Stat. § 49.011 may only be used for *in rem* or *quasi in rem* proceedings, and therefore, cannot be used to "serve" a party in a guaranty or other contract action.

**Apartment Inv. and Mgmt. Co. v. Flamingo/South Beach 1 Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 832828 (Fla. 3d DCA 2012).

Arbitration is not required when the agreement to arbitrate between parties contains an exception to arbitration for equitable relief, and a complaint seeks only equitable relief.

**Federal Home Loan Mortg. Corp. v. De Souza**, --- So.3d ----, 2012 WL 832838 (Fla. 3d DCA 2012).

A foreclosure judgment may be vacated under Florida Rule of Civil Procedure 1.540 (b) only upon specific allegations of fraud.

**Smith v. Sylvester**, --- So.3d ----, 2012 WL 762035 (Fla. 1st DCA 2012).

The five day "mailbox" rule applies under the Administrative Procedures Act when an administrative agency sets a discretionary deadline by U.S. Mail and the deadline is computed by reference to a period of time.

**Bourff v. Rubin Lublin, LLC**, Slip Copy, 2012 WL 851626 (11<sup>th</sup> Cir. 2012).

An assignee of a debt is not a "creditor" under the Fair Debt Collection Practices Act, and an assignee claiming to be a "creditor" is a violation of the Act.

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**State Farm Florida Ins. Co. v. Unlimited Restoration Specialists, Inc.**, --- So.3d ----, 2012 WL 966642 (Fla. 5th DCA 2012).

The insurance appraisal statute, Fla. Stat. §627.7017, does not require mediation prior to exercise of rights by the insured.

**Baker v. Stearns Bank, N.A.**, --- So.3d ----, 2012 WL 967786 (Fla. 2d DCA 2012).

Substituted service under Fla. Stat. § 48.031 may be made on any person “residing” at the defendant’s residence, including a houseguest. However, a short-term (e.g., one week) houseguest does not “reside” so as to effect service upon the defendant.

**Kaltenbacher v. Morgan Keegan & Co., Inc.**, --- So.3d ----, 2012 WL 967838 (Fla. 2d DCA 2012).

Arbitration proceedings are concluded if a non-prevailing party pays the arbitration award prior to confirmation, even if the trial court has yet to award attorneys’ fees. Any proceedings to seek attorneys’ fees after payment of the award are new proceedings.

**Kitroser v. Hurt**, --- So.3d ----, 2012 WL 952349 (Fla. 2012).

The Corporate Shield Doctrine does not prevent a defendant from being haled into Florida through long-arm jurisdiction when the defendant is in Florida or committed a tortious act in Florida. However, a corporate employee who commits no torts in Florida cannot be haled into the jurisdiction based solely on her status as a corporate employee.

**Srygley v. Capital Plaza, Inc.**, --- So.3d ----, 2012 WL 955506 (Fla. 1st DCA 2012).

An individualized notice (i.e., certified return receipt sent to landowner) is not statutorily required for re-notice of a tax deed sale; general notice by publication in a newspaper of general circulation is sufficient.

**Command Sec. Corp. v. Moffa**, --- So.3d ----, 2012 WL 932501 (Fla. 4th DCA 2012).

A party is not bound by a contractually set date to seek post-closing adjustment of a purchase price when the contract does not contain a “time of the essence” clause, the parties do not provide a penalty for failure to seek adjustment within the time frame, and the circumstances of the contract do not demonstrate that time is of the essence, i.e., the deadline is not material to the contract.

**Guerrero v. Chase Home Finance, LLC**, --- So.3d ----, 2012 WL 932991 (Fla. 3d DCA 2012).

A party seeking to re-establish a lost note must provide sufficient evidence under Fla. Stat. § 673.3091 that the obligor will be protected against loss under the re-established note.

**Zulon v. Peckins**, --- So.3d ----, 2012 WL 933013 (Fla. 3d DCA 2012).

Personal representative cannot be removed without evidentiary hearing and due process.

**Harris v. Bristol Lakes Homeowners Ass'n, Inc.**, --- So.3d ----, 2012 WL 933022 (Fla. 4th DCA 2012).

Upon rehearing, the Fourth District re-affirms that intervention is generally not allowed after final judgment even if a motion to intervene was pending when the case was resolved.

**Harambam Congregation, Inc. v. Simcha Connection, Inc.**, --- So.3d ----, 2012 WL 933026 (Fla. 3d DCA 2012).

After a temporary injunction is entered, a defendant has the choice of contesting notice by appealing under Florida Rule of Civil Procedure 9.130 (a)(3)(B) or seeking to dissolve the injunction in the trial court. If a motion to dissolve is filed, any possible lack of notice becomes irrelevant.

**Pasquale v. Loving**, --- So.3d ----, 2012 WL 933030 (Fla. 4th DCA 2012).

The validity of a trust that is incorporated into a will cannot be determined without the will being contested.

**Royal Palm Corporate Center Ass'n, Ltd. v. PNC Bank, NA**, --- So.3d ----, 2012 WL 933060 (Fla. 4th DCA 2012).

A plaintiff may sue for both foreclosure and a money judgment in the same action, and a trial court may permit a money judgment and not set the foreclosure sale until plaintiff certifies it has not been able to collect on the money judgment.

**Cox v. Great American Ins. Co.**, --- So.3d ----, 2012 WL 933073 (Fla. 4th DCA 2012).

A judgment awarding attorney's fees for violation of Florida Rule of Civil Procedure 1.730 regarding mediation requires specific factual findings. Such a judgment is a sanction and not fee shifting, and therefore, an award of fees for seeking fees is proper.

**Alsina v. Gonzalez**, --- So.3d ----, 2012 WL 933081 (Fla. 4th DCA 2012).

Striking of pleadings for failure to appear at calendar call and without a finding as to all of the *Kozel v. Ostendorf*, 629 So. 3d 817 (Fla. 1993), factors is improper.

**MB Financial Bank, N.A. v. Paragon Mortg. Holdings, LLC**, --- So.3d ----, 2012 WL 933598 (Fla. 2d DCA 2012).

The transfer of senior indebtedness from one party to another entity controlled by some guarantors of the senior indebtedness, even when the transfer may affect the collectability of the junior indebtedness, does not result in the satisfaction of the senior indebtedness.

**Gollobith v. Ferrell**, --- So.3d ----, 2012 WL 933599 (Fla. 2d DCA 2012).

Past consideration will not support a contract, including a settlement agreement.

**Broin v. Phillip Morris Companies, Inc.**, --- So.3d ----, 2012 WL 934034 (Fla. 3d DCA 2012).

The federal method of determining whether counsel has a conflict in class action cases, i.e., that counsel may continue to represent the class as a whole even if some members of the class object to a settlement and thus are at conflict with their attorney, is adopted for class action cases.

**Sackett v. E.P.A.**, --- S.Ct. ----, 2012 WL 932018 (2012).

A “compliance order” issued by the Environmental Protection Agency regarding alleged wetlands is “final agency action” for purposes of possible remedies enjoyed by landowners.

**Mayo Collaborative Services v. Prometheus Laboratories, Inc.**, --- S.Ct. ----, 2012 WL 912952 (2012).

Human genes and the laws of nature cannot be patented, therefore, tests which are too closely patterned after the laws of nature cannot be patented despite the fact they pass the “machine or transformation” test.

**Weiss v. City of Gainesville, Fla.**, Slip Copy, 2012 WL 933592 (11<sup>th</sup> Cir. 2012).

Conditional land use plans are not “self amending comprehensive plans,” and are therefore permissible.

**In re Checking Account Overdraft Litigation MDL No. 2036**, --- F.3d ----, 2012 WL 934054 (11<sup>th</sup> Cir. 2012).

“Delegation provisions” in arbitration agreements that permit arbitrators to determine whether claims are arbitrable or to be litigated are permissible.

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**Clevens v. Omni Healthcare, Inc.**, --- So.3d ----, 2012 WL 1057602 (Fla. 5th DCA 2012).

A trial court order directing the parties to continuing negotiating an issue is a case management order, not a mandatory injunction, and is therefore not immediately appealable under Florida Rule of Appellate Procedure 9.130 (a)(3)(B).

**Orlando/Orange County Expressway Authority v. Tuscan Ridge, LLC**, --- So.3d ----, 2012 WL 1057622 (Fla. 5th DCA 2012).

Florida follows the “unity rule” with regard to condemnation proceedings, so a condemning authority can make a pre-suit offer to the fee simple owner “subject to apportionment” of the claims of all others in the real property.

**Heiderich v. Florida Equine Veterinary Services, Inc.**, --- So.3d ----, 2012 WL 1057631 (Fla. 5th DCA 2012).

An unambiguous restrictive covenant in an employment agreement that prohibits establishing an office within a certain radius is not violated by establishing an office outside the radius but serving clients located within the radius.

**Read v. MFP, Inc.**, --- So.3d ----, 2012 WL 1058876 (Fla. 2d DCA 2012).

The federal Fair Debt Collection Practices Act requires a debt collector to identify themselves, but the Florida Consumer Collection Practices Act does not. Accordingly, a debt collector that leaves messages without indentifying itself does not violate the Florida Consumer Collection Practices Act.

**Florida House of Representatives v. Expedia, Inc.**, --- So.3d ----, 2012 WL 1033662 (Fla. 1st DCA 2012).

Members of the Florida House of Representatives (and their legislative aides) are entitled to invoke the “legislative privilege” under common law and refuse to testify or have confidential legislative documents admitted into evidence.

**Osorto v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 1020022 (Fla. 4th DCA 2012).

Summary judgment on a foreclosure is not proper if discovery remains outstanding.

**Bridgeview Bank Group v. Callaghan**, --- So.3d ----, 2012 WL 1020044 (Fla. 4th DCA 2012).

Conveyance of real property to a husband and wife conclusively creates a tenancy by the entireties; the rebuttable presumption of *Beal Bank, SSB, v. Almand and Assocs.*, 780 So. 2d 45 (Fla. 2001), applies to personal property but not real property.



**Castelo Development, LLC v. Aurora Loan Services LLC**, --- So.3d ----, 2012 WL 1020171 (Fla. 4th DCA 2012).

A foreclosure sale conducted without a Notice of Sale being published in advance of the sale is not valid.

**Carone v. Millennium Settlements, Inc.**, --- So.3d ----, 2012 WL 1020173 (Fla. 4th DCA 2012).

A return of service proper on its face requires the defendant to come forward with clear and convincing evidence that the return is not proper. If the defendant does so, the burden then shifts back to the plaintiff to rebut the defendant's evidence.

**Swope Rodante, P.A. v. Harmon**, --- So.3d ----, 2012 WL 1020184 (Fla. 2d DCA 2012).

An attorney may sue another attorney for tortiously interfering with the first attorney's contract and relationship with his client.

**Credit Suisse Securities (USA) LLC v. Simmonds**, --- S.Ct. ----, 2012 WL 986812 (2012).

The two year statute of limitation to recover short-term profits under Section 16 (a) of the Securities and Exchange Act is tolled until the plaintiff did or should have discovered the fraud; the Court remains divided whether a statute of repose applies.

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**Centerstate Bank Cent. Florida, N.A. v. Krause**, --- So.3d ----, 2012 WL 1121380 (Fla. 5th DCA 2012).

A recorded *lis pendens* grants no rights in the property upon which it is recorded; a *lis pendens* merely gives constructive notice to third parties of pending claims. Accordingly, parties listed as mortgage foreclosure defendants due to filing a *lis pendens* have no standing to challenge the underlying borrowing of money and executing the mortgage.

**Schwartz v. Bloch**, --- So.3d ----, 2012 WL 1108408 (Fla. 4th DCA 2012).

A party seeking to recover attorneys' fees from a defendant under the Wrongful Act Doctrine does need not present independent, corroborating evidence from an expert regarding attorneys' fees.

**Ziadie v. Feldbaum**, --- So.3d ----, 2012 WL 1108419 (Fla. 4th DCA 2012).

A proposal for settlement which conditions the proposal upon releases, indemnity and confidentiality agreements, but fails to attach the proposed agreements, is ineffective.

**Rigby v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2012 WL 1108428 (Fla. 4th DCA 2012).

To establish standing, a foreclosure plaintiff must submit the note bearing a special indorsement in favor of the plaintiff, an assignment from payee to the plaintiff or an affidavit of ownership proving its status as holder of the note. Accordingly, an undated special indorsement does not, without more, establish plaintiff had standing when it filed foreclosure.

**Talel Corp. v. Shimonovitch**, --- So.3d ----, 2012 WL 1108437 (Fla. 4th DCA 2012).

An arbitrator may, after adopting the rules of civil procedure, default a party for continued failure to follow arbitration orders. Moreover, a party in arbitration is not entitled to all the "niceties" that a party is entitled to in court proceedings. However, parties in arbitration are still entitled to a fundamentally fair process, and accordingly, are entitled to a hearing on unliquidated damages.

**Kahn v. American Heritage Life Ins. Co.**, --- So.3d ----, 2012 WL 1110117 (Fla. 1st DCA 2012).

No material fact exists for a breach of contract claim for procuring insurance policies when a party procures accounts but not insurance policies.

**Dianne v. Wingate**, --- So.3d ----, 2012 WL 1071548 (Fla. 1st DCA 2012).

Whether installing speed bumps interferes with an easement depends on specific factual determinations, and cannot be determined on summary judgment.

**In re Phillips**, Slip Copy, 2012 WL 1071270 (11<sup>th</sup> Cir. 2012).

The standard for violating the bankruptcy code by failing to disclose all assets on the Statement of Financial Affairs is “knowingly and fraudulently,” but conduct that is intentionally reckless may be sufficient to meet this test.

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**Ducharme v. Tissuenet Distribution Services, LLC**, --- So.3d ----, 2012 WL 1231049 (Fla. 5th DCA 2012).

Plaintiff failed to prove theft of a trade secret, i.e., a chemical cleansing procedure, when the chemicals and the procedure used are well known in the industry. Confidentiality and employment agreements cannot be used to prohibit a former employee working for a competitor; a non-competition agreement is needed.

**Fort Plantation Investments, LLC v. Ironstone Bank**, --- So.3d ----, 2012 WL 1231072 (Fla. 5th DCA 2012).

A lender may pursue guarantee and foreclosure remedies at the same time, but a judgment must be reduced by the amount received at foreclosure sale by lender.

**Soares Da Costa Const. Services, LLC v. Altamar Development, LLC**, --- So.3d ----, 2012 WL 1232609 (Fla. 2d DCA 2012).

A party cannot divest a trial court of jurisdiction to enter judgment confirming an arbitration award (and award prevailing party attorneys' fees) by voluntarily dismissing the action prior to the trial court entering judgment.

**Empire Developers Group, LLC v. Liberty Bank**, --- So.3d ----, 2012 WL 1232618 (Fla. 2d DCA 2012).

The correct formula for determining a deficiency judgment is the total debt (as set forth in the final judgment of foreclosure) minus the fair market value of the property (as determined by the court) on foreclosure sale date. The party seeking a deficiency has the burden of proving the fair market value of the foreclosed property was less than the judgment amount.

**Griswold Ready Mix Concrete, Inc. v. Reddick**, --- So.3d ----, 2012 WL 1216268 (Fla. 1<sup>st</sup> DCA 2012).

A construction contract indemnification provision under Fla. Stat. § 725.06 must contain a monetary limitation as set forth in the statute otherwise it is void.

**Clark v. Bluewater Key RV Ownership Park**, --- So.3d ----, 2012 WL 1192089 (Fla. 3d DCA 2012).

An association may not impose fees on lot owners' rights to lease to third parties if the Declaration of Restrictive Covenants permits on "reasonable regulations" on leasing.

**AJH Property Investments Ltd. v. Suntrust Bank**, --- So.3d ----, 2012 WL 1192097 (Fla. 3d DCA 2012).

Summary judgment for escrow holder reversed since escrow holder did not prove it met the requirements for release of second ten percent (10%) of funds under agreement.

**U.S. Bank Nat. Ass'n v. Knight**, --- So.3d ----, 2012 WL 1192143 (Fla. 4th DCA 2012).  
An owner or holder of a promissory note at the time of filing a foreclosure suit need not have an assignment at the time of suit.

**Baptist Hosp., Inc. v. Baker**, --- So.3d ----, 2012 WL 1150211 (Fla. 1st DCA 2012).  
In order to certify a class, the class representative has to establish she will have an actual case or controversy that will last the entire term of the litigation and that she has been damaged.

**Burger King Corp. v. Broad Street Licensing Group, LLC**, Slip Copy, 2012 WL 1193501 (11<sup>th</sup> Cir. 2012).  
An implied duty of good faith and fair dealing exists with regard to a discretionary clause that is silent with regard to the methodology or standards used in exercising the discretion.

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**Orange County Property Appraiser v. Sommers**, --- So.3d ----, 2012 WL 1365061 (Fla. 5th DCA 2012).

A landowner is not entitled to a simultaneous homestead exemption/tax cap and non-homestead tax cap for the same piece of real property.

**Gonzalez v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 1366727 (Fla. 2d DCA 2012).

Whether plaintiff owns and holds the note on suite date, not the date of an assignment of mortgage, is the relevant inquiry for determining standing for foreclosure suit. If, however, the issue of standing has been placed at issue, the lender must establish through evidence it had standing on suit date.

**Pena v. Citizens Property Ins. Co.**, --- So.3d ----, 2012 WL 1366730 (Fla. 2d DCA 2012).

Even though fraud on the court is proven, dismissal with prejudice is too severe a sanction when the fraud relates to a procedural issue.

**Deutsche Bank Nat. Trust Co. v. Clarke**, --- So.3d ----, 2012 WL 1314190 (Fla. 4th DCA 2012).

It is sufficient to introduce a copy of a promissory note if the original note has already been surrendered to the court and placed in the court file. It is not necessary to introduce the original mortgage into evidence as it is not a document contemplated by the Best Evidence Rule, Fla. Stat. § 90.953.

**Flagstar Bank, F.S.B. v. Cleveland**, --- So.3d ----, 2012 WL 1314237 (Fla. 4th DCA 2012).

A party may not obtain relief from judgment by re-filing with a successor judge a previously denied motion for relief from judgment.

**Khodam v. Escondido Homeowner's Ass'n, Inc.**, --- So.3d ----, 2012 WL 1315327 (Fla. 4th DCA 2012).

Even though a jury awards no damages for the breach, a party that proves the other party breached a contract is the "prevailing party" for purposes of attorneys' fee awards.

**Mullne v. Sea-Tech Const. Inc.**, --- So.3d ----, 2012 WL 1315864 (Fla. 4th DCA 2012). Fla. Stat. § 713.12 (joint interests of spouses in property can be liened and foreclosed as long as one spouse signs contract) does not permit an *in personam* judgment against the non-signing spouse. Moreover, a trial court is without jurisdiction to award unpled damages notwithstanding a default has been entered.

**Burtoff v. Tauber**, --- So.3d ----, 2012 WL 1316848 (Fla. 4th DCA 2012).

Not being given the opportunity to contest the allegations contained in a motion for injunction, either at the issuance or the motion to dissolve stage, requires reversal.

**Pruitt v. Sands**, --- So.3d ----, 2012 WL 1317228 (Fla. 4th DCA 2012).

Local government's interpretation of its own ordinances and rules is entitled to great weight in administrative proceedings.

**SEIU Florida Public Services Union, CTW, CLC v. City of Boynton Beach**, --- So.3d ----, 2012 WL 1317617 (Fla. 4th DCA 2012).

A party objecting to an arbitration award must, pursuant to Fla. Stat. § 682.09, file a motion to vacate or modify the award within 90 days of award issuance otherwise the award will stand.

**William G. Graney, P.E. v. Caduceus Properties, LLC**, --- So.3d ----, 2012 WL 1290841 (Fla. 1st DCA 2012).

The Relation Back Doctrine under Florida Rule of Civil Procedure 1.190 (c) applies when there is a mistake or misnomer in identifying a party; not when adding a new party. Accordingly, a first party plaintiff may not rely on the Relation Back Doctrine to add a new party to the first party complaint, even if the new first party defendant has already been sued as a third party defendant.

**Harvey Covington & Thomas, LLC v. WMC Mortg. Corp.**, --- So.3d ----, 2012 WL 1292421 (Fla. 1st DCA 2012).

Improper to deny additional time to conduct discovery when motion for summary judgment is pending and discovery has not been responded to.

**Thomas v. Ocwen Loan Servicing, LLC**, --- So.3d ----, 2012 WL 1292423 (Fla. 1st DCA 2012).

A movant for summary judgment must show absence of material fact issues and factually refute the non-movant's affirmative defenses or show their legal insufficiency.

**Filarsky v. Delia**, --- S.Ct. ----, 2012 WL 1288731 (2012).

A person temporarily hired by a governmental unit to carry out a governmental function is entitled to the qualified immunity of 42 U.S.C. § 1983. Accordingly, attorney hired by city to assist municipality in investigating wrongdoing in municipality is entitled to qualified immunity.

**Miller v. Chase Home Finance, LLC**, --- F.3d ----, 2012 WL 1345834 (11<sup>th</sup> Cir. 2012).

The federal Home Affordable Modification Program (HAMP) does not create an implied private cause of action on behalf of homeowners against their lenders.

**Crystal Dunes Owners Ass'n Inc. v. City of Destin, Fla.**, Slip Copy, 2012 WL 1293117 (11<sup>th</sup> Cir. 2012).

Landowners may not sue local Sheriff for failure to enforce trespass laws as there is no substantive due process right to governmental aid or protection.

**Holston Investments, Inc. B.V.I. v. LanLogistics Corp.**, --- F.3d ----, 2012 WL 1293469 (11<sup>th</sup> Cir. 2012).

In a case of first impression in the Eleventh Circuit, the court holds that a dissolved corporation has no principal place of business for diversity purposes.

**Dream Custom Homes, Inc. v. Modern Day Const., Inc.**, Slip Copy, 2012 WL 1320122 (11<sup>th</sup> Cir. 2012).

Architectural work is protected by copyright so long as claimant has a valid copyright and demonstrates original elements of the protected work have been copied. To determine whether copying occurred, a plaintiff must prove defendant copied portions of the protected work and that the copied elements are not protected expression. Only the arrangement of common elements, not the common elements themselves, are protected by architectural copyright law.



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**Duplantis v. Brock Specialty Services, Ltd.**, --- So.3d ----, 2012 WL 1440438 (Fla. 5th DCA 2012).

An undifferentiated offer of judgment based upon disputed vicarious liability is not enforceable.

**Perrine v. Henderson**, --- So.3d ----, 2012 WL 1440455 (Fla. 5th DCA 2012).

Fraud on the court requires a clear evidence of plan to evade or stymie the court; a party's misconduct consisting of inconsistency, nondisclosure, poor recollection, dissemblance, and even lying is insufficient to support a dismissal for fraud.

**Weston Orlando Park, Inc. v. Fairwinds Credit Union**, --- So.3d ----, 2012 WL 1440592 (Fla. 5<sup>th</sup> DCA 2012).

Court cannot reserve on a claim for breach of promissory note when it has granted foreclosure as the debt, i.e., the promissory note, merges into the foreclosure judgment.

**Grapski v. City of Alachua**, --- So.3d ----, 2012 WL 1448503 (Fla. 1st DCA 2012).

The appellate standard of review for attorney fee awards is abuse of discretion.

**JP Morgan Chase Bank v. Journey**, --- So.3d ----, 2012 WL 1448655 (Fla. 2d DCA 2012).

An appellate opinion which "is effective upon release" but permits rehearing is effective upon release, and remains in effect while rehearing motions are disposed by court.

**Roach v. Totalbank**, --- So.3d ----, 2012 WL 1414275 (Fla. 4th DCA 2012).

The defense of Statute of Frauds to a purported oral agreement to extend a loan may be barred by acts of estoppel occurring after written contracts are executed.

**Continental Florida Materials v. Kusherman**, --- So.3d ----, 2012 WL 1414280 (Fla. 4th DCA 2012).

While clauses indemnifying parties for their own negligence are disfavored, a subcontractor may indemnify a general contractor for the subcontractor's negligence.

**West Const., Inc. v. Florida Blacktop, Inc.**, --- So.3d ----, 2012 WL 1414304 (Fla. 4th DCA 2012).

Unless an offeree agrees in advance, an offer cannot define the manner of acceptance of the offer. Accordingly, a contractor's use of subcontractor's estimate in formulating its bid to the owner does not accept the subcontractor's estimate either by contract language to that effect or by action.

**Daniels v. JP Morgan Chase Bank**, --- So.3d ----, 2012 WL 1414305 (Fla. 3d DCA 2012).

A party cannot seek to avoid a trial court contempt order by bad faith appeal; an appellate court may dismiss the appeal under this circumstance.

**Dougherty v. City of Miami**, --- So.3d ----, 2012 WL 1414322 (Fla. 3d DCA 2012).

Upon remand from second-tier certiorari review and based on the Law of the Case Doctrine, a tribunal may conduct only limited review to fulfill appellate mandate.

**Dickson v. Heaton**, --- So.3d ----, 2012 WL 1414326 (Fla. 4th DCA 2012).

The contractual basis for attorneys' fees does not need to be specifically pled. Furthermore, a party may waive the *Stockman v. Downs* requirement to plead a claim for fees if all parties are aware of the existence of an attorneys' fees provision.

**Solis v. Lacayo**, --- So.3d ----, 2012 WL 1414368 (Fla. 3d DCA 2012).

Under Fla. Stat. § 201.08 (1) (a), a trial court may not enter judgment on promissory notes secured by real estate while documentary stamps on notes remain unpaid.

**South Florida Coastal Elec. v. Treasures on Bay II Condo Ass'n**, --- So.3d ----, 2012 WL 1414576 (Fla. 3d DCA 2012).

Whether an agency relationship exists is an issue of fact that cannot be determined on summary judgment if there are conflicting factual positions. Judicial estoppel applies only when a party successfully takes inherently conflicting positions in separate lawsuits.

**MV Insurance Consultants v. NAFH Nat. Bank**, --- So.3d ----, 2012 WL 1414838 (Fla. 3d DCA 2012).

Arbitration may be compelled on obligations contained in one instrument but not all if the instruments are executed contemporaneously and intended as part of same transaction.

**Dish Network Service L.L.C. v. Myers**,--- So.3d ----, 2012 WL 1414936 (Fla. 2d DCA 2012).

An attorneys' fees multiplier is not available under the Fair Debt Collection Practices Act.

**U.S. v. Home Concrete & Supply, LLC**, --- S.Ct. ----, 2012 WL 1413964 (2012).

A taxpayer's overstating basis in real property it sold by over twenty-five percent (25%) is not an "omission" permitting the Internal Revenue Service to extend to six years the time within which it can assess the taxpayer.

**Akanthos Capital Management, LLC v. CompuCredit Holdings Corp.**, --- F.3d ----, 2012 WL 1414247 (11<sup>th</sup> Cir. 2012).

Certain persons who are not parties to "no action clauses" in indenture agreements may still enforce the clauses and receive its protection.

**F.T.C. v. Watson Pharmaceuticals, Inc.**, --- F.3d ----, 2012 WL 1427789 (11<sup>th</sup> Cir. 2012).

Absent sham litigation or fraud, reverse payment settlement is not violate of antitrust laws so long as anticompetitive effects fall within exclusionary potential of patent.

**Anago Franchising, Inc. v. Shaz, LLC**, --- F.3d ----, 2012 WL 1380417 (11<sup>th</sup> Cir. 2012).

A stipulation for dismissal is self-executing and dismisses case upon filing despite trial court post-dismissal order seeking to retain jurisdiction.

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**Manuel Farach**

**Rhodes v. Newport Building and Const., Inc.**, --- So.3d ----, 2012 WL 1557323 (Fla. 2d DCA 2012).

There are no further litigation proceedings once an arbitration award is paid in full. Accordingly, foreclosure of construction lien not permitted once arbitration award paid.

**Feldman v. Villa Regina Ass'n, Inc.**, --- So.3d ----, 2012 WL 1520852 (Fla. 3d DCA 2012).

Damages for temporary injury to real property consists of cost of restoring the property to its original condition. When cost of repair exceeds the value of the property in its original condition or when the injury is permanent, the measure of damages is the diminution in value of the real property. Moreover, a party cannot claim permanent damages throughout trial and then seek temporary damages when only temporary damages are awarded on the verdict form.

**KPMG LLP v. Cocchi**, --- So.3d ----, 2012 WL 1520853 (Fla. 4th DCA 2012).

Under Delaware law, derivative claims against auditors are subject to arbitration.

**Kondler v. Bottner**, --- So.3d ----, 2012 WL 1520857 (Fla. 4th DCA 2012).

An order directing a trustee to pay attorneys' fees out of a specific trust is a non-final, non-appealable order.

**U.S. Bank Nat. Ass'n v. Cowell**, --- So.3d ----, 2012 WL 1520858 (Fla. 3d DCA 2012).

Dismissal without leave to amend for failure to follow administrative procedures regarding packaging of motions for summary judgment is too severe a sanction, especially since the running of the statute of limitations converts the dismissal into a dismissal with prejudice.

**Philips Lake Worth, L.P. v. BankAtlantic**, --- So.3d ----, 2012 WL 1520877 (Fla. 4th DCA 2012).

When the reading of two contractual provisions creates an ambiguity, parol evidence is permitted to explain the inconsistency. Accordingly, parol evidence is proper when a lease termination provision and new lease are in conflict with regard to right of new tenant to terminate a lease.

**CitiMortgage, Inc. v. Synuria**, --- So.3d ----, 2012 WL 1520883 (Fla. 4th DCA 2012).

Gross inadequacy of foreclosure sale price, even if lender caused the foreclosure sale problem, constitutes basis for vacating foreclosure sale.

**S.E.C. v. Morgan Keegan & Co., Inc.**, --- F.3d ----, 2012 WL 1520895 (11<sup>th</sup> Cir. 2012).

The “hypothetical reasonable investor” analysis conducted for purposes of S.E.C. Rule 10(b) – 5 includes statements made by an individual broker to an individual investor, not just statements made to the public as a whole.

**Reese v. Ellis, Painter, Ratterree & Adams, LLP**, --- F.3d ----, 2012 WL 1500108 (11<sup>th</sup> Cir. 2012).

Dunning letter and other documents sent to consumers relate to the enforcement of a security interest may have a dual purpose and also relate to collection of a debt and thus subject to the Fair Debt Collection Practices Act.

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**Manuel Farach**

**Give Kids the World, Inc. v. Sanislo**, --- So.3d ----, 2012 WL 1645607 (Fla. 5th DCA 2012).

Exculpatory clauses are disfavored under the law, but unambiguous exculpatory contracts are enforceable unless they contravene public policy. The wording of the exculpatory clause must be clear and understandable so that an ordinary and knowledgeable person will know what he or she is contracting away. In examining exculpatory clauses, courts will review the unequal bargaining power of the parties only in the public utility or public function context.

**Heck v. Bank Liberty**, --- So.3d ----, 2012 WL 1623518 (Fla. 1st DCA 2012).

A party's "usual place of abode" for purposes of valid service under section 48.031(1)(a) is the place where the defendant is actually living at the time of service. The word "abode" means one's fixed place of residence for the time being when service is made. If a person has more than one residence, he must be served at the residence in which he is actually living at the time of service.

**Velasquez v. Ettenheim**, --- So.3d ----, 2012 WL 1605239 (Fla. 3d DCA 2012).

The statutory process for distribution of surplus funds after a foreclosure sale, Fla. Stat. § 197.582 (2), does not permit a third party creditor of the foreclosed property owner to receive the surplus funds even if the foreclosed property owner does not object. Per the statute, unclaimed funds go first to governmental units holding lien claims against the property, then non-governmental lienholders in order of priority, and then to the foreclosed property owners.

**Bank of Montreal, Harris, N.A. v. Estate of Antoine**, --- So.3d ----, 2012 WL 1605248 (Fla. 4th DCA 2012).

A deposition may be used in court even though the deposition was not complete as the witness died before cross-examination.

**Taplin v. Taplin**, --- So.3d ----, 2012 WL 1605253 (Fla. 3d DCA 2012).

The statute of limitations is inapplicable to shield trustees from claims of breach of duty by the beneficiaries of the trust.

**Suarez v. Benihana Nat. of Florida Corp.**, --- So.3d ----, 2012 WL 1605268 (Fla. 3d DCA 2012).

Contradictions and discrepancies in depositions typically do not rise to the high level needed to dismiss a suit on the basis of fraud on the court.

**Becker v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 1605432 (Fla. 4th DCA 2012).

Mortgagee did not violate Florida Rule of Civil Procedure 1.110 (b) (foreclosure complaints must be verified) by attaching the verification as a separate sheet to the foreclosure complaint rather than incorporating it into the foreclosure complaint.

**Younessi v. Recovery Racing, LLC**, --- So.3d ----, 2012 WL 1605483 (Fla. 4th DCA 2012).

If the agreement of the parties indicates that American Arbitration Association rules apply, it is error for a trial court to direct the parties to select an arbitrator in a fashion inconsistent with AAA rules.

**Figueroa v. MERSCORP, Inc.**, Slip Copy, 2012 WL 1648879 (11<sup>th</sup> Cir. 2012).

The Rooker-Feldman Doctrine applies to foreclosure actions that were conclusively litigated in state court.

**In re McNeal**, Slip Copy, 2012 WL 1649853 (11<sup>th</sup> Cir. 2012).

A debtor may “strip down” a wholly unsecured lien on their home under 11 U.S.C. § 502; *Dewsnup v. Timm*, 502 U.S. 410, (1992) applies only to partially unsecured liens.

**Insurance Co. of the West v. Island Dream Homes, Inc.**, --- F.3d ----, 2012 WL 1588799 (11<sup>th</sup> Cir. 2012).

Regardless of whether defendants are considered “professionals” under *Moransais v. Heathman*, 744 So.2d 973 (Fla.1999), a plaintiff must demonstrate a defendant’s actions fell below the standard of care required for that particular trade or industry.

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**Wells v. Circle Redmont, Inc.**, --- So.3d ----, 2012 WL 1753639 (Fla. 5th DCA 2012).

Posting cash supersedeas bond in judgment amount plus statutory interest and an amount sufficient to cover additional storage fees for a skylight entitled owner to release of the skylight and relief from the continued accumulation of storage fees.

**Acosta v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 1698004 (Fla. 4th DCA 2012).

Florida Rule of Civil Procedure 1.540 (b) requires a party seeking relief from judgment demonstrate a meritorious defense, and affidavits reflecting attorney missed hearing due to calendaring mistake constitutes excusable neglect.

**Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC**, --- So.3d - ---, 2012 WL 1698165 (Fla. 4th DCA 2012).

A contractual attorneys' fees provision that provides for an award of attorneys' fees for "any litigation between the parties under this Agreement" permits an award of attorneys' fees for litigating the amount of, and not just entitlement to, attorneys' fees.

**Lopez v. United Capital Fund, LLC**, --- So.3d ----, 2012 WL 1698311 (Fla. 4th DCA 2012).

A "floating forum selection clause" (locale determined by reference to mutable facts) is enforceable while the following non-specific forum selection clause is not enforceable:

EACH OF THE PARTIES HERETO WAIVES ITS RESPECTIVE RIGHTS TO A TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTION CONTEMPLATED HEREBY OR THEREBY IN ANY ACTION, PROCEEDING OR OTHER LITIGATION OF ANY TYPE BROUGHT BY ANY PARTY AGAINST THE OTHER PARTY, WHETHER WITH RESPECT TO CONTRACT CLAIMS, TORT CLAIMS, OR OTHERWISE. EACH OF THE PARTIES HERETO AGREES THAT ANY SUCH CLAIM OR CAUSE OF ACTION SHALL BE TRIED BY A COURT TRIAL WITHOUT A JURY IN SELLER'S COUNTY AND STATE OF CHOICE. WITHOUT LIMITING THE FOREGOING, THE PARTIES FURTHER AGREE THAT THEIR RESPECTIVE RIGHT TO A TRIAL BY JURY IS WAIVED BY OPERATION OF THIS PARAGRAPH AS TO ANY ACTION, COUNTERCLAIM OR OTHER PROCEEDING WHICH SEEKS, IN WHOLE OR IN PART, TO CHALLENGE THE VALIDITY OR ENFORCEABILITY OF THIS AGREEMENT OR ANY PROVISION HEREOF OR THEREOF. BUYER AGREES THAT A LEGAL MEDIATION SHALL TAKE PLACE IN COUNTY AND STATE OF SELLER'S CHOICE BEFORE ANY COURT TRIAL. . .



**Lash & Goldberg LLP v. Clarke**, --- So.3d ----, 2012 WL 1698335 (Fla. 4th DCA 2012). Concerted conduct or conspiracy between a signatory and a non-signatory to an arbitration agreement will allow the non-signatory to enforce arbitration.

**Nastasi v. Thomas**, --- So.3d ----, 2012 WL 1698486 (Fla. 4th DCA 2012). An order on a Motion to Enforce Settlement Agreement, which order reflects that further trial court judicial labor is anticipated, is not a final, appealable order.

**In re TOUSA, Inc.**, --- F.3d ----, 2012 WL 1673910 (11<sup>th</sup> Cir. 2012). Theory under which a transfer has been avoided is irrelevant to the liability of the transferee against whom the trustee seeks to recover transferred property or its value.

**Virgilio v. Ryland Group, Inc.**, --- F.3d ----, 2012 WL 1758086 (11<sup>th</sup> Cir. 2012). A 1.5% commission, without ability to control the purported agent's actions, does not create an agency relationship that requires *Johnson v. Davis* disclosures. The failure of a sales agent to disclose subdivision being marketed is next to a former bombing range does not rise to the level of unjust enrichment, FDUTPA or negligence.

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**Crawford Residences, LLC v. Banco Popular North America**, --- So.3d ----, 2012 WL 1889269 (Fla. 2d DCA 2012).

A borrower is not judicially estopped from raising affirmative defenses and counterclaims against a lender for matters occurring after borrower signed a release.

**Tempel v. Southern Homes of Palm Beach, L.L.C.**, --- So.3d ----, 2012 WL 1867586 (Fla. 3d DCA 2012).

A Fla. Stat. § 720.401 (1) (a) disclosure that does not state the current assessment and time period covered by the assessment violates the statute, and cannot be cured by reference to materials or information outside the disclosure.

**Calarese v. Weissfisch**, --- So.3d ----, 2012 WL 1859417 (Fla. 3d DCA 2012).

A party moving for summary judgment in a fraudulent conveyance action must refute the affirmative defenses of the implied party.

**Gonzalez v. NAFH Nat. Bank**, --- So.3d ----, 2012 WL 1859437 (Fla. 3d DCA 2012).

A motion to strike an affirmative defense only tests the legal sufficiency of the defense and does not weigh the evidence in support of or opposed to the affirmative defense. Even if loan is given to only one spouse, bank's requirement that both spouses sign mortgage in order to obtain loan does not violate the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d) (a) if the real property is owned by both spouses.

**US Acquisition, LLC v. Tabas, Freedman, Soloff, Miller & Brown, P.A.**, --- So.3d ----, 2012 WL 1859514 (Fla. 4th DCA 2012).

As an attorney charging lien against an aircraft applies to the aircraft and its parts (and not just the award of judgment or proceeds from aircraft), the attorney charging lien must be perfected with the Federal Aviation Administration.

**Bayview Const. Corp. v. Jomar Properties, LLC**, --- So.3d ----, 2012 WL 1859871 (Fla. 4th DCA 2012).

Trial court cannot reduce amount of transfer bond that replaced contractor's construction lien, based on arbitration award that was less than the amount of the bond, without considering evidence as to the amount of contractor's damages on the date the bond was reduced since the contractor's claims for interest and attorney fees continued to accrue.

**Boye v. CitiMortgage, Inc.**, --- So.3d ----, 2012 WL 1869921 (Fla. 2d DCA 2012).

Lender cannot foreclose if it cannot prove it delivered default notice as required by mortgage.

**Thomas J. Duggan, LLC v. Peacock Point, LLC**, --- So.3d ----, 2012 WL 2087907 (1st DCA 2012).

As-is provision in contract governing auction sale of six-lot waterfront subdivision placed on purchaser the risk of mistake and claims for misrepresentation or mutual mistake regarding whether subdivision was immediately ready for residential construction was unwarranted.

**Freeman v. Quicken Loans, Inc.**, --- U.S. ---, 132 S.Ct. 2034 (2012).

A plaintiff seeking to establish a RESPA “fee splitting” violation under 12 U.S.C. § 2607 (b) must demonstrate a charge for settlement services was divided between two or more people; RESPA does not prohibit a single provider’s retention of an unearned fee.

**Rissman, Barrett, Hurt, Donahue & McClain, P.A. v. Westport Ins. Corp.**, Slip Copy, 2012 WL 1889410 (11<sup>th</sup> Cir. 2012).

An attorney acting as an unlicensed broker in a real estate transaction is not covered by his law firm’s malpractice policy if he is sued by a participant in the transaction.

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**France v. France**, --- So.3d ----, 2012 WL 1956352 (Fla. 5th DCA 2012).

The unauthorized taping of a Florida resident by a non-Florida resident is a violation of the Florida Security of Communications Act, Fla. Stat. § 934.03, and constitutes sufficient minimum contacts for the non-resident to be haled into Florida under the long-arm statute, Fla. Stat. § 48.193 (1) (b).

**Rogers v. Vulcan Mfg. Co., Inc.**, --- So.3d ----, 2012 WL 1959375 (Fla. 1st DCA 2012).

A prevailing former employee in a lawsuit by the former employer alleging violation of employment agreements is entitled to an award of prevailing party attorneys' fees, irrespective of whether the former employee or the new employer paid the fees.

**QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.**, --- So.3d ----, 2012 WL 1947863 (Fla. 2012).

"Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract. This covenant is intended to protect 'the reasonable expectations of the contracting parties in light of their express agreement.' However, there are two limitations on such claims: (1) where application of the covenant would contravene the express terms of the agreement; and (2) where there is no accompanying action for breach of an express term of the agreement. Ins. A duty of good faith must "relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements." There is no common law duty of good faith for insurers to inspect hurricane damage within a certain period of time; only a statutory action bad faith action.

**Cox v. Great American Ins. Co.**, --- So.3d ----, 2012 WL 1934409 (Fla. 4th DCA 2012).

Upon rehearing, the March 21, 2012 opinion at 2012 WL 933073 is withdrawn and the following is substituted in its place:

A judgment awarding attorney's fees for violation of Florida Rule of Civil Procedure 1.730 regarding mediation requires specific factual findings. Notwithstanding that such a judgment is a sanction and not fee shifting, an award of fees for seeking fees is not proper.

**RadLAX Gateway Hotel, LLC v. Amalgamated Bank**, --- U.S. ---, 132 S.Ct. 2065 (2012).

Chapter 11 cramdown "sales" plan under 11 U.S.C. § 1129 (b) (2) (A) (i) has to satisfy statutory requirements of a "sales" plan, and cannot be confirmed on the basis of "indubitable equivalence." Judgment creditor in such a plan may "credit bid."

**Alderwoods Group, Inc. v. Garcia**, --- F.3d ----, 2012 WL 1940336 (11<sup>th</sup> Cir. 2012).

Only the bankruptcy court that entered the discharge order can enter sanctions for violation of the order.

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**Bill Kasper Const. Co., Inc. v. Morrison**, --- So.3d ----, 2012 WL 2051149 (Fla. 5th DCA 2012).

Disagreeing with its own prior precedent, the Fifth District denies certiorari and holds that late added expert witnesses may be stricken because error, if any, can be remedied on plenary appeal.

**Shands Teaching Hosp, and Clinics, Inc. v. Mercury Ins. Co. of Florida**, --- So.3d --- -, 2012 WL 2035832 (Fla. 2012).

Special Law of Florida which permits hospital to create a recordable lien for debts is unconstitutional as violative of Fla. Const. Art. III, Sec. 11 (a) (9) ("There shall be no special law or general law of local application pertaining to: . . . creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts.")

**Royal Caribbean Cruises, Ltd. v. Pavone**, --- So.3d ----, 2012 WL 2012069 (Fla. 3d DCA 2012).

Juror failing to disclose involvement in his own personal injury case on juror questionnaire and during *voir dire* invalidates jury award.

**Schwartz v. Bloch**, --- So.3d ----, 2012 WL 2012321 (Fla. 4th DCA 2012).

Independent expert witness testimony is not necessary to corroborate a claim for attorneys' fees under the Wrongful Act Doctrine (attorneys' fees may be recovered as an element of damages where "the wrongful act of the defendant has involved the claimant in litigation with others, and has placed the claimant in such relation with others as makes it necessary to incur expenses to protect its interests").

**Martinec v. Early Bird Intern., Inc.**, --- So.3d ----, 2012 WL 2012558 (Fla. 4th DCA 2012).

The Fourth District grants rehearing of its earlier opinion found at 2012 WL 716073 (Fla. 4th DCA 2012) and re-affirms that origination of one or more mortgages within a twelve-month period subjects the originator to the Truth In Lending Act (T.I.L.A.), notwithstanding that the originator is not a traditional lender.

**Kaner v. Robert R. Schiffman, D.C., P.C.**, --- So.3d ----, 2012 WL 2013453 (Fla. 4th DCA 2012).

Trial court must rule on pending motions for treble damages and class certification under the Telephone Consumer Protection Act, 47 U.S.C. § 227, before granting defendant's Motion to Enter Consent Judgment under the Act.

**Jaffer v. Chase Home Finance LLC**, --- So.3d ----, 2012 WL 2013725 (Fla. 4th DCA 2012).

Foreclosure sale properly cancelled and summary judgment properly vacated on plaintiff supplied information that affidavits in support thereof may have been improper.

**State, Dept. of Transp. v. Florida Gas Transmission Co.**, --- So.3d ----, 2012 WL 2014755 (Fla. 4th DCA 2012).

An easement is a real property right that is compensable in condemnation proceedings. An easement's characteristics (width, boundaries, etc.) are determined by the intent of the parties at the time of granting the easement, not by present day standards and procedures.

**Armour v. City of Indianapolis, Ind.**, --- S.Ct. ----, 2012 WL 1969350 (2012).

City had rational basis for distinction between resident who had already paid for project costs and those who had not, thus there was no Equal Protection Clause violation by City forgiving the obligation of some residents to pay for costs.

**Acosta v. James A. Gustino, P.A.**, Slip Copy, 2012 WL 2017337 (11<sup>th</sup> Cir. 2012).

State foreclosure action against defendant and defendant's federal lawsuit against the attorney's prosecuting the state foreclosure action are not so substantially similar as to invoke the Colorado River Abstention Doctrine pending the outcome of the state proceedings.

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**Him v. Firstbank Florida**, --- So.3d ----, 2012 WL 2158731 (Fla. 5th DCA 2012).

A power of attorney for the specific purpose of purchasing a condominium does not confer on the grantee of the power the ability to accept service of process.

**Sun Harbor Homeowners' Ass'n, Inc. v. Bonura**, --- So.3d ----, 2012 WL 2120923 (Fla. 4th DCA 2012).

In order for landlord to be held responsible for discrimination for failure to make reasonable accommodation, the landlord must be notified of the disability and requested accommodation, and have an opportunity to conduct a meaningful review to determine whether the requested accommodation is required by law.

**Weisenberg v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 2121196 (Fla. 4th DCA 2012).

An affidavit which demonstrates the affiant knows how the data underlying the affidavit was collected and summarized meets the requirement for the business records exception to the Hearsay Rule.

**CFC of Delaware LLC v. Santalucia**, --- So.3d ----, 2012 WL 2122179 (Fla. 4th DCA 2012).

A claim of fraud as to a contract that contains an arbitration provision is determined by the arbitrator; a claim of fraud as to the arbitration provision alone is determined by the trial court.

**Wells Fargo Bank, N.A. v. Reeves**, --- So.3d ----, 2012 WL 2122307 (Fla. 1st DCA 2012).

Fraud on the court is an evidentiary determination, and accordingly, cannot be made at the motion to dismiss stage. Likewise, it is error to dismiss a mortgage foreclosure complaint with prejudice for failure to comply with the court's administrative procedures.

**Good To Go Food Store, Inc. v. LRM Realty, LLP**, --- So.3d ----, 2012 WL 2125943 (Fla. 2d DCA 2012).

A landlord does not have to strictly follow Florida Rule of Civil Procedure Form 1.947 (Tenant Eviction) in order to state a cause of action for eviction.

**Beggi v. Ocean Bank**, --- So.3d ----, 2012 WL 2150338 (Fla. 3d DCA 2012).

A foreclosed borrower loses standing to appeal a foreclosure judgment once he transfers the real property to a third party after judgment.

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**Baptista v. PNC Bank Nat. Ass'n**, --- So.3d ----, 2012 WL 2359652 (Fla. 5th DCA 2012).

Fla. Stat. § 655.85 (checks may only be settled at par value) applies to any bank transaction involving a state chartered bank (whether Florida or out of state).

**Richards v. HSBC Bank USA**, --- So.3d ----, 2012 WL 2359656 (Fla. 5th DCA 2012).

Summary judgment of foreclosure may not be granted when an allonge is inconsistent with the assignment of mortgage and in contradiction of the complaint.

**RSC Corp. v. Hertz Vehicles, LLC**, --- So.3d ----, 2012 WL 2359660 (Fla. 5th DCA 2012).

Towing company seeking to impose towing charges and sell a vehicle for same must make a good faith effort to locate and notify the vehicle's owner of the charges and intention to sell the vehicle for towing charges. Fla. Stat. § 713.78 (6) (damages for improperly selling stored vehicles) permits awards of damages and attorneys' fees, but does not permit a trial court to return the sold vehicle to the original owner.

**Wells Fargo Bank, N.A. v. Taboada**, --- So.3d ----, 2012 WL 2361501 (Fla. 2d DCA 2012).

Verification of mortgage foreclosure complaints under Florida Rule of Civil Procedure 1.110 (b) need only be based on information and belief, i.e., the verification does not need to state the statements are true and correct.

**Schwartzberg v. Brown**, --- So.3d ----, 2012 WL 2361510 (Fla. 2d DCA 2012).

Unless later controverted by evidence, a complaint sufficiently alleges long-arm jurisdiction if it tracks the language of the long-arm statute.

**Deutsche Bank National Trust Co. v. Waldorf**, --- So.3d ----, 2012 WL 2361517 (Fla. 2d DCA 2012).

A trial court must consider the *Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla.1993), factors before dismissing a foreclosure complaint with prejudice for failure to follow the court's administrative procedures for foreclosure complaints.

**BAC Home Loan Servicing, L.P. v. Stentz**, --- So.3d ----, 2012 WL 2362389 (Fla. 2d DCA 2012).

Verification of mortgage foreclosure complaints under Florida Rule of Civil Procedure 1.110 (b) need only be based on information and belief, i.e., the verification does not need to state the statements are true and correct. Additionally, the verification need not be contained in the complaint and may start on a separate page.



**Karl v. Carefree Lifestyles, Inc.**, --- So.3d ----, 2012 WL 2327721 (Fla. 3rd DCA 2012). Award of damages to employer for employee breach of non-compete agreement requires calculation of net lost profits award by deducting the expenses of salaries paid to employer's officers.

**Crastvell Trading Ltd. v. Marengere**, --- So.3d ----, 2012 WL 2327749 (Fla. 4th DCA 2012).

A non-party to an agreement may not enforce the forum selection clause in loan agreements, even if the non-party is the principal of the lender under the loan agreements.

**PGA North II of Florida, LLC v. Division of Admin., State of Florida Dept. of Transp.**, --- So.3d ----, 2012 WL 2327758 (Fla. 4th DCA 2012).

A special warranty differs from a general warranty deed only in that a general warranty deed warrants against claims of all persons, whereas a special warranty is limited to claims involving the grantor. A "real covenant" concerns property conveyed and occupation and enjoyment thereof; a "personal covenant" is collateral or is not immediately concerned with property granted. In order to establish a covenant that runs with the land, one must show that the covenant touches and concerns the land; intent; and notice.

**Hanrahan v. Hometown America, LLC**, --- So.3d ----, 2012 WL 2327814 (4th DCA 2012).

Florida law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals *ferae naturae* unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality. Accordingly, a landlord is not responsible for the death of a tenant from fire ant bites that occurred on the leased premises.

**Miller v. Kondaur Capital Corp.**, --- So.3d ----, 2012 WL 2327822 (Fla. 4th DCA 2012).

A non-holder in possession of a promissory note is entitled to enforce the note, even if the note was not properly indorsed to the non-holder.

**Langer v. Fels**, --- So.3d ----, 2012 WL 2327921 (Fla. 4th DCA 2012).

"Law of the case doctrine" includes not only issues explicitly ruled upon by the court, but also those issues which were implicitly addressed or necessarily considered by the appellate court's decision.

**Jasser v. Saadeh**, --- So.3d ----, 2012 WL 2328230 (Fla. 4th DCA 2012).

A promissory note that does not state any time of payment is "payable on demand" in accordance with Fla. Stat. § 673.673.1081 (1).

**Meadows v. Medical Optics, Inc.**, --- So.3d ----, 2012 WL 2328234 (Fla. 4th DCA 2012).

Upon the granting of a temporary injunction, an evidentiary hearing must be held to determine whether the amount of the bond will be sufficient to compensate the restricted party if the injunction were wrongfully issued.

**Pensacola Motor Sales Inc. v. Eastern Shore Toyota, LLC**, --- F.3d ----, 2012 WL 2345117 (11<sup>th</sup> Cir. 2012).

Competitor did not waive safe harbor defense to Anticybersquatting Consumer Protection Act by failing to specifically the safe harbor defense.

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**Health First, Inc. v. Cataldo**, --- So.3d ----, 2012 WL 2464680 (Fla. 5th DCA 2012).

A party may withdraw one of its claims at any time, even if done at trial and even if doing so changes the nature of the defense. Once a claim is dropped, cross-examination may be limited on the dropped claims (which now constitute collateral issues).

**Paul N. Howard Co. v. Camp, Dresser, & McKee, Inc.**, --- So.3d ----, 2012 WL 2464870 (Fla. 5th DCA 2012).

Expert witness and deposition costs may be taxable, even if not used at trial, if the costs were reasonably necessary to prepare the winning party's case.

**Royal Palm Bank Of Florida v. Hunters Property, LLC**, --- So.3d ----, 2012 WL 2470864 (Fla. 2d DCA 2012).

Pursuant to Fla. Stat. § 475.61 (4), an appraiser does not need to be licensed or certified in order to testify as an expert witness.

**Lyons v. Chamoun**, --- So.3d ----, 2012 WL 2400867 (Fla. 4th DCA 2012).

A proposal for settlement which offers a release but fails to attach a release together with failure to define to whom the release is directed makes the proposal invalid.

**Vives v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2012 WL 2400891 (Fla. 3d DCA 2012).

Letter written by mortgagor accepting offered payment plan did not constitute pro se answer; thus mortgagor was entitled to file answer contesting service process.

**Geraci v. Sunstar EMS**, --- So.3d ----, 2012 WL 2401793 (Fla. 2d DCA 2012).

A residence subject to a long term lease can qualify for the homestead exemption from forced levy under Art. X, Section 4 of the Florida Constitution.

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**Manuel Farach**

**THI Holdings, LLC v. Shattuck ex rel. Estate of Townsend**, --- So.3d ----, 2012 WL 2613383 (Fla. 2d DCA 2012).

Petitions for admission *pro hac vice* should essentially be granted on a *pro forma* basis, the existence of a possible conflict is not sufficient to deny admission.

**Quesada v. City of Tampa**, --- So.3d ----, 2012 WL 2614918 (Fla. 2d DCA 2012).

An arbitrator's conducting non-legal research is "misconduct" as set forth in Fla. Stat. § 682.13 (1) (b) sufficient to vacate the award.

**McDaniel v. FirstBank Puerto Rico**, --- So.3d ----, 2012 WL 2615785 (Fla. 2d DCA 2012).

The filing of a Notice of Appearance and Motion to Quash Service does not waive a contest to personal jurisdiction. Actual knowledge of suit does not cure improper substitute service.

**Pacheco v. Indymac Federal Bank, F.S.B.**, --- So.3d ----, 2012 WL 2579596 (Fla. 4th DCA 2012).

Lack of standing may not be raised for the first time in a motion to vacate final judgment. Moreover, movant who seeks relief from judgment based on fraud must allege the fraud with particularity in order to be entitled to an evidentiary hearing.

**CFC of Delaware LLC v. Santalucia**, --- So.3d ----, 2012 WL 2579609 (Fla. 4th DCA 2012).

A trial court may conduct hearings on whether a party was defrauded with regard to an arbitration contract when the fraud is limited to the arbitration provision only; all other allegations (including whether the entire agreement was procured through fraud) must be decided by the arbitration panel.

**In re Amendments to Florida Rules of Civil Procedure-Electronic Discovery**, --- So.3d ----, 2012 WL 2579681 (Fla. 2012).

The Florida Supreme Court has revised the Rules of Civil Procedure to address electronically stored information (ESI). The changes are the following:

**RULE 1.201. COMPLEX LITIGATION**

(J) the possibility of obtaining agreements among the parties regarding the extent to which such electronically stored information should be preserved, the form in which such information should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;

**RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY**

(3) Electronically Stored Information. A party may obtain discovery of electronically stored information in accordance with these rules.

(d) Limitations on Discovery of Electronically Stored Information.

(1) A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order the discovery from such sources or in such formats if the requesting party shows good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.

(2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or (ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

#### **RULE 1.340. INTERROGATORIES TO PARTIES**

(c) Option to Produce Records. When the answer to an interrogatory may be derived or ascertained from the records (including electronically stored information) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or shall identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. If the records to be produced consist of electronically stored information, the records shall be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

#### **RULE 1.350. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES**

#### **RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS**

(e) Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

#### **RULE 1.410. SUBPOENA**

(c) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents (including

electronically stored information), or tangible things designated therein, but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery. A party seeking a production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party as provided in rule 1.080. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

**Village of Palmetto Bay v. Palmer Trinity Private School, Inc.**, --- So.3d ----, 2012 WL 2580713 (Fla. 3rd DCA 2012).

Once a petitioner for a special exception has met the requirements for and submitted competent substantial evidence supporting the exception, a zoning body must grant the petition in full (and may not change or vary the use).

**Heron at Destin West Beach & Bay Resort Condominium Ass'n, Inc. v. Osprey at Destin West Beach**, --- So.3d ----, 2012 WL 2546063 (Fla. 1st DCA 2012).

A master condominium association will be governed by the Condominium Act (and not the corporate act) if it is primarily responsible for the operation of real property or facilities that are not common elements of an individual condominium or property of a condominium association, condominium unit owners have user rights in the master association's property, voting membership is exclusively reserved to condominium unit owners (or their agents or representatives), membership is a requirement of unit ownership, and the master association is authorized to assess its members or affected owners for the payment of shared expenses (with unpaid assessments becoming a lien). Moreover, the Condominium Act permits weighted voting.

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**Kist v. Hubbard, --- So.3d ----**, 2012 WL 2864379 (Fla. 5th DCA 2012).

The (Public) Employee Immunity Statute, Fla. Stat. § 768.28 (9) (a), requires that public employees be sued where they are employed unless the complaint alleges the employee “acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”

**Surna Const., Inc. v. Stephens, --- So.3d ----**, 2012 WL 2864385 (Fla. 5th DCA 2012).

A purchaser of an invalidated tax deed is entitled to interest on the monies it paid pursuant to Fla. Stat. § 197.602.

**In re Amendments to Florida Rules of Judicial Administration, --- So.3d ----**, 2012 WL 2848890 (Fla. 2012).

**RULE 2.514. COMPUTING AND EXTENDING TIME**

(a) Computing Time. The following rules apply in computing time periods specified in any rule of procedure, local rule, court order, or statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, or falls within any period of time extended through an order of the chief justice under Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv), the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any period of time extended through an order of the chief justice.

(2) Period Stated in Hours. When the period is stated in hours

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, or during any period of time extended through an order of the chief justice under Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv), the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any period of time extended through an order of the chief justice.

(3) Period Stated in Days Less Than Seven Days. When the period stated in days is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(4) “Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends

(A) for electronic filing or for service by any means, at midnight; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means

(A) the day set aside by section 110.117, Florida Statutes, for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, the Friday after Thanksgiving Day, or Christmas Day, and

(B) any day observed as a holiday by the clerk's office or as designated by the chief judge.

(b) Additional Time after Service by Mail or E-mail. When a party may or must act within a specified time after service and service is made by mail or e-mail, 5 days are added after the period that would otherwise expire under subdivision (a).

**Estate of Deresh ex rel. Schneider v. FS Tenant Pool III Trust**, --- So.3d ----, 2012 WL 2813819 (Fla. 4th DCA 2012).

Nursing home arbitration agreement that prohibits punitive damages is enforceable upon the striking the punitive damages exclusion.

**Ioannides v. Romagosa**, --- So.3d ----, 2012 WL 2813833 (Fla. 4th DCA 2012).

A party may appeal the denial of a motion for summary judgment after a full trial on the merits if there are no factual disputes on the motion and the motion was decided on a pure question of law. Additionally, a party cannot recover for fraudulent inducement into a contract if the issue upon which the party was allegedly defrauded is adequately covered in the contract between the parties.

**Simonson v. Palm Beach Hotel Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 2813875 (Fla. 4th DCA 2012).

Employing Florida Statute § 45.031 (publication requirements for foreclosure sale) may be not be mandatory in all foreclosure sales, but is required if the final judgment of foreclosure references and directs the sale be in accordance therewith.

**Romero v. Erik G. Abrahamson, P.A.**, --- So.3d ----, 2012 WL 2813988 (Fla. 2d DCA 2012).

A case management order which prohibits a party from contacting people outside of the litigation goes beyond dissemination of information gleaned through discovery and other court processes, and constitutes an injunction prohibiting speech.

**F.D.I.C. v. North Savannah Properties, LLC**, --- F.3d ----, 2012 WL 2849488 (11<sup>th</sup> Cir. 2012).

The F.D.I.C. is automatically substituted in state court proceedings once it files its Notice of Substitution for a failed banking institution; it is not necessary that the court issue an order on a formal petition for substitution.



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**Premier Lab Supply, Inc. v. Chemplex Industries, Inc.**, --- So.3d ----, 2012 WL 2913173 (Fla. 4th DCA 2012).

A jury instruction for misappropriation of trade secrets may, but does not require, a temporal limitation on damages due to a “head start period” (the amount of time it would have taken the misappropriating defendant to independently develop its own product had it not misappropriated the trade secret).

**Cirrus Design Corp. v. Sasso**, --- So.3d ----, 2012 WL 2913180 (Fla. 4th DCA 2012).

If an offer to settle makes clear the settlement contract is in full satisfaction of a tort dispute, the contract becomes an accord and immediate satisfaction. A subsequent breach of the settlement agreement implicates the breach of contract remedies set forth in the contract, but not the underlying tort remedy.

**Pardo v. Goldberg**, --- So.3d ----, 2012 WL 2913191 (Fla. 3rd DCA 2012).

The court grants the motion for rehearing, and clarifies its prior opinion issued at 2011 WL 5375107 (Fla. 3d DCA 2011) to read that contractual attorneys’ fees on appeal are not awardable unless the particular language of the contract or related documents (a guaranty in this case) provide for appellate attorney’s fees, and Fla. Stat. § 59.46 only applies when a contract or statute provides for fees.

**Doukas v. Facilities Development Corp.**, --- So.3d ----, 2012 WL 2913236 (Fla. 4<sup>th</sup> DCA 2012).

Under *Rowe*, a trial court must make written findings concerning the hourly rate, the number of hours reasonably expended, and whether to apply enhancement factors.

**Bonilla v. Bank United**, --- So.3d ----, 2012 WL 2913281 (Fla. 4th DCA 2012).

“Surprise” under Florida Rule of Civil Procedure 1.540 (b) is basis for relief from judgment when the trial court permits withdrawal of counsel with thirty days to obtain new counsel and enters final judgment five (5) days later.

**Zervas v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2012 WL 2913892 (Fla. 2d DCA 2012).

Movant for summary judgment before answer is filed bears high burden to prove no answer could ever be filed which could raise issues of fact. The high burden not met in this case when movant does not establish that it gave proper notice under the notice requirements of the mortgage.

**Cerron v. GMAC Mortg., LLC**, --- So.3d ----, 2012 WL 2919124 (Fla. 2d DCA 2012).

An opponent to summary judgment need not file an affidavit in opposition to summary judgment; it is the initial burden of the movant to either conclusively refute affirmative defenses to their claim or show the defenses are legally insufficient.

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**Horizons A Far, LLC v. Plaza N 15, LLC**, --- So.3d ----, 2012 WL 3044271 (Fla. 5th DCA 2012).

The following language means the waiver of a receiver is limited to waives during dissolution proceedings:

No Petition for Dissolution. The Members agree that irreparable damage would be done to the good will and reputation of the Company if any Member should bring an action in any court to dissolve the Company and to have a liquidator or receiver for the Company appointed. Care has been taken in this Agreement to provide what the parties feel is fair and just payment in liquidation of the Interests of all Members. Accordingly, each Member hereby waives and renounces any right to file or pursue any such petition for dissolution of the Company or to seek the appointment by any court of a liquidator or receiver for the Company. If any Member, in violation of the foregoing provision, does file or pursue any such dissolution or liquidation petition or action in any court, the Company and/or any of the other Members shall be entitled to an injunction, as a matter of right, against such petition or action.

**Turkali v. City of Safety Harbor**, --- So.3d ----, 2012 WL 3020381 (Fla. 2d DCA 2012).

A claim for damages under the Bert Harris Act, Fla. Stat. § 70.001, must include an appraisal and the appraised value cannot be “bundled” with other properties, i.e., the appraisal must be limited to the value of only the claimed property before and after enactment of the offending land use decision.

**Good v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 3021580 (Fla. 4th DCA 2012).

An affidavit which creates disputed issue of material fact with regard to violation of RESPA by virtue of a yield spread premium precludes foreclosure summary judgment.

**Stratton v. 6000 Indian Creek, LLC**, --- So.3d ----, 2012 WL 3022850 (Fla. 3d DCA 2012).

A purchaser or assignee at foreclosure sale may intervene post-judgment in order to obtain and enforce post judgment orders such as writs of possession.

**Centennial Homeowners Ass'n, Inc. v. Dolomite Co., Inc.**, --- So.3d ----, 2012 WL 3023095 (Fla. 3rd DCA 2012).

Betterment under Fla. Stat. § 66.041 is available to any party who, under a mistaken belief they had a legal claim to the property, improves the property but is later disposed.

**General Star Indem. Co. v. Atlantic Hospitality of Florida, LLC**, --- So.3d ----, 2012 WL 3023162 (Fla. 3rd DCA 2012).

Claims against insurance companies for breach of the implied duty of good faith and fair dealing are actually statutory bad faith claims under Fla. Stat. § 624.155.

**Morey v. Everbank**, --- So.3d ----, 2012 WL 3000608 (Fla. 1st DCA 2012).

Life insurance proceeds payable to a trust are not automatically exempt from claims of creditors under Fla. Stat. § 222.13 (1), and may be available to creditors if so provided in the trust instrument. Likewise, homestead becomes part of the probate estate if a testamentary disposition is made to a person other than listed in Art. X, Section 4 of the Florida Constitution.

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**Davis v. Marion County**, --- So.3d ----, 2012 WL 3136465 (Fla. 5th DCA 2012).

A local government may re-assess landowners for public works when the landowners being re-assessed have been specially benefitted.

**DePuy Orthopaedics, Inc. v. Waxman**, --- So.3d ----, 2012 WL 3138681 (Fla. 1st DCA 2012).

A successor business is entitled to enforce a restrictive covenant contained in an employment agreement, and continued employment is not a condition precedent to being able to enforce the restriction.

**Mayfield v. First City Bank of Florida**, --- So.3d ----, 2012 WL 3115140 (Fla. 1st DCA 2012).

Pursuant to Fla. Stat. § 695.11, constructive notice attaches at the time of recording and continues to apply even if the instrument is improperly recorded, incorrectly recorded or even if removed from the public record.

**R.T.G. Furniture Corp. v. Coates**, --- So.3d ----, 2012 WL 3101309 (Fla. 4th DCA 2012).

Offers of judgment served no less than 45 days before trial are effective under the Florida Rules of Civil Procedure.

**MDC 6, LLC v. NRG Inv. Partners, LLC**, --- So.3d ----, 2012 WL 3101843 (Fla. 2d DCA 2012).

The plain meaning of an arbitration clause in a mortgage is that foreclosure is to be sent to arbitration, even though the clause might be contradictory, i.e., it required arbitration of foreclosure claims, excluded the claims from arbitration and then re-required arbitration.

**Zakhary v. Raymond Thompson PSM, Inc.**, --- So.3d ----, 2012 WL 3101844 (Fla. 2d DCA 2012).

Prior boundary dispute lawsuit by landowner against neighbor did not judicially estop landowner from bringing suit against neighbor's surveyor for professional malpractice.

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**Bistricer v. Palmer**, --- So.3d ----, 2012 WL 3237813 (Fla. 2d DCA 2012).

A quiet title action cannot be treated as an action for fraud, and accordingly, a trial court cannot apply the four year statute of limitations for fraud to a quiet title action.

**Florida Georgia Grove, LLP v. Collier County**, --- So.3d ----, 2012 WL 3238046 (Fla. 2d DCA 2012).

A temporary injunction that permits access over a property must meet all requirements for injunctions, and since damages are limited to the amount of the injunction bond, all parties are permitted to participate in the evidentiary hearing to determine the correct amount of the bond.

**Carrithers v. Cornett's Spirit of Suwannee, Inc.**, --- So.3d ----, 2012 WL 3238679 (Fla. 1st DCA 2012).

A trial court order awarding attorneys' fees after entitlement ordered by appellate court may not be attacked on entitlement despite the adoption of new Florida Rule of Appellate Procedure 9.170.

**Estilien v. Dyda**, --- So.3d ----, 2012 WL 3192762 (Fla. 4th DCA 2012).

A party seeking the opposing party's billing records for attorneys' fees purposes must demonstrate relevance of the records, that the records are needed for an attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source. Failure to keep one's own records is not a sufficient basis to require production of opposing counsel's records.

**Nirk v. Bank Of America, N.A.**, --- So.3d ----, 2012 WL 3192801 (Fla. 4th DCA 2012).

Prior opinions of the Fourth District are revised to clarify that the Fla. Stat. § 48.031 (5) requirement to place service notations on the "process" refer to the summons, and not the complaint, that is served.

**SCG Harbourwood, LLC v. Hanyan**, --- So.3d ----, 2012 WL 3194329 (Fla. 2d DCA 2012).

Optional arbitration provision in a contract must be exercised at time of contracting; exercising the provision at a later date constitutes an impermissible unilateral modification of the contract.

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**Dadurian v. Mar-A-Lago Club, L.L.C., L.C.**, --- So.3d ----, 2012 WL 3326309 (Fla. 4th DCA 2012).

The following clause in a membership agreement validly prohibits a member of a private club from resigning membership in the club:

Resignation: Any member may resign from the Club by written notice to the Admissions Committee, provided all indebtedness to the Club has been paid. Upon resignation, prepaid annual dues will be refunded on a pro rata basis based on the number of months remaining in the Membership Year.

**Florida Power & Light Co. v. Russell Engineering, Inc.**, --- So.3d ----, 2012 WL 3326341 (Fla. 4th DCA 2012).

A statutory remedy may be cumulative or exclusive of common law remedies, and is considered to be cumulative unless the statute indicates it is exclusive. A statute also will not be considered to have changed the common law unless it so states or is entirely repugnant to the common law. Applying these principles, common law damages for negligence (increased construction costs due to utility improperly listing location of its utilities) may be assessed against a utility since the statutory method of assessing damages against a utility set forth in Fla. Stat. §§ 337.403 and 337.404 are not exclusive and are not so repugnant that they are not presumed to change common law.

**Famsun Invest, LLC v. Therault**, --- So.3d ----, 2012 WL 3328702 (Fla. 4th DCA 2012).

A final order of possession in a landlord tenant action is not a “final order” if a claim for damages remains outstanding, and as a result, the “final order” may not be appealed as a final order pursuant to Fla. Rule of Appellate Procedure 9.130 (f). Moreover, Rule 9.130 (f) does not prohibit the entry of default and final judgment for failure of a tenant to deposit monies into the registry of the pursuant to Fla. Stat. § 83.232.

**M.J.O. Holding Corp. v. Heller**, --- So.3d ----, 2012 WL 3329195 (Fla. 4th DCA 2012).

Under Fla. Stat. § 95.051 (1) (b), the statute of limitations is tolled by a person’s use of a false name. However, the running of the statute re-commences upon the plaintiff learning of the defendant’s true identity.

**Mosaic Fertilizer, LLC v. Van Fleet Intern. Airport Development Group, LLC**, Slip Copy, 2012 WL 3490904 (11<sup>th</sup> Cir. 2012).

Failure to deliver a survey and close by a date certain, both as required by a contract, constitutes a breach of contract to purchase real estate. Moreover, a conditional loan commitment is not sufficient to demonstrate buyer was “ready, willing and able” to close.

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**Jag Auto Body, Inc. v. Capone**, --- So.3d ----, 2012 WL 3627406 (Fla. 5th DCA 2012). Merely employing an attorney does not give the attorney the authority to settle a case. Likewise, an impending pretrial conference is not an “emergency” that gives an attorney the authority to settle a case without permission.

**Bernhardt v. Halikoytak**is, --- So.3d ----, 2012 WL 3629020 (Fla. 2d DCA 2012). A “Google Earth” photograph is not to be given conclusive effect in the context of a contested summary judgment.

**Emeritus Corp. v. Pasquariello**, --- So.3d ----, 2012 WL 3629030 (Fla. 2d DCA 2012). A power of attorney limited to “finance” grants the agent sufficient power to agree to financial terms, including arbitration, of a nursing home agreement.

**Dage v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 3629195 (Fla. 2d DCA 2012).

A final judgment of foreclosure entered when plaintiff lacked standing is voidable, not void *ab initio*. Accordingly, a motion to vacate such final judgment cannot be made under Florida Rule of Civil Procedure 1.540 (b) (4) concerning “void” judgments.

**Sherman v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 3586613 (Fla. 3rd DCA 2012).

Equitable subrogation is not permitted when new loan alters the risk of non-payment by the borrower, proceeds of new loan are turned over the mortgagor and not the mortgagee, and party seeking equitable subrogation fails to demonstrate that subrogated lender is not harmed.

**Maida Vale, Inc. v. Abbey Road Plaza Corp.**, --- So.3d ----, 2012 WL 3586643 (Fla. 4th DCA 2012).

Court cannot rule upon eviction action without resolving tenant defenses and counterclaims that are inextricably intertwined with the eviction. Moreover, an assignee tenant will be bound by a lease rider it is unaware of if it agrees to assume the lease with all its parts.

**Moriber v. Dreiling**, --- So.3d ----, 2012 WL 3586750 (Fla. 3d DCA 2012).

The inadvertent receipt of confidential information will not automatically disqualify opposing counsel. Instead, courts will review the information itself, the context of the information, the manner in which it was inadvertently delivered, the response of counsel who received the inadvertent information, and whether any litigation advantage was obtained by the receipt of the information.

**NHB Advisors, Inc. v. Czyzyk**, --- So.3d ----, 2012 WL 3587216 (Fla. 4th DCA 2012).

A non-resident who participates in a conspiracy that commits a tort in Florida is subject to long-arm jurisdiction pursuant to Florida Statute § 48.193 (1).

**LaRue v. Kalex Const. and Development, Inc.**, --- So.3d ----, 2012 WL 3587263 (Fla. 3d DCA 2012).

An agreement that states an employee will receive a 25% ownership share if she works at the business for three years is unenforceable under the Statute of Frauds.

**National City Bank v. Nagel**, --- So.3d ----, 2012 WL 3587358 (Fla. 4th DCA 2012).

A court may not *sua sponte* dismiss a claim based upon affirmative defenses not raised in the pleadings, even if the affirmative defense is based on the court's own investigation.

**Regions Bank v. Deluca**,--- So.3d ----, 2012 WL 3588021 (Fla. 2nd DCA 2012).

Recorded mortgages with minor mistakes or irregularities still impart constructive notice. Accordingly, a mortgage still encumbers property when the legal description was contained in the mortgage but in an illogical and confusing fashion.

**Frym v. Flagship Community Bank**, --- So.3d ----, 2012 WL 3588483 (Fla. 2nd DCA 2012).

The "local action" rule for Florida real property actions (Fla. Stat. § 47.011) is modified by Fla. Stat. § 702.04 ("[w]hen a mortgage includes lands ... lying in two or more counties, it may be foreclosed in any one of said counties, and all proceedings shall be had in that county as if all the mortgaged land ... lay therein.").

**Pendergast v. Sprint Nextel Corp.**, --- F.3d ----, 2012 WL 3553466 (11<sup>th</sup> Cir. 2012).

Federal law will preempt Florida law regarding a class action waiver in the "dispute resolution" portion of a wireless provider service contract, and pursuant to Federal law, the class action waiver is valid and enforceable.



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**Manuel Farach**

**Brown & Brown, Inc. v. School Bd. of Hamilton County**, --- So.3d ----, 2012 WL 3758638 (Fla. 5th DCA 2012).

Under the doctrine of judicial estoppel, a party may not take a position in later litigation that is contrary to a position she successfully maintained in prior litigation. "Successfully maintained" means the prior court adopted the claim or position of the party as a preliminary decision or final judgment.

**RLI Live Oak, LLC v. South Florida Water Management Dist.**, --- So.3d ----, 2012 WL 3758645 (Fla. 5th DCA 2012).

Any final judgment imposing civil penalties must be proven by clear and convincing evidence.

**Joselite v. Wachovia Mortg. Corp.**, --- So.3d ----, 2012 WL 3758648 (Fla. 5th DCA 2012).

The Fifth District adopts the Fourth District's position and holds that surprise, mistake, accident or irregularity in the conduct of a foreclosure sale is sufficient to set aside a foreclosure sale, inadequacy in the sale price is not needed.

**Spencer v. EMC Mortg. Corp.**, --- So.3d ----, 2012 WL 3705166 (Fla. 3rd DCA 2012).

A mortgage foreclosure action will be dismissed for failure to prosecute if there is no activity for 10 months, a notice of lack of prosecution issues and there is no activity within the 60 day window, and good cause is not shown within 5 days of the hearing date.

**Town of Longboat Key v. Islandside Property Owners Coalition, LLC**, --- So.3d ----, 2012 WL 3705264 (Fla. 2d DCA 2012).

A trial court is not required to defer to a municipality's self-serving interpretation of its own ordinance.

**Lee County Electric Co-op., Inc. v. City of Cape Coral**, --- So.3d ----, 2012 WL 3705266 (Fla. 2d DCA 2012).

A public utility easement does not give a utility specific property rights, and moving a public utility easement does not involve appropriation or destruction of the utility's property and does not constitute taking by the government. Under the common and statutory law of Florida and unless altered by the franchise agreement, the utility bears the cost of moving utilities.

**Prieto v. Smook, Inc.**, --- So.3d ----, 2012 WL 3711444 (Fla. 4th DCA 2012).

A fraudulent misrepresentation generally concerns a past or existing fact, but may concern a future fact if it can be established the promisor has no intention of performing the act.

**In re Read**, --- F.3d ----, 2012 WL 3738062 (11<sup>th</sup> Cir. 2012).

A bankruptcy debtor does not have additional time under 11 U.S.C. § 108 (a) to contest a tax appraiser's ad valorem tax liability; 11 U.S.C. § 505 (a) (2) (c) creates an exception to the tolling provisions of 11 U.S.C. § 108 (a).

**Zinni v. ER Solutions, Inc.**, --- F.3d ----, 2012 WL 3641911 (11<sup>th</sup> Cir. 2012).

Offer to settle Fair Debt Collection Practices Act claims by offering \$1 in excess of statutory damages did not moot the claims of Plaintiffs as the settlement offers did not offer full relief, i.e., attorneys' fees and judgments in favor of consumers which are enforceable against collectors.

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**Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.**, --- So.3d ----, 2012 WL 3870405 (Fla. 5th DCA 2012).

Injunctive relief is available to claimant under Florida Deceptive and Unfair Trade Practices Act even if claimant cannot prove actual damages.

**Continental Cas. Co. v. A.W. Baylor Versapanel-Plastering, Inc.**, --- So.3d ----, 2012 WL 3870415 (Fla. 5th DCA 2012).

Florida Statute section § 713.29 is the controlling statute for determining attorney's fees under a claim for a bond under Chapter 713; Florida Statutes §§ 627.76 and 627.428 do not apply in proceedings Florida Statute § 713.23.

**Finnegan v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 3822195 (Fla. 4th DCA 2012).

Attaching unsworn and uncertified documents to a motion for summary judgment does not meet the requirements for summary judgment under Rule 1.510 (e).

**Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co.**, --- So.3d ----, 2012 WL 3822215 (Fla. 4th DCA 2012).

An insurance appraisal award constitutes a "favorable resolution" for purposes of the insurance bad faith statute.

**AGBL Enterprises, LLC v. Girlcook, Inc.**, --- So.3d ----, 2012 WL 3822760 (Fla. 4th DCA 2012).

Parol evidence is not permitted to vary the terms, i.e., start date, of a fully integrated, "as is" lease.

**Minty v. Meister Financialgroup, Inc.**, --- So.3d ----, 2012 WL 3823035 (Fla. 4th DCA 2012).

An order requiring a party and its counsel to pay funds to a third party is an injunction, and must comply with all the requirements of an injunction pursuant to Florida Rule of Civil Procedure 1.610 (c).

**Smith v. Eldred**, --- So.3d ----, 2012 WL 3827001 (Fla. 4th DCA 2012).

A party may not serve requests to produce upon the opposing party's expert unless upon motion.

**Suntree Technologies, Inc. v. Ecosense Intern., Inc.**, --- F.3d ----, 2012 WL 3832458 (11<sup>th</sup> Cir. 2012).

Subcontractor's use of a manufacturer's name in a construction bid and then the use of a competitor's product when the subcontractor won the bid does not rise to the level of a Lanham Act violation.

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**Berdick v. Costilla, --- So.3d ----, 2012 WL 4039271 (Fla. 2d 2012).**

A trial court is limited on a motion to dismiss to reviewing only the four corners of the complaint, and may not consider, even in action on a lease contract, other possible leases or instruments which may affect the landlord-tenant relationship.

**Wojnowski v. State, Office of Financial Regulation, --- So.3d ----, 2012 WL 4009546 (Fla. 1st DCA 2012).**

A single arbitrator FINRA award satisfies the Florida Statute § 517.161 (1) provision that an individual found responsible in a national securities association decision involving a violation of state securities laws may be denied securities licensure in Florida.

**Polley v. Gardner, --- So.3d ----, 2012 WL 4009774 (Fla. 1st DCA 2012).**

Pursuant to Florida Statute § 682.12, a trial court must confirm an arbitration award and has no discretion to deny or delay confirmation unless a motion to vacate, modify or correct the award is made within ninety days of delivery of the award.

**B & G Aventura, LLC v. G-Site Ltd. Partnership, --- So.3d ----, 2012 WL 3964816 (Fla. 3d DCA 2012).**

A purchaser may not prevail on a claim of mutual mistake or fraudulent inducement into a fully integrated real estate purchase contract when the contract reveals direct treatment of the alleged misrepresentation/mistake contrary to purchaser's allegations.

**Florida Dept. of Agriculture and Consumer Services v. Brignoni, --- So.3d ----, 2012 WL 3964983 (Fla. 3d DCA 2012).**

Notwithstanding that a statute authorizes the actions of an agency of the State of Florida, the taking of private property without compensation (i.e., citrus trees) constitutes inverse condemnation and entitles the owner to full compensation.

**Roger E. Freilich, D.M.D., P.A. v. Shochet, --- So.3d ----, 2012 WL 3964986 (Fla. 4th DCA 2012).**

Engaging in limited state court discovery while arbitration proceedings are already pending does not waive right to arbitrate dispute.

**Kernel Records Oy v. Mosley, --- F.3d ----, 2012 WL 4040695 (11<sup>th</sup> Cir. 2012).**

In order to be entitled to a judgment of copyright infringement, a claimant must first comply with all statutory formalities under 17 U.S.C. § 411 (a) and have registered (or have been refused registration of) the work in the United States, or in the alternative, show the work was first published outside the United States.

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**Berrios v. Orlando Regional Healthcare System**, --- So.3d ----, 2012 WL 4208202 (Fla. 5th DCA 2012).

Releases are contracts, and Florida follows the rule of *lex loci contractus* (the location of the execution of the contract determines the applicable law) when interpreting contracts. Accordingly, a contract of release executed in Georgia follows Georgia law which holds, contrary to Florida law, that a general release as to one party does not release all possibly responsible parties.

**Wilson v. University Community Hosp., Inc.**, --- So.3d ----, 2012 WL 4210301 (Fla. 2d DCA 2012).

The Second District finds that nominal damages need not be awarded even if there is a finding of breach of contract. Conflict is certified with the Fifth District.

**Raza v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 4210309 (Fla. 2d DCA 2012).

A flat fee engagement agreement does not substitute for evidence and a finding of a reasonable hourly rate and number of hours worked as required by *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985).

**Doe v. Beasley Broadcast Group, Inc.**, --- So.3d ----, 2012 WL 4210455 (Fla. 2d DCA 2012).

Invasion of privacy damages are measured by tort, not contract, standards.

**Vila & Son Landscaping Corp. v. Posen Const., Inc.**, --- So.3d ----, 2012 WL 4093545 (Fla. 2d DCA 2012).

A contract provision permitting either party to cancel a contract for convenience is not illusory, void for lack of consideration or a violation of the doctrine of good faith and fair dealing.

**Baldwin v. Regions Financial Corp.**, --- So.3d ----, 2012 WL 4094147 (Fla. 3d DCA 2012).

An arbitration clause does not defeat the remedial provisions of the Florida Consumer Collection Practices Act, Fla. Stat. § 559.77.

**Keys Island Properties, LLC v. Crow**, --- So.3d ----, 2012 WL 4094212 (Fla. 3d DCA 2012).

A prior action which does not place an easement at issue does not extinguish the easement. The attaching of a survey to the complaint in the prior lawsuit is not sufficient to put the parties on notice that the easement was capable of being extinguished in that action.

**Brady v. P3 Group, LLC**, --- So.3d ----, 2012 WL 4094281 (Fla. 3d DCA 2012).

A first party plaintiff lacks standing to prosecute an action, including a default, against a third party defendant as the third party action is an independent action.

**Bethany Trace Owners' Ass'n, Inc. v. Whispering Lakes I, LLC**, --- So.3d ----, 2012 WL 4094830 (Fla. 2d DCA 2012).

Association documents may condition the ability of an association to file suit against one of its members on the affirmative vote of a majority of the members of the association.

**The Estate Of Tore Myhra, v. Royal Caribbean Cruises, Ltd.**, --- F.3d ----, 2012 WL 4207303 (11<sup>th</sup> Cir. 2012).

Forum selection clauses are *prima facie* valid, even between parties of unequal bargaining strength, unless it is demonstrated enforcement of the clause is unreasonable or unjust (including whether the forum selection clause violates the public policy of the state in which the suit is filed).

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**Nogales v. Countrywide Home Loans, Inc.**, --- So.3d ----, 2012 WL 4465513 (Fla. 2d DCA 2012).

An order or judgment, even if it is purportedly void, must be appealed within thirty days of rendition in order for the reviewing court to have appellate jurisdiction.

**J.P. Morgan Mortg. Acquisition Corp. v. Golden**, --- So.3d ----, 2012 WL 4465525 (Fla. 2d DCA 2012).

A prevailing defendant in a mortgage foreclosure suit is entitled to fees even if suit is re-instituted and plaintiff is prevailing party in the second suit. A 2.5 multiplier is appropriate when new counsel was retained on a pure contingency, success was in doubt at the outset as default was of record for six months, and defendants' expert witness testified no other attorneys in court's geographical area would take the case.

**19650 NE 18th Ave. LLC v. Presidential Estates Homeowners Ass'n, Inc.**, --- So.3d ----, 2012 WL 4448792 (Fla. 3d DCA 2012).

A violation of a restrictive covenant cannot implicitly set forth a forfeiture; the penalty of forfeiture for violation of a restrictive covenant must be clearly set forth. Accordingly, there can be no loss of permitted residential units under a restrictive covenant since the forfeiture of the residential units was not clearly set forth as a penalty for violation of the covenant.

**Board of Trustees of Internal Improvement Trust Fund v. American Educational Enterprises, LLC**, --- So.3d ----, 2012 WL 4449131 (Fla. 2012).

Overbreadth is not a basis for certiorari review of discovery orders, and relevancy of information sought at the discovery stage has a wider scope than relevancy of admissible evidence at the trial stage.

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**Sanchez v. Soleil Builders, Inc.**, --- So.3d ----, 2012 WL 4738864 (Fla. 5th DCA 2012). Court must consider counterclaims before entering summary judgment on principal claims.

**Giddens v. Tlsty**, --- So.3d ----, 2012 WL 4748148 (Fla.1st DCA 2012). Motions to tax appellate costs may not be filed in the district court but must be filed in the trial court within thirty (30) days after the mandate issues.

**Garcia v. Andonie**, --- So.3d ----, 2012 WL 4666458 (Fla. 2012). A person need not be a citizen in order to claim residence in and a Florida homestead, but must have a legal basis to be able to establish residence in Florida (e.g., a temporary visa will not suffice). Homestead may be established by residing on the property or the maintenance of others legally or naturally dependent on the owner. The burden of proof in homestead determination matters is on the property appraiser.

**Fidelity Warranty Services, Inc. v. Firststate Ins. Holdings, Inc.**, --- So.3d ----, 2012 WL 4511329 (Fla. 4th DCA 2012). There can be more than one “prevailing party” when there are claims and counterclaims that are independent actions and not merely alternative theories of liability for the same wrong.

**Progress Energy, Inc. v. U.S. Global, LLC**, --- So.3d ----, 2012 WL 4511295 (Fla. 4th DCA 2012). A general limitation of damages provision in a contract is enforceable.



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**October 13, 2012**  
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**Joe Nagy Towing, Inc. v. Lawless**, --- So.3d ----, 2012 WL 4839853 (Fla. 2d DCA 2012).

A common-law conversion claim against a towing company is not preempted by the Interstate Commerce Act, 49 U.S.C. § 14501(c) (1) (2006), when the claim is not related to the “price, route or service” of a motor carrier.

**City of Boynton Beach v. Janots**, --- So.3d ----, 2012 WL 4795639 (Fla. 4th DCA 2012).

A municipality does not need to file an independent action or petition in order to pay its own code enforcement liens on one parcel from condemnation proceeds of a separate parcel owned both parcels are owned by the same person.

**Rubin v. Addison Reserve Country Club, Inc.**, --- So.3d ----, 2012 WL 4795662 (Fla. 4th DCA 2012).

A temporary, not mandatory final, injunction against further work is moot if the construction work complained of has already been completed.

**O'Brien v. Stermer**, --- So.3d ----, 2012 WL 4795669 (Fla. 3d DCA 2012).

An assignee under an Assignment for Benefit of Creditors can sell assignor's assets unless a party can demonstrate it owned the specific assets the assignor is selling.

**Koster v. Sullivan**, --- So.3d ----, 2012 WL 4798610 (Fla. 2d DCA 2012).

A return of service is “regular on its face” and complies with Fla. Stat. § 48.21 without the need to state all the factors of the statute; conflict certified with the Third District.

**Longleaf C & D Disposal Facility, Inc. v. Green's Fill Dirt, Inc.**, --- So.3d ----, 2012 WL 4800997 (Fla. 1st DCA 2012).

An order determining a claim for trespass is not final and appealable as a final order unless all claims (including an existing claim for ejectment) are resolved and is not appealable as a non-final order if not timely (motions for rehearing do not extend the time to file non-final appeals).

**Flamingo South Beach I Condominium Ass'n, Inc. v. Selective Ins. Co.**, Slip Copy, 2012 WL 4839117 (11th Cir. 2012).

Rainwater that accumulates on a condominium deck is not “surface waters” under a standard flood insurance policy.

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**Travelers Cas. and Sur. Co. of America v. Culbreath Isles Property**, --- So.3d ----, 2012 WL 5076098 (Fla. 2d DCA 2012).

While denial of a motion to dismiss a complaint is typically not reviewed until plenary appeal, prohibition will issue if trial court exceeds its jurisdiction by permitting additional pleadings (unrelated to fees and costs issues) while a case is on appeal.

**Avante at Boca Raton, Inc. v. Senior Care Pharmacy of Florida, LLC**, --- So.3d ----, 2012 WL 5076102 (Fla. 2d DCA 2012).

Even if a defendant admits not paying under a contract, it is up to the jury to find whether a breach occurred and jury instructions cannot suggest that a breach occurred.

**In Re: Amendments To The Florida Rules Of Civil Procedure, The Florida Rules Of Judicial Administration, The Florida Rules Of Criminal Procedure, The Florida Probate Rules, The Florida Small Claims Rules, The Florida Rules Of Juvenile Procedure, The Florida Rules Of Appellate Procedure, And The Florida Family Law Rules Of Procedure— Electronic Filing**, --- So.3d ----, 2012 WL 4936363 (Fla. 2012).

Amendments to the rules governing practice to implement electronic filing and court records.

**Good v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 4897284 (Fla. 4th DCA 2012).

A mortgagor cannot raise the defense of violation of the Real Estate Settlement Procedures Act (R.E.S.P.A.) against a foreclosing lender who is not the originator of the loan, even if the defense is raised in recoupment, because R.E.S.P.A. provides no basis for successor liability.

**Wolfe v. Smilack**, --- So.3d ----, 2012 WL 4897555 (Fla. 4th DCA 2012).

If either party demands jury trial and claimed damages are unliquidated, a jury trial must be conducted even if defendant's pleadings are stricken.

**Morgan v. Milton**, --- So.3d ----, 2012 WL 4872518 (Fla. 1st DCA 2012).

Not all false statements during *voir dire* will result in a new trial; the court must balance the need for finality in trials with the question of whether the verdict is unreliable as a result of the untruthful statements.

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**Garvin v. Tidwell**, --- So.3d ----, 2012 WL 5232224 (Fla. 4th DCA 2012).

Failure to disclose relevant information during discovery can be the basis of unilateral rescission of a settlement agreement under *Stamato v. Stamato*, 818 So.2d 662, 664 (Fla. 4th DCA 2002), if the unilateral mistake goes to the “very substance of the agreement,” and the “(1) the mistake did not result from an inexcusable lack of due care, and (2) defendant's position did not so change in reliance that it would be unconscionable to set aside the agreement.”

**Plakhov v. Serova**, --- So.3d ----, 2012 WL 5232231 (Fla. 4th DCA 2012).

Tenant cannot use a possible breach of landlord's agreement with its mortgagee to defend enforcement proceedings against tenant unless tenant is an intended third party beneficiary of the contract between landlord/mortgagor and mortgagee. Additionally, residential landlord's obligation to provide Fla. Stat. § 83.49 notice to tenant of intent to impose claim on security deposit is excused by tenant failing to give required seven-day notice before vacating or abandoning the premises.

**Grimsley v. Moody, Jones, Ingino & Morehead, P.A.**, --- So.3d ----, 2012 WL 5232235 (Fla. 4th DCA 2012).

The Fair Credit Reporting Act, 15 U.S.C. § 1681h(e), pre-empts state law negligence claims, including those against law firms for incorrectly forwarding incorrect information to credit agencies.

**Berkowitz v. Delaire Country Club, Inc.**, --- So.3d ----, 2012 WL 5232251 (Fla. 4th DCA 2012).

There are two types of contractual ambiguity: patent and latent. Patent ambiguity is apparent on the face of the document while a “latent ambiguity is said to exist where a contract fails to specify the rights or duties of the parties in certain situations and extrinsic evidence is necessary for interpretation or a choice between two possible meanings.” Notwithstanding that the admission of extrinsic evidence is proper, summary judgment cannot be based on unauthenticated evidence.

**Palm Beach Marketplace, LLC v. Aleyda's Mexican Restaurante, Inc.**, --- So.3d ----, 2012 WL 5232324 (Fla. 4th DCA 2012).

If the lease so provides, a landlord is entitled to rent on the first of the month despite any conduct to the contrary.

**Blue Star Palms, LLC v. LED Trust, LLC**, --- So.3d ----, 2012 WL 5232954 (Fla. 3d DCA 2012).

A party is entitled to have a constructive trust and *lis pendens* imposed on real property based on monies fraudulently obtained, but not if the fraud was committed by someone other than the property owner.

**Smith v. Powder Mountain, LLC**, Slip Copy, 2012 WL 5262638 (11th Cir. 2012).

Under Florida Statute § 678.1061(4) (b), a purchaser of securities accounts is secured as to those accounts when purchaser gives value, does not have notice of the adverse claim, and obtains control of the account. "Control" means the seller no longer has the power to direct the accounts.

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**GMPF Framing, LLC v. Villages at Lake Lily Associates, LLC**, --- So.3d ----, 2012 WL 5364649 (Fla. 5th DCA 2012).

Award of prevailing party attorney's fees under construction lien statute is premature when equitable lien and quantum meruit claims remain outstanding.

**American K-9 Detection Services, Inc. v. Cicero**, --- So.3d ----, 2012 WL 5364650 (Fla. 5th DCA 2012).

Clause stating that parties consent "to the personal jurisdiction of the federal and state courts within Central Florida" is a permissive forum selection clause (i.e., venue can be anywhere, including Central Florida) even without the words "forum" or "venue."

**Braaksma v. Pratt**, --- So.3d ----, 2012 WL 5373433 (Fla. 2d DCA 2012).

Attorneys' fees must be awarded under a proposal for settlement that meets the requirements of the statute and rule notwithstanding that rejection of the offer did not delay or prolong the litigation.

**Vidal v. Liquidation Props., Inc.**, --- So.3d ----, 2012 WL 5347964 (Fla. 4th DCA 2012).

A mortgagor cannot raise as an affirmative defense the allegation of fraud that lender knew the mortgagor's income was not as stated; the mortgagors are in a position to know their own income, and recipients who know a statement is fraudulent are not entitled to rely on the fraudulent statement. Oral misrepresentations as to the rate of a loan are likewise not a basis for fraud because the documents themselves (which state the rate) likewise stop a party from properly relying on the statement.

**Bedwell v. Rucks**, --- So.3d ----, 2012 WL 5349381 (Fla. 4th DCA 2012).

Damages are not an element of a claim under the Uniform Fraudulent Transfers Act, so the place where damages accrue under the act does not establish venue. Venue under the Act is established where the transfer occurred.

**BKD Twenty-One Management Company, Inc. v. Delsordo**, --- So.3d ----, 2012 WL 5349400 (Fla. 4th DCA 2012).

Contractual language is ambiguous only if it is capable of more than one reasonable interpretation, and the word "Establishment" in a lease addendum is not ambiguous (and means "place of business").

**G Barrett LLC v. Ginn Co.**, Slip Copy, 2012 WL 5358883 (11th Cir. 2012).

The following statements in loan instruments insulated a lender from claims of fraud and violation of the Florida Unfair and Deceptive Trade Practices Act with regard to the value of Florida real estate:

“specifically disclaim any responsibility for any ... statements, promises or representations” made by its salespersons that were “in conflict with or in addition to the information contained in this Contract and the Community Documents”; “acknowledge that [they] have not relied upon any such statements, promises or representations, if any, and waive[d] any rights or claims arising from any such statements, promises or representations”; “neither [lender] nor its agents, brokers, insurers, servicers, successors or assigns ha[d] made any representation or warranty, express or implied, ... regarding the property or the condition or value of the property”; “SunTrust makes no representations or warranties, express or implied, regarding the property, the condition of the property, or the value of the property.”

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**Highway 46 Holdings, LLC v. Myers**, --- So.3d ----, 2012 WL 5456404 (Fla. 5th DCA 2012).

If a dual party injunction (i.e., entered against both parties to the litigation) is not immediately appealed, then any party later seeking changes to the injunction must demonstrate changed circumstances from the original injunction.

**Walker v. Fifth Third Mortg. Co.**, --- So.3d ----, 2012 WL 5457220 (Fla. 5th DCA 2012).

Service of process statutes are strictly construed, and returns of service which fail to comply with statute (i.e., no date and time of service, no identification number of process server) are defective.

**In re Guardianship of Trost**, --- So.3d ----, 2012 WL 5458080 (Fla. 2d DCA 2012).

The “next of kin” of a ward/shareholder is not entitled to trust documents under Fla. Stat. § 744.441 and corporate documents under Fla. Stat. § 607.1602 merely by virtue of familial status.

**Florida Atlantic Stock Transfer, Inc. v. Smith**, --- So.3d ----, 2012 WL 5414523 (Fla. 4th DCA 2012).

An order directing that stock certificates be certificated in the name of a particular person does not direct immediate possession, and therefore is not appealable as an interlocutory order. By contrast, a replevin or garnishment of stock certificates does direct possession of the certificates, and is appealable as an interlocutory order.

**Genser v. Reef Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 5415450 (Fla. 4th DCA 2012).

Pre-judgment interest on attorneys’ fees should be added to the amount owed to create a total amount owed, and the prejudgment interest is calculated from date of entitlement (even if the amount is not determined until later).

**ABA Capital Markets Corp. v. Provincial De Reasegueros C.A.**, --- So.3d ----, 2012 WL 5416441 (Fla. 3d DCA 2012).

An order on *forum non conveniens* does not need to specifically set forth the *Kinney* factors if it is clear the factors were adequately considered during hearing.

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**November 17, 2012**  
**Manuel Farach**

**Manatee County v. 1187 Upper James of Florida, LLC**, --- So.3d ----, 2012 WL 5681620 (Fla. 2d DCA 2012).

A municipal ordinance, the terms of which a party earlier agreed to, should be enforced through a temporary injunction while the parties litigate the constitutionality of the ordinance. The municipality has a substantial chance of prevailing on the merits when the parties previously agreed to the terms of the ordinance, the private party received benefits under the agreement, and the private party's previous challenge to the ordinance was rejected.

**Romero v. State**, --- So.3d ----, 2012 WL 5680670 (Fla. 1st DCA 2012).

Failure to renew objection to a particular juror and to accept the jury waives the prior objection to the juror.

**Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.**, --- So.3d ----, 2012 WL 5517204 (Fla. 2012).

A writ of prohibition is not available to challenge a non-final order denying a motion to dismiss based on a claim of sovereign immunity where sovereign immunity has been partially waived, and Florida Rule of Appellate Procedure 9.130 is likewise not available as a remedy.

**Telesur v. DOT (SR), Inc.**, --- So.3d ----, 2012 WL 5499994 (Fla. 2d DCA 2012).

Plaintiff failed to properly allege jurisdiction against internet corporation where complaint did not allege that registrars were contacted in Florida, interference with business relationships occurred in Florida, domain names were being sold worldwide and not just in Florida, no server was located in Florida, and there was no allegation that tortious conduct arose from communications into Florida.

**Everhome Mortg. Co. v. Janssen**, --- So.3d ----, 2012 WL 5500336 (Fla. 2d DCA 2012).

A foreclosure judgment entered into without the mortgagee possessing the note at time suit is filed is voidable, not void.

**Espresso Disposition Corp. 1 v. Santana Sales & Marketing Group**, --- So.3d ----, 2012 WL 5500524 (Fla. 3d DCA 2012).

A mandatory forum selection clause ("The venue with respect to any action pertaining to this Agreement shall be the State of Illinois.") requires that suit be brought in the selected state, notwithstanding allegations that the particular forum clause arises out of a cutting and pasting error.



**Cardiosonx Labs., Inc. v. Aguadilla Med. Services, Inc.**, --- So.3d ----, 2012 WL 5503583 (Fla. 3d DCA 2012).

A trial court must rule on a pending motion to vacate a clerk's default before entering a final default judgment.

**In re New River Dry Dock, Inc.**, Slip Copy, 2012 WL 5675911 (11th Cir. 2012).

A professional hired by a debtor and approved by the bankruptcy court will be required to disgorge his professional fees if he failed to disclose interests adverse to the estate when retained, notwithstanding the confirmed Chapter 11 plan contains releases for professionals and notwithstanding the adverse interest did not cost the estate.

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**Manuel Farach**

**Sedra Family Ltd. Partnership v. 4750, LLC**, --- So.3d ----, 2012 WL 5869932 (Fla. 4th DCA 2012).

Tenants have no right to an equity of redemption, and may redeem a foreclosure judgment only through and under the mortgagor's right of redemption.

**Xavier v. Leviev Boymelgreen Marquis Developers, LLC**, --- So.3d ----, 2012 WL 5869998 (Fla. 3d DCA 2012).

A motion to dismiss based on statute of limitations may not be granted unless the record is fixed as to the date the cause of action accrued, and an action for fraud (notwithstanding a written contract four years earlier) accrues when the fraud is discovered.

**Castelo Developments, LLC v. Rawls**, --- So.3d ----, 2012 WL 5870007 (Fla. 3d DCA 2012).

A purchaser at foreclosure sale who deeds the foreclosed property to a third party while a motion to vacate foreclosure sale is pending lacks standing to participate in an appeal from the order granting the motion to vacate.

**Steinger, Iscoe & Greene, P.A. v. GEICO General Ins. Co.**, --- So.3d ----, 2012 WL 5870041 (Fla. 4th DCA 2012).

"Hybrid" expert witnesses, i.e., those experts that can render both fact and expert testimony, are protected to the same extent as "pure" expert witnesses from overly intrusive "bias discovery" under Florida Rule of Civil Procedure Rule 1.280(b)(5)(A)(iii). Bias discovery directed to a law firm, as opposed to a party or witness, is subject to a lower threshold of protection.

**Surgical Partners, LLC v. Choi**, --- So.3d ----, 2012 WL 5870043 (Fla. 4th DCA 2012).

No prevailing party attorneys' fees can be awarded under a contract that never came into existence due to a party's failure to meet a condition precedent.

**Star Funding Solutions, LLC v. Krondes**, --- So.3d ----, 2012 WL 5870047 (Fla. 4th DCA 2012).

*Res judicata* does not prevent a mortgagee from instituting a new foreclosure action based on an act of default different than the default alleged in a previously dismissed action.

**Daby v. Palm Beach Sheriff's Dept.**, --- So.3d ----, 2012 WL 5870080 (Fla. 4th DCA 2012).

Although there is no "magical number of amendments" a party is permitted, it is generally not an abuse of discretion to dismiss a complaint after three attempts at proper pleading.

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**Manuel Farach**

**Brennan v. Honsberger**, --- So.3d ----, 2012 WL 5969617 (Fla. 5th DCA 2012).

A party seeking to establish a lost will must present witnesses to both its execution and the contents of the will.

**Welch v. Dececco**, --- So.3d ----, 2012 WL 5969623 (Fla. 5th DCA 2012).

Stock registration is considered as one factor, but is not conclusive, in determining whether there was an inter vivos gift (i.e., donative intent, delivery, and acceptance) of stock.

**Landmark American Ins. Co. v. Santa Rosa Beach Development Corp. I**, --- So.3d - ---, 2012 WL 5971204 (Fla. 1st DCA 2012).

A pre-work signed contract by contract signed by a condominium association for repair work which contains the language “. . . Association, either for itself or in any representative capacity will not sue or seek any relief whatsoever against Developer or Contractor ... for the conditions which Developer undertakes herein to correct” releases parties for all work.

**Board of Supervisors of St. John's Water Control Dist. v. State**, --- So.3d ----, 2012 WL 5933012 (Fla. 4th DCA 2012).

Prevailing inverse condemnation claimant is entitled to attorneys' fees for its entire work on the case, including prior to the claim being filed.

**Stevens v. Peebles**, --- So.3d ----, 2012 WL 5933023 (Fla. 4th DCA 2012).

Lawsuit to allocate dock space must be dismissed when unit owners, who are indispensable parties, are joined after five year statute of limitations for injunctive relief.

**Vargas v. Deutsche Bank Nat. Trust Co.**, --- So.3d ----, 2012 WL 5933055 (Fla. 3d DCA 2012).

A mortgagee cannot be forced to enter into an oral loan modification agreement allegedly entered into after final judgment.

**Wolfe v. Culpepper Constructors, Inc.**, --- So.3d ----, 2012 WL 5935633 (Fla. 2d DCA 2012).

A joint offer made by two defendants to a single offeree is enforceable.

**Judy v. MSMC Venture, LLC**, --- So.3d ----, 2012 WL 5935651 (Fla. 2d DCA 2012).

A general notice of mortgage default is insufficient to give proper notice under the following notice of default provision:

Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument.... The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding[,] and sale of the Property.

**Fundamental Long Term Care Holdings, LLC v. Estate of Jackson**, --- So.3d ----, 2012 WL 5935678 (Fla. 2d DCA 2012).

A plaintiff does not need to file a new complaint and serve the complaint with original process in order to bring third party impleaded defendants under Fla. Stat. § 56.29 into an action.

**Mead v. HS76 Milton, LLC**, --- So.3d ----, 2012 WL 5907073 (Fla. 1st DCA 2012).

Under Fla. Stat. §§ 48.061(1) and 608.463(1) (a), service on a business manager of a LLC at the regular place of business of the LLC is good and sufficient service

**Nitro-Lift Technologies, L.L.C. v. Howard**, --- U.S. ---, 133 S.Ct. 500 (2012).

Attacks on a contract containing an arbitration clause, as opposed to attacks on the arbitration clause itself, are to be first resolved by the arbitrator.

**Iberiabank v. Beneva 41-I, LLC**, --- F.3d ----, 2012 WL 5974042 (11th Cir. 2012).

Termination clause in sublease providing that sub-lease was automatically terminated if the lease was transferred to another entity is not enforceable against the F.D.I.C. as receiver.

**In re Sundale, Ltd.**, Slip Copy, 2012 WL 5974125 (11th Cir. 2012).

A bankruptcy court has jurisdiction to enter judgment on state law counterclaims that are necessarily resolved in the process of ruling on a creditor's proof of claim.

**Chavez v. Mercantil Commercebank, N.A.**, --- F.3d ----, 2012 WL 5907151 (11th Cir. 2012).

A requirement that payment orders be delivered in person is not a "security provision" under Florida U.C.C. statute § 670.202 absolving a bank from liability for improper payment.

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**Cemex Const. Materials v. Ross**, --- So.3d ----, 2012 WL 6061081 (Fla. 5th DCA 2012).

Absent a stipulation and upon a contemporaneous objection, unsworn representations by counsel cannot serve as the basis for a trial court's factual findings.

**Kirrie v. Indian River County Code Enforcement Bd.**,--- So.3d ----, 2012 WL 6027711 (Fla. 4th DCA 2012).

Petitioners from decision of local administrative body are denied due process when circuit court, sitting in its appellate capacity, affirms decision of local administrative body without ruling on petition to supplement.

**Galleon Bay Corp. v. Board of County Com'rs of Monroe County**, --- So.3d ----, 2012 WL 6027768 (Fla. 3d DCA 2012).

A trial court cannot examine real property platted years before the real property in question in determining whether regulations created an inverse condemnation taking and deprived landowner of investment backed expectations. Use of the word "and" in ordinance with regard to land use requires both prongs of the ordinance be met before development be permitted.

**Joel M. Weissman, P.A. v. Abou-Sayed**, --- So.3d ----, 2012 WL 6027798 (Fla. 4th DCA 2012).

Attorney's efforts have to produce tangible benefits (excluding assets that are exempt from claims of creditors under law) in order for a charging lien to attach.

**Delmonico v. Crespo**, --- So.3d ----, 2012 WL 6027800 (Fla. 4th DCA 2012).  
Costs of consulting and jury selection experts are not taxable as court costs.

**Shuck v. Smalls**, --- So.3d ----, 2012 WL 6027820 (Fla. 4th DCA 2012).

As a result of the 1999 amendment to the statute, a case need not be frivolous from inception in order for Fla. Stat. § 57.105 fees be awarded.

**Campbell v. Chitty**, --- So.3d ----, 2012 WL 6031283 (Fla. 1st DCA 2012).

Trust instruments may predicate liability of trustee on negligence and exclude breach of fiduciary duty as a basis of liability.

**Arkansas Game and Fish Com'n v. U.S.**, --- U.S. ---, 133 S.Ct. 511 (2012).

Flooding of property, even if caused by government and even if temporary in nature, still constitutes a taking.

**Bahamas Sales Associate, LLC v. Byers**, --- F.3d ----, 2012 WL 6012972 (11th Cir. 2012).

Non-signatories to a contract containing a forum selection clause are not bound to the clause, either on the basis of waiver or equitable estoppels.

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**Bischoff v. Walker**, --- So.3d ----, 2012 WL 6213271 (Fla. 5th DCA 2012).

In determining real estate boundaries, a “monument” under Fla. Stat. § 472.005 (11) includes non-navigable waters. Accordingly, the following legal description indicates a grant to the centerline of the non-navigable waterway:

That part of the Northeast 1/4 of the Southeast 1/4 of Section 8, Township 22 South, Range 32 East, Orange County, Florida lying East of Canal and North of Lake, LESS the East 100 feet and LESS the North 30 feet thereof for road right-of-way.

**Conlen v. National Credit Union Admin. Bd.**, --- So.3d ----, 2012 WL 6216751 (Fla. 2d DCA 2012).

The National Credit Union Administration Board is entitled to strike affirmative defenses of fraud in the inducement and *ultra vires* under the *D’Oench* doctrine, 12 U.S.C. § 1823 (e).

**Spring Lake NC, LLC v. Figueroa**, --- So.3d ----, 2012 WL 6216764 (Fla. 2d DCA 2012).

An arbitration agreement that uses the phrase “nationally recognized arbitration association” is enforceable as the phrase is unambiguous. Moreover, the Florida Arbitration Code, under Fla. Stat. § 682.04, provides a method for appointing a substitute arbitrator if the method chosen fails for any reason.

**Anarkali Boutique, Inc. v. Ortiz**, --- So.3d ----, 2012 WL 6163181 (Fla. 4th DCA 2012).

An employee’s change in status from “employee” to “independent contractor” is not a termination of employment that triggers the running of a two-year restrictive covenant under an employment agreement.

**Ibis Lakes Homeowners Ass’n, Inc. v. Ibis Isle Homeowners**, --- So.3d ----, 2012 WL 6163184 (Fla. 4th DCA 2012).

*Ejusdem generis* applies to generally defined arbitration provisions that conflict with specifically defined provisions, but does not apply when general the general provisions do not conflict with the specific provisions.

**Rooney v. Wells Fargo Bank, N.A.**, --- So.3d ----, 2012 WL 6171942 (Fla. 4th DCA 2012).

The defense that a particular trust, i.e., the Wells Fargo as Trustee of WAMU Mortgage Pass-Through Certificates. Series 2005-PR4, does not exist because it does not appear on applicable websites is an affirmative defense of standing that must be raised prior to final judgment otherwise it is waived.

**In re Witcher**, --- F.3d ----, 2012 WL 6200619 (11th Cir. 2012).

A bankruptcy court may examine the debtor's ability to pay his or her debts in making the determination whether the debtor has engaged in abuse of bankruptcy under 11 U.S.C. § 707 (b) (3) (B).

**Pantoja v. Edward Zengel & Son Exp., Inc.**, Slip Copy, 2012 WL 6117886 (11th Cir. 2012).

Unpaid contributions to an employee 401 (K) plan are not "plan assets" under ERISA.



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**U.S. Bank Nat. Ass'n v. Quadomain Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 6600349 (4th DCA 2012).

Pursuant to Fla. Stat. § 48.23 (1)(a)(d), all (including of record and unrecorded) claims regarding the subject property reflected in the *lis pendens* must be adjudicated in the initial action in which the *lis pendens* is filed. A non-party to the initial suit seeking to assert a claim against real property must do so in the action in which the *lis pendens* is filed by means on intervention, and a subsequent court is without jurisdiction to adjudicate claims not filed in the initial action.

**Advanced Chiropractic and Rehabilitation Center v. United Auto. Ins. Co.**, --- So.3d ----, 2012 WL 6600482 (Fla. 4th DCA 2012).

Florida Rule of Appellate Procedure 9.400 (b) applies to original appellate proceedings, and a request for appellate attorneys' fees must be included in the petition, response or reply in order to be considered timely.

**HSBC Bank USA, Nat. Ass'n v. Nixon**, --- So.3d ----, 2012 WL 6600927 (Fla. 4th DCA 2012).

A court, through administrative order, may amend the statutory framework for foreclosure sales under Fla. Stat. § 45.031, and may dispense with the need for publication and proof of publication being filed with the court prior to sale.

**Spikes v. OneWest Bank FSB**, --- So.3d ----, 2012 WL 6601217 (Fla. 4th DCA 2012).

Equitable subrogation and vendor's liens may be imposed on real property upon failure of a spouse to join in mortgage documents, notwithstanding there is no fraud by the mortgagor or mortgagor's spouse.

**Terzis v. Pompano Paint and Body Repair, Inc.**, --- So.3d ----, 2012 WL 6601316 (Fla. 4th DCA 2012).

A contract is outside the Statute of Frauds if it can possibly be performed within one year, and full performance takes a contract outside of the Statute of Frauds as well. Accordingly, a month-to-month indefinite duration storage contract is outside the Statute of Frauds if full payment is made each month.

**Southern Sky Air & Tours, LLC v. Arrow Energy, Inc.**, --- So.3d ----, 2012 WL 6601367 (Fla. 4th DCA 2012).

The use of the words "may be indebted to defendant" in a garnishee's answer indicates garnishee is uncertain whether it is or is not indebted to defendant, and does not waive any claims garnishee may have to the funds in question.

**Jasser v. Saadeh**, --- So.3d ----, 2012 WL 6601383 (Fla. 4th DCA 2012).

For *res judicata* purposes, “parties” encompasses parties in interest and not just the actual parties in separate actions.

**IndyMac Federal Bank FSB v. Hagan**, --- So.3d ----, 2012 WL 6602661 (Fla. 3d DCA 2012).

An objection to foreclosure sale under Fla. Stat. § 45.031 (5) must be directed to irregularities or improprieties during the foreclosure sale itself; an “objection to foreclosure sale” which merely re-argues alleged irregularities or improprieties during the litigation is a legal nullity which may be disregarded by the court when issuing a certificate of title.

**Courvoisier Courts, LLC v. Courvoisier Courts Condominium Ass'n, Inc.**, --- So.3d ----, 2012 WL 6602858 (Fla. 3d DCA 2012).

Reading these two declaration of condominium provisions in conjunction with each other demonstrates the developer maintains control of limited common elements until it has sold all units; it is not reasonable to interpret the provisions to mean developer maintains control until the first of either sale of all units or turnover of the development.

The two provisions are:

One or more parking spaces and/or storage spaces may be assigned to a Condominium Unit as a Limited Common Element. Such parking spaces and storage spaces shall initially be assigned by the Developer, and the Developer may receive compensation from a purchaser in connection with the assignment of a parking space and/or storage space to a Unit. Any parking spaces and storage spaces that have not been assigned by the time Developer has sold all Units owned by it will become common elements and become the property of the Association. The Association may promulgate rules and regulations regarding the transfer of parking spaces and storage spaces among Unit Owners.

and

Developer Activities: Until such time as the Developer completes and sells all of the Units in the Condominium, the Developer reserves the right to utilize various portions of the Common Elements or the uncompleted Units in connection with such construction and development of the Condominium.

**Ryan v. National Marine Mfrs. Ass'n**, --- So.3d ----, 2012 WL 6602861 (Fla. 3d DCA 2012).

A party who leases real property for a special event is entitled to the protections of Fla. Stat. § 768.075 (1) (Immunity from liability for injury to trespassers on real property).

**General Mechanical Corp. v. Williams**, --- So.3d ----, 2012 WL 6554560 (Fla. 1st DCA 2012).

A nominal offer of judgment of One Dollar (\$1.00) is enforceable if the undisputed record strongly indicates the defendant has no exposure (e.g., barring of a five year oral contract for failure to comply with the Statute of Frauds).

**Harris v. Liberty Community Management, Inc.**, --- F.3d ----, 2012 WL 6604518 (11th Cir. 2012).

A property management company's action of collecting unpaid community association assessments is exempt from the Fair Debt Collections Practices Act under 15 U.S.C. § 1692a(6)(F)(i) if collection of the debts is "incidental" to the company's *bona fide* fiduciary obligations to the association.

**Sovereign Military Hospitaller Order Of Saint John Of Jerusalem Of Rhodes And Of Malta v. The Florida Priory Of The Knights Hospitallers Of The Sovereign Order Of Saint John Of Jerusalem, Knights Of Malta, The Ecumenical Order**, --- F.3d ----, 2012 WL 6582565 (11th Cir. 2012).

Even though oath signer failed to disclose another's use of the mark, a party does not fraudulently obtain its trademarks based on misrepresentations in the declaration oath (such that would provide basis for canceling the registered marks under the Lanham Act) absent evidence that representative was aware that any other organization was using the marks for which the order sought federal protection, and knew or believed that those organizations had a right to use the mark.

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**Spencer Estates of Florida, LLC v. Havill**, --- So.3d ----, 2012 WL 6719463 (Fla. 5th DCA 2012).

The proper remedy for failure of a property appraiser to classify lands in future years in the same manner as ordered by the court for previous years is to file a new suit seeking re-classification and to seek Fla. Stat. § 57.105 fees; the remedy is not to seek contempt of the prior judgment.

**Rocka Fuerta Const. Inc. v. Southwick, Inc.**, --- So.3d ----, 2012 WL 6719470 (Fla. 5th DCA 2012).

Failure to advise a court of a prior unfulfilled settlement agreement is not the type of violation that constitutes fraud on the court warranting dismissal of a lawsuit; the settlement agreement (whether valid or not) is an affirmative defense to the lawsuit.

**Chase Home Loans, LLC v. Sosa**, --- So.3d ----, 2012 WL 6681986 (Fla. 3d DCA 2012).

Unsworn allegations do not support a Florida Rule of Civil Procedure 1.540 (b) motion, even if the allegations contend one mortgagor failed to inform family members of the foreclosure status by hiding notifications under the couch.

**Universal Music Venezuela, S.A. v. Montaner**, --- So.3d ----, 2012 WL 6681989 (Fla. 3d DCA 2012).

Unless a defendant controls or directs the activities of a separate (but affiliated) company, the separate company cannot be used as the basis for long arm jurisdiction.

**Vorbeck v. Betancourt**, --- So.3d ----, 2012 WL 6681995 (Fla. 3d DCA 2012).

A pure bill of discovery may not be used as a fishing expedition to see if causes of action exist, but may only be used only in the absence of a legal remedy and to identify defendants and theories of liability or to collect information to meet a condition precedent. A pure bill of discovery may not be used by a shareholder to collect information on corporate actions and payments.

**13 Parcels LLC v. Laquer**, --- So.3d ----, 2012 WL 6682009 (Fla. 3d DCA 2012).

A related lawsuit will not be sufficient to waive an arbitration requirement if the lawsuit is on a different topic than that covered in the arbitration.