

## Remedies for Real Property Disputes in Florida

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**by**

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## I. DEFAULTS UNDER PURCHASE AND SALE CONTRACTS

### A. Nature of Defaults.

A default under a contract for the sale and purchase of real estate in Florida must be material to be legally justified. If a material default occurs, the contract for sale, if enforceable under Florida law, generally governs the parties' rights and remedies. Although there can be numerous grounds to declare a default, they generally fall within two categories: monetary and non-monetary defaults.

#### 1. Monetary Defaults.

A monetary default is where a party, usually the buyer, fails to meet a financial obligation due the other party, usually the seller, under the contract for sale. Typically, this occurs when a buyer fails or refuses to pay a deposit or pay the final purchase price for the property. A seller can also cause a monetary default, although it is less common and depends on the terms of the contract for sale. For example, a contract for sale could provide for the seller to pay for agreed upon repairs or improvements to the property and to provide evidence of such payment before closing. The seller's failure to do so would arguably constitute a monetary default under the contract for sale. A monetary default is almost always considered material, although the timing of the default may or may not be material depending on whether the contract for sale provides that "time is of the essence."<sup>1</sup>

#### 2. Non-Monetary Defaults.

Non-monetary defaults under contracts for sale can be more problematic. For example, a seller could fail to disclose known, material, latent defects to the property prior to closing, such as termite infestation or roof leaks. A title search could also reveal a title defect which the seller is unwilling to cure, despite the terms of the contract requiring such a cure. The contract for sale could require the seller to actually perform repairs or improvements to the property, but the seller fails to do so prior to closing. The seller could fail to sufficiently maintain a minimum level of tenants before closing. The ways in which either party could cause a non-monetary default are only limited by the obligations set forth in the contract for sale and to the extent that the default is material. In general, a non-monetary default will be judicially enforced provided there is evidence that the non-defaulting party has been materially prejudiced.

### B. Notice of Default and Right to Cure.

Most contracts for sale require one party to give the other party notice of a material default and a reasonable opportunity to cure the default. Such notice is a

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<sup>1</sup>*Sun Bank of Miami v. Lester*, 404 So. 2d 141, 142 (Fla. 3d DCA 1981).

condition precedent to the non-defaulting party enforcing his or her rights under the contract for sale.

C. Waiver of Notice and Default.

By closing on any sale with knowledge of a default under the contract, the non-defaulting party may be deemed to have waived any right to enforce the default, unless such rights are expressly reserved in a writing signed by all parties. However, many contracts for sale include “anti-waiver” provisions to prevent the assertion of a continuing waiver. The following is one example of such a provision:

Either party’s forbearance or waiver of any breach or violation of this contract shall not be construed as a continuing waiver or consent to any subsequent breach or violation and shall not bar any party’s right to demand strict compliance with that provision or any other provision of this agreement. No course of dealing between the seller and the buyer shall constitute a waiver of any of the seller’s rights or any of the buyer’s obligations as due hereunder.

Notwithstanding a similar provision, a party’s conduct of accepting a cure of a default could still be deemed a waiver of the default and similar types of future defaults. For example, the seller may accept a deposit that is untimely made under the contract. Even though the contract for sale may provide that time is of the essence for all obligations, the seller may have thereby waived this requirement to refuse a future untimely deposit. For a court to make that determination, it would have to conclude that the default from the first untimely deposit was waived, along with the anti-waiver provision itself.

Florida’s parol evidence rule may provide some protection against a party to a contract alleging that its terms were modified or waived by an oral agreement. The rule is that, if the terms of a contract are unambiguous and the contract is a complete agreement, those terms are not subject to modification, variance or contradiction by parol (oral) evidence.<sup>2</sup> If the contract for sale is ambiguous as to the parties’ intent on any matter, parol evidence will be admissible on the issue.<sup>3</sup> “The parol evidence rule serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, subtract from it, or affect its

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<sup>2</sup>See *Titusville Assocs., Ltd. v. Barnett Banks Trust Co.*, 591 So. 2d 609, 611 (Fla. 1991); see also *Co & Co Enter., Inc. v. Robertson*, 761 So. 2d 1179, 1179 (Fla. 4th DCA 2000); *Newbern v. Am. Plasticraft, Inc.*, 721 So. 2d 351, 352 (Fla. 2d DCA 1998); *Polk v. Crittenden*, 537 So. 2d 156, 159 (Fla. 5th DCA 1989); *Rodriguez v. Tombrink Enter., Inc.*, 870 So. 2d 117, 119 n. 2 (Fla. 2d DCA 2003).

<sup>3</sup>See *3679 Waters Ave. Corp. v. Water St. Ovens, Ltd.*, 779 So. 2d 349, 351 (Fla. 2d DCA 2000).

construction.”<sup>4</sup> Since the rule only applies if the parties’ agreement is unambiguous and complete, it is important that the contract is clear in its terms and expressly states that it is “the entire agreement between the seller and the buyer and all other oral or written understandings and agreements are merged into the contract and are deemed void.”

D. Excuse of performance.

Florida law excuses performance of a contract, if performance is either impossible or the contract purpose has become commercially frustrated.<sup>5</sup> However, the performance must be more than difficult or burdensome.<sup>6</sup> The defense of impossibility of performance refers to the occurrence of an event that is beyond the parties’ control which, given the purpose for which the contract was made, renders one side’s performance to be impossible.<sup>7</sup> Supervening impossibility of performance based upon an event which occurs after inception of a contract is **not** an excuse for non-performance of a contract.<sup>8</sup> Likewise, an unexpected impediment to the performance of a contract will not relieve a party from his contractual obligations, unless his performance is rendered impossible by an “act of God.”<sup>9</sup> Such an “act of God” must be so extraordinary and unprecedented that human foresight could not anticipate or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence, and care.<sup>10</sup>

Further, a party’s performance will not be excused if the other party has fully performed or if the impossibility or frustration of purpose was foreseeable at the time the contract was formed.<sup>11</sup> Even an “act of God” will not excuse non-performance under a contract where one party has substantially or fully performed under the contract.<sup>12</sup>

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<sup>4</sup>*Crittenden*, 537 So. 2d at 159 (quoting *Sears v. James Talcott, Inc.*, 174 So. 2d 776, 778 (Fla. 2d DCA 1965)).

<sup>5</sup>*Home Design Ctr.-Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 769-70 (Fla. 2d DCA 1990); see also *Florida Dep’t of Fin. Servs. v. Freeman*, 921 So. 2d 598, 608 (Fla. 2006) (Cantero, J., concurring).

<sup>6</sup>*Home Design Ctr.-Joint Venture*, 563 So. 2d at 769-70.

<sup>7</sup>*Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965).

<sup>8</sup>*Metro. Dade County v. Babcock Co.*, 287 So. 2d 139, 142 n.1 (Fla. 3d DCA 1973).

<sup>9</sup>*Enid Corp. v. Mills*, 101 So. 2d 906, 908-09 (Fla. 3d DCA 1958).

<sup>10</sup>*Seaboard Airline Ry. Co. v. Mullin*, 70 So. 467 (Fla. 1915); see also *Fla. Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944); *Norris v. Savannah, F&W Ry. Co.*, 1 So. 475, 478 (Fla. 1887) (stating that an extraordinary flood is an act of God).

<sup>11</sup>*Home Design Ctr.-Joint Venture*, 563 So. 2d at 769; see also *Valencia Ctr., Inc. v. Publix Super Mkts., Inc.*, 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985); *Moon v. Wilson*, 130 So. 25, 27 (Fla. 1930).

<sup>12</sup>*Moon*, 130 So. at 27.

## II. SELLER'S REMEDIES

Should the buyer breach a material term of a contract for sale, the seller has several alternative remedies.<sup>13</sup> The seller may choose to retain the property and sue for breach of contract or the seller may elect to sue in equity for specific performance.<sup>14</sup> In other words, the seller may sue for actual damages caused by a default, or request a court, under limited circumstances, to order specific performance and require the buyer to complete the sale.<sup>15</sup> As a practical matter, however, courts generally do not grant specific performance against a buyer who refuses to complete any sale in the absence of evidence that the buyer has the financial ability to close.

### A. Compensatory, Incidental and Consequential Damages.

If the seller chooses to retain the property and sue the buyer for damages, the proper measure of actual damages is the difference between the agreed purchase price in the contract and the fair value of the property at the time of the breach, less any money received by the seller under the contract for sale.<sup>16</sup> Unless expressly precluded by the contract for sale, the seller may also recover such incidental and consequential damages that were reasonably contemplated by the parties at the time the contract was executed and which directly and proximately result from the buyer's default.<sup>17</sup> A seller's incidental and consequential damages may include title search expenses, closing fees or broker's fees which would not have otherwise been paid, but for the buyer's default.

### B. Liquidated Damages.

Most contracts for sale provide that the seller may retain, as liquidated damages, all deposits made by the buyer in the event of a material breach. The amount of liquidated damages, however, must be reasonably related to: (i) the actual damages incurred by the seller; (ii) other facts and circumstances known to the parties as of the date the contract was signed; and (iii) with due regard to future expectations. The sum for liquidated damages cannot be disproportionate to any compensatory damages that may have been reasonably expected to result from a breach at the time the contract was executed.<sup>18</sup> Further, the liquidated damages may not be a penalty, otherwise the

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<sup>13</sup>*Clements v. Leonard*, 70 So. 2d 840, 842 (Fla. 1954); see also *Miller v. Rolfe*, 97 So. 2d 132, 134 (Fla. 1st DCA 1957).

<sup>14</sup>*Miller*, 97 So. 2d at 134.

<sup>15</sup>*Clements*, 70 So. 2d at 842; see also *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So. 2d 1201, 1203 (Fla. 5th DCA 1982).

<sup>16</sup>*Buschman v. Clark*, 583 So. 2d 799, 800 (Fla. 1st DCA 1991); see also *Frank Silvestri, Inc.*, 418 So. 2d at 1203.

<sup>17</sup>*Buschman*, 583 So. 2d at 800.

<sup>18</sup>See *Valenti v. Coral Reef Shopping Ctr., Inc.*, 316 So. 2d 589, 592 (Fla. 3d DCA 1975); see also *Hooper v. Breneman*, 417 So. 2d 315, 317 (Fla. 5th DCA 1982).

contract provision will not be enforced.<sup>19</sup> The enforcement of a liquidated damages clause may also be called into question if the seller has the express contractual option to recover actual compensatory damages in excess of the amount of liquidated damages.<sup>20</sup>

C. Specific Performance.

The obligations for performance under the contract for sale must be clear, definite and certain for a court to order specific performance in the event the buyer fails or refuses to close.<sup>21</sup> The seller must also be ready, willing and able to complete the sale in accordance with the contract terms.<sup>22</sup> Ultimately, the court has discretion whether to grant specific performance, even where all other elements of the claim are proven.<sup>23</sup>

If an adequate remedy at law exists, it is error for the court to grant specific performance.<sup>24</sup> Whether a monetary judgment is collectible is not to be considered by the court in determining whether the movant has an adequate legal remedy.<sup>25</sup>

D. Rescission.

A seller seeking rescission of a contract for sale must be able to return the buyer to the *status quo* prior to the execution of the contract for sale. To do so, the seller must return to the buyer all amounts paid to the seller or paid into escrow. However, the seller may deduct any financial damage sustained, along with any amount of

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<sup>19</sup> *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972); see also *Berndt v. Bieberstein*, 465 So. 2d 1264, 1265 (Fla. 2d DCA 1985).

<sup>20</sup> See *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991); see also *Crosby Forrest Prods., Inc. v. Byers*, 623 So. 2d 565, 568 (Fla. 5th DCA 1993); *Ropiza v. Reyes*, 583 So. 2d 400, 401 (Fla. 3d DCA 1991); *Hackett v. J.R.L. Dev., Inc.*, 566 So. 2d 601, 603 (Fla. 2d DCA 1990); *Haisfield v. Fleming, Haile & Shaw, P.A.*, 819 So. 2d 182, 186 (Fla. 4th DCA 2002).

<sup>21</sup> *Our Savior Lutheran Church v. Tom Jones Enter., Inc.*, 421 So. 2d 738, 739 (Fla. 4th DCA 1982).

<sup>22</sup> *Bay Club, Inc. v. Brickell Bay Club, Inc.*, 293 So. 2d 137, 138 (Fla. 3d DCA 1974); see also *Muniz v. Crystal Lake Project, LLC*, 947 So. 2d 464, 469 (Fla. 3d DCA 2006).

<sup>23</sup> *Mann v. Thompson*, 100 So. 2d 634, 637 (Fla. 1st DCA 1958); see also *Campbell v. A.B. Taff & Sons, Inc.*, 519 So. 2d 1039, 1041 (Fla. 1st DCA 1988).

<sup>24</sup> *Vagabond Travel & Tours, Inc. v. Universal Inns of Am., Inc.*, 440 So. 2d 482, 483 (Fla. 2d DCA 1983); see also *Terex Trailer Corp. v. McIlwain*, 579 So. 2d 237, 241 (Fla. 1st DCA 1991).

<sup>25</sup> *Employee Benefit Plans, Inc. v. Radice Corporate Ctr. I, Inc.*, 593 So. 2d 1125, 1127 (Fla. 4th DCA 1992).

financial benefit the buyer received if he or she was in possession of the real property prior to the default.<sup>26</sup>

E. Reformation.

A court may equitably reform an executed agreement to effect the intent of an agreement previously entered into by the parties, but which by mistake of the draftsman, does not fulfill the parties' mutual intent. In short, if a written instrument fails to express the mutual intent of the parties, a court in equity may reform the instrument, although the failure may have resulted from a mutual mistake as to the legal meaning and operation of the terms used in the writing. Reformation will not be permitted if only one party is mistaken as to the legal meaning, scope and effect of the agreement he or she has signed.<sup>27</sup> Also, the statute of frauds is not a bar to reformation of a land contract.<sup>28</sup>

### III. BUYER'S REMEDIES

Where a seller wrongfully fails or refuses to perform under a contract for sale or to convey the quality of title agreed to be conveyed to the buyer, the buyer has several legal and equitable remedies against the seller.<sup>29</sup> One of those remedies is for the buyer, under certain circumstances, to bring an action for specific performance of the contract for sale. If the buyer is unsuccessful in an action for specific performance, the buyer may be precluded from bringing a subsequent suit for damages based upon the doctrine of *res judicata*.<sup>30</sup> For this reason, a buyer should bring a multiple count lawsuit for specific performance and, in the alternative, damages should the court decline to grant specific performance. Consideration should be given to any controlling contract provisions for liquidated damages or a limitation of liability.<sup>31</sup>

A. Specific Performance.

As with a seller requesting specific performance, a buyer may only seek specific performance if the obligations for performance under the contract for sale are clear,

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<sup>26</sup> See *Braman Dodge, Inc. v. Smith*, 515 So. 2d 1053, 1054-55 (Fla. 3d DCA 1987); see also *Niesz v. Gehris*, 418 So. 2d 445, 447 (Fla. 5th DCA 1982).

<sup>27</sup> *Jacobs v. Parodi*, 39 So. 833, 836 (Fla. 1905); see also *Smith v. Royal Auto. Group, Inc.*, 675 So. 2d 144, 150 (Fla. 5th DCA 1996).

<sup>28</sup> *Miley v. Miley*, 402 So. 2d 557, 558 (Fla. 2d DCA 1981); see also *Genarro v. Leeper*, 313 So. 2d 70, 72 (Fla. 2d DCA 1975); *Royal Auto.*, 675 So. 2d at 153.

<sup>29</sup> See *John Ringling Estates, Inc. v. White*, 141 So. 884, 885 (Fla. 1932).

<sup>30</sup> *Greenstein v. Greenbrook, Ltd.*, 443 So. 2d 296, 297 (Fla. 3d DCA 1983); see also *Alvarez v. Nestor Salesco, Inc.*, 695 So. 2d 941, 942 (Fla. 4th DCA 1997).

<sup>31</sup> *Miller*, 97 So. 2d at 134.

definite and certain.<sup>32</sup> The buyer must also be ready, willing and able to complete the sale.<sup>33</sup> Again, the court has discretion whether to grant specific performance even where all other elements of the claim are proven.<sup>34</sup> If the buyer has an adequate remedy at law, the court may not grant specific performance.<sup>35</sup>

B. Notice of Lis Pendens.

If a buyer desires to pursue specific performance of a contract for sale, the buyer needs to consider recording a notice of lis pendens against the property to prevent the seller from transferring title to a subsequent buyer pending the outcome of the lawsuit. Florida's lis pendens statute governs when that can be done, which states in part:

When the pending pleading does not show that the action is **founded on** a duly recorded instrument or on a lien claimed under part I of chapter 713 or when the action no longer affects the subject property, the court **shall** control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions.<sup>36</sup>

In order for a notice of lis pendens to be filed and recorded by any party without first posting a bond, the lawsuit must be “founded on” a duly recorded instrument or upon a lien claimed under part I of Chapter 713, *Florida Statutes*. If the action is “founded on” an unrecorded document, such as a contract for sale, the proponent of the lis pendens should consider first obtaining leave of court before filing and recording the lis pendens. The court must then determine whether to require the posting of a bond to secure the opposing parties’ damages, interest thereon, and attorneys’ fees and costs that may be incurred to dissolve the lis pendens.<sup>37</sup> For any lawsuit to be “founded” upon a duly recorded instrument, the primary rights asserted by the proponent of the lis pendens must have “arose from the recorded instrument.”<sup>38</sup>

The Florida Supreme Court has addressed whether it is mandatory under Florida Statute §48.23(3) for a trial court to require a lis pendens bond where the action is not based upon a recorded instrument or a construction lien.

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<sup>32</sup>*Our Savior Lutheran Church*, 421 So. 2d at 739.

<sup>33</sup>*Harrison v. Baker*, 402 So. 2d 1270, 1273 (Fla. 3d DCA 1981).

<sup>34</sup>*Mann*, 100 So. 2d at 637.

<sup>35</sup>*Vagabond Travel & Tours, Inc.*, 440 So. 2d at 483.

<sup>36</sup>*Fla. Stat.* § 48.23(3) (2011) (emphasis added).

<sup>37</sup>*See Avalon Assocs. of Del., Ltd. v. Avalon Park Assocs., Inc.*, 760 So. 2d 1132, 1134 (Fla. 5th DCA 2000); *see also Suarez v. KMD Constr., Inc.*, 965 So. 2d 184, 187-88 (Fla. 5th DCA 2007).

<sup>38</sup>*Avalon Assocs. Of Del., Ltd.*, 760 So. 2d at 1134-35; *see also Feinstein v. Dolene*, 455 So. 2d 1126, 1127 (Fla. 4th DCA 1984); *Hough v. Bailey*, 421 So. 2d 708, 708 (Fla. 1st DCA 1982).



[I]t is within the trial court's discretion to determine whether to require the lis pendens proponent to post a bond when the property-holder defendant can show that damages will likely result to that defendant in the event the notice of lis pendens is unjustified.<sup>39</sup>

The Florida Supreme Court stated that the amount of the bond is also within the discretion of the trial court, but should bear a reasonable relationship to the amount of damages the seller proves are likely to result if the lis pendens is unjustified.<sup>40</sup>

In addition, the lis pendens may be dissolved where the buyer does not establish a "fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit."<sup>41</sup> A fully executed contract for sale establishes a fair nexus between a buyer's claim for specific performance and ownership of the real property for purposes of defeating a seller's motion to dissolve a lis pendens. This is because any order dissolving the notice of lis pendens could jeopardize the rights of subsequent buyers or lienors and could also jeopardize the buyer's unrecorded claim against the property, should the buyer prevail in his action for specific performance.<sup>42</sup> It has been held that it would be error for a trial court to not require the posting of a bond to maintain a lis pendens for an equitable lien claim where the lawsuit is not founded upon a duly recorded instrument.<sup>43</sup>

### C. Equitable Liens.

Equitable liens arise from two sources: (a) a written contract which shows an intention to charge some particular property with a debt or obligation, and (b) when declared by a court of equity out of general considerations of right and justice. . . .<sup>44</sup>

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<sup>39</sup> *Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc.*, 675 So. 2d 915, 916 (Fla. 1996); see also *Nickerson v. Watermark Marina of Palm City, LLC*, 978 So. 2d 187, 189 (Fla. 4th DCA 2008).

<sup>40</sup> *Med. Facilities Dev., Inc.*, 675 So. 2d at 918 n. 2.

<sup>41</sup> *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993).

<sup>42</sup> *Christian v. Sanderhoff*, 731 So. 2d 804, 805 (Fla. 4th DCA 1999); see also *Von Mitschke-Collande v. Kramer*, 869 So. 2d 1246, 1249-50 (Fla. 3d DCA 2004).

<sup>43</sup> See *Baghaffar v. Story*, 515 So. 2d 1373, 1374 (Fla. 5th DCA 1987); see also *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479, 480-81 (Fla. 5th DCA 1984); *Roger Homes Corp. v. Persant Constr. Co.*, 637 So. 2d 5, 6 n.1 (Fla. 3d DCA 1994); *Porter Homes, Inc. v. Soda*, 540 So. 2d 195, 195 (Fla. 2d DCA 1989).

<sup>44</sup> *Carter v. Suggs*, 190 So. 2d 784, 787 (Fla. 1st DCA 1966) (citing *Tucker v. Prevatt Builders, Inc.*, 116 So. 2d 437, 439 (Fla. 1st DCA 1959)).

For example, a written contract containing an agreement for a property owner to grant a mortgage **at some time in the future** as security may create a right to an equitable lien.<sup>45</sup>

A buyer under an executory contract for sale who is not in default is entitled to rescind the contract and recover all purchase money paid with interest, along with other expenses incurred by reason of the seller's default. The buyer further has a claim to an equitable lien against the property to secure such damages.<sup>46</sup> If the buyer chooses to proceed with a specific performance claim, the fact that he or she may be entitled to record a notice of lis pendens has the same effect as creating an equitable lien on the property subject to the final determination of the claim for specific performance.

D. Compensatory, Incidental and Consequential Damages.

If the seller's default was in good faith and the property has not been sold, the buyer's measure of damages is the buyer's "out-of-pocket" damages, such as any money paid to the seller, interest on that sum and any other actual damages incurred as a result of the default.<sup>47</sup> If the default was in bad faith and the property has not yet been sold, the buyer is entitled to recover its "benefit of the bargain" damages, which are measured as the difference in the purchase price in the contract for sale and the fair market value of the property at the time of the breach.<sup>48</sup> Bad faith is determined by the intent of the seller and is deemed present where the seller knew or should have known that the seller could not perform under the contract for sale, or where the seller simply refuses to close on the sale without legal justification.<sup>49</sup>

Should a seller default under a contract by failing to close and *later sells* the property to another buyer, the initial buyer may pursue the seller for "benefit of the bargain" damages, measured by all monies paid to the seller, interest on that amount, special damages and any profit made by the seller on the subsequent sale.<sup>50</sup> The foregoing is the rule regardless of whether the seller's default was in good faith or bad faith.

In the event a seller defaults under the contract by failing to disclose a material, known, latent defect and the buyer closes on the sale, the buyer's damages are measured by the *lesser of*:

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<sup>45</sup>*Meyer v. Schwartz*, 391 So. 2d 310, 311 (Fla. 4th DCA 1980).

<sup>46</sup>*Sparks v. Charles Wayne Group*, 568 So. 2d 512, 515 (Fla. 5th DCA 1990) receded on other grounds by *Chiusolo v. Kennedy*, 589 So. 2d 420, 421 (Fla. 5th DCA 1991); limitation on other grounds recognized by *Chiusolo v. Kennedy*, 614 So. 2d 491, 492-93 (Fla. 1993).

<sup>47</sup>*Avellone v. Mehta*, 544 So. 2d 1122, 1123 (Fla. 3d DCA 1989).

<sup>48</sup>*Port Largo Club, Inc. v. Warren*, 476 So. 2d 1330, 1333 (Fla. 3d DCA 1985).

<sup>49</sup>*Wolofsky v. Behrman*, 454 So. 2d 614, 615-16 (Fla. 4th DCA 1984).

<sup>50</sup>*Coppola Enter., Inc. v. Alfone*, 531 So. 2d 334, 335 (Fla. 1988).

1. Diminution in fair value; or
2. The cost of repairing or restoring the property to its condition prior to the defect.<sup>51</sup>

Damages for the cost of restoration are limited to the value of the property in its original condition.<sup>52</sup> However, the restoration rule is not applicable where: (a) the cost of restoring the property exceeds the value of the property in its original condition; (b) the restoration would result in a depreciation in the value of the property; (c) the cost of restoration is more than the actual damage sustained by the buyer; or (d) where the restoration is impracticable.<sup>53</sup>

#### E. Rescission.

For a buyer to rescind a contract for sale, the buyer must reconvey the real property if the sale has already closed and return all benefits received from the sale. In return, the buyer is entitled to a refund of all purchase money paid to the seller and the rescission of any purchase money note and mortgage held by the seller or others who are not good faith purchasers for value, such as holders in due course.<sup>54</sup>

A buyer, who in good faith has made improvements to the property, is also entitled to receive the reasonable value of those improvements upon rescission of the contract for sale.<sup>55</sup> A trial court is not permitted to rescind a contract for sale and a deed where it is proven that rescission will not return the parties to their *status quo* prior to the sale, particularly where one party has made improvements to the property for which no compensation is or can be received.<sup>56</sup> This rule may not be applicable if the improvements were made by a party in possession, but after suit was instituted.<sup>57</sup>

#### F. Reformation.

Reformation is proper to equitably reform an executed agreement to effect the mutual intent of an agreement previously entered into by the parties, but which by mistake of the draftsman, does not fulfill the parties' mutual intent. However,

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<sup>51</sup>*Davey Compressor Co. v. City of Delray Beach*, 639 So. 2d 595, 596 (Fla. 1994); *Am. Equity Ins. Co. v. Van Ginhoven*, 788 So. 2d 388, 391 (Fla. 5th DCA 2001).

<sup>52</sup>*Davey Compressor Co.*, 639 So. 2d at 596.

<sup>53</sup>*Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1317 (N.D. Fla. 2001).

<sup>54</sup>*Niesz*, 418 So. 2d at 447-48.

<sup>55</sup>*Walker v. Galt*, 171 F.2d 613, 615 (5th Cir. 1948).

<sup>56</sup>*Royal v. Parado*, 462 So. 2d 849, 856 (Fla. 1st DCA 1985).

<sup>57</sup>*See Walker*, 171 F.2d at 615.

reformation will not be permitted if only one party is mistaken as to the legal meaning, scope and effect of the agreement he or she has signed.<sup>58</sup>

#### G. Injunctions.

A temporary injunction is an extraordinary remedy. The movant must prove all essential elements for a temporary injunction with competent, admissible evidence.<sup>59</sup> Those elements are as follows: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (4) the injunction is in the public interest.<sup>60</sup>

A prospective irreparable injury must be more than a remote possibility; it must be imminent and probable.<sup>61</sup> There must be a reasonable probability, not a bare possibility, that a real irreparable injury will occur.<sup>62</sup> If the irreparable injury is doubtful or contingent, injunctive relief may not be granted.<sup>63</sup>

Irreparable harm and the lack of an adequate remedy at law are not established where any potential loss can be adequately compensated by a monetary judgment.<sup>64</sup> The irreparable injury must be of a peculiar nature, so that monetary compensation will not be adequate.<sup>65</sup> Similarly, collectability of a monetary judgment is not to be considered by the court in determining whether the movant has an adequate legal remedy.<sup>66</sup>

### IV. MEDIATION

#### A. The Mediation Process

Mediation is a process whereby a neutral third person encourages and facilitates the resolution of a dispute between two or more parties in an

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<sup>58</sup> *Jacobs*, 39 So. at 837.

<sup>59</sup> *State Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173, 175 (Fla. 2d DCA 1995).

<sup>60</sup> *Richard v. Behavioral Healthcare Options, Inc.*, 647 So. 2d 976, 978 (Fla. 2d DCA 1994).

<sup>61</sup> *City of Coral Springs v. Florida Nat'l Prop., Inc.*, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976).

<sup>62</sup> *Miller v. MacGill*, 297 So. 2d 573, 575 (Fla. 1st DCA 1974); see also *A1A Mobile Home Park, Inc. v. Brevard County*, 246 So. 2d 126, 128 (Fla. 4th DCA 1971).

<sup>63</sup> *Sanstrom v. Garren*, 187 So. 2d 366, 367 (Fla. 3d DCA 1966); see also *First Nat'l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 424 (Fla. 2d DCA 1963).

<sup>64</sup> *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989).

<sup>65</sup> *First Nat'l Bank in St. Petersburg*, 156 So. 2d at 423.

<sup>66</sup> *Employee Benefit Plans, Inc.*, 593 So. 2d at 1127.

informal proceeding to help the parties reach a voluntary binding agreement.<sup>67</sup>

The mediator does not make any rulings or decisions for the parties.<sup>68</sup> The mediator may not give the parties any legal advice, but the mediator may discuss the possible outcomes of the lawsuit or arbitration if not settled, as well as the potential strengths and weaknesses of the parties' positions in the case.<sup>69</sup> The process is conducted in an informal non-adversarial manner. The objective of the mediation is to reach a mutually acceptable agreement.<sup>70</sup>

A circuit or county court is *required* to order the parties to a civil lawsuit to mediation if one party requests mediation and the lawsuit is for monetary damages, *provided* the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, unless:

- a. ***The action is a landlord and tenant dispute that does not include a claim for personal injury.***
- b. The action is filed for the purpose of collecting a debt.
- c. The action is a claim of medical malpractice.
- d. The action is governed by the Florida Small Claims Rules.
- e. The court determines that the action is proper for referral to non-binding arbitration.
- f. The parties have agreed to binding arbitration.
- g. The parties have agreed to an expedited trial.
- h. The parties have agreed to voluntary trial resolution.<sup>71</sup>

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<sup>67</sup> Fla. Stat. § 44.1011(2) (2011); Fla. R. Med. 10.210.

<sup>68</sup> Fla. R. Med. 10.310.

<sup>69</sup> Fla. R. Med. 10.370.

<sup>70</sup> Fla. R. Med. 10.410.

<sup>71</sup> Fla. Stat. § 44.102(2)(a) (2011).

B. Agreements to Mediate through AAA

If the parties wish to require mediation with the American Arbitration Association (“AAA”) for all future disputes relating to a contract **before** any arbitration or litigation can be commenced, the following mediation clause may be added to the contract:

If a dispute between the parties arises out of or relates to this contract, the breach thereof, or any performance or obligation due hereunder, and if the dispute cannot be settled through direct negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties wish to mediate an existing dispute, they may enter into the following agreement, independent of any contract:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Rules: (describe dispute).

C. Selection of the Mediator

The parties may agree on the appointment of any person to act as the mediator for any mediation conference. As long as the parties agree, the mediator does not need to be certified.<sup>72</sup> Depending on the level of “reality checking” the parties would like the mediator to undertake, the parties should consider the substantive experience of the mediator.

In the absence of the parties’ agreement, the court may only appoint a certified mediator to conduct a mediation conference.<sup>73</sup> The chief judge of each judicial circuit is required to maintain a list of certified mediators who have registered for appointment in that circuit.<sup>74</sup>

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<sup>72</sup> Fla. R. Civ. P. 1.720(f)(1)(B).

<sup>73</sup> Fla. R. Civ. P. 1.720(f).

<sup>74</sup> Fla. Stat. § 44.102(4) (2011).

D. Appearance at the Mediation Conference

Unless permitted by court order or the parties' written agreement, a party is deemed to appear at a mediation if the following persons are physically present:

- a. The party or the party's representative having full authority to settle *without* further consultation; and
- b. The party's counsel of record, if any; and
- c. A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, *without further consultation*.<sup>75</sup>

Thus, the mediator does not have the authority to excuse any attorney, party or insurance carrier representative from attending the mediation in person, unless the parties have agreed in writing.

Full authority to settle means that the person attending the mediation is the final decision maker with respect to all issues presented by the case and who has the legal ability to execute a binding settlement agreement.<sup>76</sup> As a result, it may be extremely difficult for most insurance carriers and large corporations to strictly comply with this rule. However, this rule does not require any party to actually enter in a settlement agreement.<sup>77</sup>

Appearance by a public entity under Chapter 286, *Florida Statutes*, only requires the party's representative to physically appear at mediation with full authority to *negotiate* on behalf of the entity and *recommend* settlement to the decision-making body of the entity.<sup>78</sup>

Unless otherwise agreed upon by the parties, each party must, 10 days prior to the mediation, file and serve a written notice identifying the persons who will be attending the mediation as a party representative or as an insurance carrier representative and confirm that those persons have full authority as required under the rule.<sup>79</sup>

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<sup>75</sup> *Fla. R. Civ. P.* 1.720(b).

<sup>76</sup> *Fla. R. Civ. P.* 1.720(c).

<sup>77</sup> *Id.*

<sup>78</sup> *Fla. R. Civ. P.* 1.720(d).

<sup>79</sup> *Fla. R. Civ. P.* 1.720(e).

If a party fails to appear at a “duly noticed mediation without good cause,” the court, upon motion, *shall* impose sanctions against the party failing to appear, including the mediator’s fees, attorney’s fees and costs. The failure to file a certification confirming the representative’s authority or the failure of the person identified in the certification to actually appear at the mediation creates a rebuttable presumption of the party’s failure to appear.<sup>80</sup>

E. Conduct of and Communications during the Mediation Conference

At all times, the mediator shall be in control of the mediation and the procedures to be followed in the mediation.<sup>81</sup> For the most part, the mediation conference is conducted in at least two stages.

- a. **Joint Session:** Initially, the mediator will conduct a joint session in which the mediator and then each attorney will give brief opening statements. Each party should be advised by their attorneys prior to the mediation that they will hear statements from the opposing attorney with which the party may disagree. Nevertheless, each attorney and his or her client, if they desire, are typically given the full opportunity to be heard without interruption. Each person attending the mediation is expected to act in a civil, respectful manner to all other persons present.
- b. **Private Caucus:** After the joint session, the mediator will separate the parties and their respective attorneys into private sessions or caucuses in which they may feel more free to candidly discuss other aspects of the dispute and how it may be resolved.

There are times when the mediator may not conduct a joint session, such as when emotions are at extreme levels and the parties are in a state of high conflict. These situations should be weighed against the need for the parties to have their opportunity to address each other directly or through counsel so that they will be able to move past their conflict towards resolution. A joint session is also a valuable time saving tool for the exchange of information directly between the parties, rather than the mediator shuttling the information between private caucuses.

Each party at mediation has the privilege to prevent any person present at the mediation from disclosing communications made during the

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<sup>80</sup> Fla. R. Civ. P. 1.720(f).

<sup>81</sup> Fla. R. Civ. P. 1.720(2)(d).



mediation.<sup>82</sup> However, Section 44.102(3), Florida Statutes, should not preclude evidence supporting a claim that a mediated settlement agreement contained a clerical error so as to lead the court to an unreasonable conclusion.<sup>83</sup>

Although attendance at any court ordered mediation is mandatory, participation in settlement negotiations is completely voluntary. It is a party's right to refuse to compromise or settle any claim and to have their day in court.<sup>84</sup>

“Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of *self-determination*.”<sup>85</sup>

Indeed, the mediation conference is an opportunity for the parties to control the outcome of the case and to fashion a resolution to the dispute which is certain and may encompass terms which an arbitrator or a court may not otherwise be able to award.

#### F. Mediation Impasse

There may be various reasons for impasse. A party may truly evaluate claims and defenses based upon significantly different criteria, making the potential settlement ranges too far apart to broach. In that instance, the parties may feel they would be better served having a third party, such as a judge, jury or arbitrator decide the dispute. It is important for the parties in such a case to fully understand the range of possible outcomes, along with the costs of going forward, including all legal fees, expert fees, deposition costs and other court costs.

Sometimes the parties are not able to reach a compromise because one or more parties are emotionally vested in their case or the events that led up to the dispute. In that instance, the emotional party often needs to feel they had the opportunity to tell their story, whether at the mediation or at a hearing. This need cannot be underestimated as a prerequisite for settlement, especially where an apology can be given.

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<sup>82</sup> Fla. Stat. § 44.102(3) (2011).

<sup>83</sup> *DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach*, 819 So. 2d 971 (Fla. 4th DCA 2002), quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); but see *Feldman v. Kritch*, 824 So. 2d 274, 276 (Fla. 4th DCA 2002) (no exception for “unilateral mistake”).

<sup>84</sup> Fla. R. Civ. P. 1.730(a).

<sup>85</sup> Fla. R. Med. 10.310(a) (emphasis added).

V. **ARBITRATION**

A. The Arbitration Process

As opposed to mediation, arbitration results in a binding or non-binding decision of the dispute. The arbitrator or panel of arbitrators consider the evidentiary presentations of the parties and then render(s) an award, which may then be confirmed by a court of competent jurisdiction.

B. Arbitration Agreements

The following is a sample clause for the arbitration of all future disputes between the parties before the AAA:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators shall be entered in any court having jurisdiction thereof.

Arbitration through the AAA for existing disputes may be accomplished by use of the following agreement, independent of any contract in question:

We, the undersigned parties, hereby agree to submit to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: *(describe the dispute)*.

We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrators, and that a judgment of any court having jurisdiction thereof shall be entered on the award.

To expedite matters, any arbitration clause can expressly adopt the summary procedures of Chapter 51, *Florida Statutes*, or customized expedited summary procedures set forth in AAA's rules or the clause itself. The arbitrators and the administrator of the proceeding are mandated to comply with those procedures, provided they are fundamentally fair to all parties.

The arbitration clause may provide for emergency interim relief by incorporating the AAA's optional rules for emergency measures of

protection or other applicable emergency rules, such as applicable Florida Rules of Civil Procedure.

In order for any party to avail itself of any statute of limitations defense, the agreement to arbitration must expressly provide for the application of the statute to any arbitration proceeding brought in connection with the agreement.<sup>86</sup>

Subject to due process considerations, arbitration clauses may expressly provide for:

- a. The number of arbitrators;
- b. The specific minimum qualifications for the arbitrators;
- c. The method of and responsibility for payment for the fees and costs associated with the arbitration;
- d. The locale for all hearings and the use of any discovery tools, including depositions under the Florida Rules of Civil Procedure;
- e. Any other item of concern to the parties.

A customized arbitration clause can be drafted with the foregoing in mind. In that regard, the following is a sample arbitration clause tailored for a real estate contract for purchase and sale of commercial property:

Except for an injunction or specific performance, any and all other claims, controversies and disputes between Seller and Buyer relating to or arising out of this agreement or the parties' performances due hereunder shall be resolved by binding arbitration administered by and in accordance with the national employment rules of the American Arbitration Association, and any court of competent jurisdiction shall enter final judgment on any such final arbitration award.

The final arbitration hearing shall be conducted in the county in which Seller's principal place of business is located no sooner than sixty (60) days and no later than one hundred twenty (120) days after any demand for arbitration is served upon the respondent for the proceeding. The arbitration proceeding shall be conducted by a panel of three neutral and impartial arbitrators. Said arbitrator panel shall be comprised of arbitrators who shall be members in good standing with the state bar

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<sup>86</sup>*Raymond James Fin. Servs., Inc., v. Phillips*, No. 2D10-2144, 2011 WL 5555691 (Fla. 2d DCA Nov. 16, 2011).

association for the state in which the final arbitration hearing shall be conducted with at least fifteen (15) years of substantial experience in real estate law.

The parties to the arbitration proceeding shall be permitted to take no more than three (3) depositions, not to exceed five (5) hours each, without good cause shown and leave of the arbitrators. The parties shall also be entitled to discover documents through the use of requests for production. No other forms of formal discovery shall be permitted by the arbitrators. All permissible discovery shall be governed by the applicable Federal Rules of Civil Procedure. The arbitrators shall be bound by and shall follow the choice of law provision set forth in this Agreement for the rendering of any final award. All defenses and claims which would otherwise be available to the parties in any court proceeding shall also be available in arbitration, including, without limitation, all applicable statutes of limitations.

Any final award shall reflect the reasoning for the award, but shall not be required to state findings of fact and conclusions of law. The arbitrators shall have the authority to award any and all relief which a court of competent jurisdiction could otherwise award. Seller shall be responsible to pay for all arbitration filing fees and arbitrator compensation. However, such fees and compensation may be awarded to Seller in the event it is determined to be the prevailing party in the arbitration proceeding.

The arbitrators and the parties shall maintain in the strictest confidence the arbitration proceeding, the final arbitration hearing, all papers filed therein and the substance of the underlying dispute for the arbitration proceeding, unless otherwise required to disclose same pursuant to applicable law.

While courts are mindful of the “liberal policy favoring arbitration agreements,” the Supreme Court has also made clear that arbitration is only appropriate “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum” allowing the statute to serve its purposes.<sup>87</sup>

The Supreme Court acknowledged that “the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal

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<sup>87</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

statutory rights in the arbitral forum.”<sup>88</sup> However, the Court noted that the “possibility” that the plaintiff would “be saddled with prohibitive costs is too speculative,” and “[t]o invalidate the agreement on that basis would undermine the ‘liberal federal policy favoring arbitration agreements.’”<sup>89</sup> The party seeking to avoid arbitration due to excessive costs “bears the burden of showing the likelihood of incurring such costs.”<sup>90</sup>

When considering the cost sharing language in an employment agreement, however, the case-by-case analysis offers little guidance in calculating a numerical figure that would be categorically shielded from attack. In *Morrison*, the former employee’s cost splitting rule in her arbitration agreement detailed her exposure to the greater of \$500 or 3% of her annual salary.<sup>91</sup> The court, applying a case-by-case analysis, concluded that this provision was unenforceable with respect to her claims.<sup>92</sup> The court supported its decision by emphasizing that an employee’s resources can be scarce, and a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances.<sup>93</sup>

Based upon the current state of the law, it appears virtually impossible to draft any arbitration clause providing for fee splitting for a consumer or employment dispute that is completely insulated from any challenge. Thus, providing for the non-consumer or employer to bear all filing fees, mediation fees, arbitration costs and arbitrator compensation is advisable until a safe harbor is established by binding case law.

### C. Commencement and Submission to Arbitration to AAA

A party to an existing dispute may commence an arbitration under the AAA’s rules by filing two copies of a demand for arbitration, signed by the party or its attorney with AAA’s regional office. (See [www.adr.org](http://www.adr.org) for various forms and rules). The demand must contain a statement of the nature of the dispute, the names and addresses of all parties, the amount of the claim, if known, the remedy sought, the hearing locale requested and the name and address of the respondent. The demand must also attach a copy of the arbitration clause in question.

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<sup>88</sup> *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>89</sup> *Id.* at 91.

<sup>90</sup> *Id.* at 92.

<sup>91</sup> *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 670.

Under AAA's Commercial Arbitration Rules, the respondent to the arbitration demand is not required (but is encouraged) to file an answer to the claims. If the respondent desires to assert a counterclaim, then it must comply with substantially all requirements as those for a demand for arbitration.

D. Enforceability of the Arbitration Agreement

After the plaintiff sued the defendant for breach of contract, the parties agreed to arbitrate "with respect to the allegations in the complaint." When the plaintiff amended his claim during arbitration, the defendant moved to terminate the arbitration proceedings. The arbitration panel denied the motion, and as a result, the defendant moved to terminate in circuit court. The trial judge granted the motion, but the appellate court reversed because the amended claim did not exceed the scope of the agreement to arbitrate as it was based upon the facts alleged in the original complaint.<sup>94</sup>

Under Florida law, to prevail on a defense that an arbitration agreement is unconscionable and therefore unenforceable, a party must establish that the agreement is both procedurally and substantively unconscionable.<sup>95</sup>

Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms."<sup>96</sup> A contract is substantively unconscionable if its terms are so "outrageously unfair" as to "shock the judicial conscience."<sup>97</sup>

Where an arbitration clause is valid and not interdependent with the remaining clauses of an agreement, any offending or unlawful provision contained therein could be severed without affecting the intent of the parties or the agreement to arbitrate.<sup>98</sup>

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<sup>94</sup> *Bates v. The Betty & Ross Company*, 46 So. 3d 615 (Fla. 3d DCA 2010).

<sup>95</sup> See *Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989); see also *Murphy v. Courtesy Ford, LLC*, 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006); *Voicestream Wireless Corp. v. U.S. Commc'ns., Inc.*, 912 So. 2d 34, 39 (Fla. 4th DCA 2005).

<sup>96</sup> *Powertel Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999).

<sup>97</sup> *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 285 (Fla. 1st DCA 2003).

<sup>98</sup> *Healthcomp Evaluation Serv. Corp. v. O'Donnell*, 817 So. 2d 1095 (Fla. 2d DCA 2002).

If a contract containing an arbitration clause is challenged as void *ab initio*, it is submitted to arbitration, unless the challenged is to the specific arbitration clause.<sup>99</sup>

An action to rescind a contract in its entirety may be subject to arbitration where the contract contained an arbitration clause and the validity of that clause was not specifically attacked, as opposed to the whole contract.<sup>100</sup>

E. Arbitration with non-signatories to agreement.

A party may be bound to arbitrate a dispute even though the party did not physically sign a written contract to arbitrate.<sup>101</sup>

On the other hand, courts have refused to require non-signatories to arbitrate in various circumstances.<sup>102</sup>

A party who personally guaranteed the obligations of another under a written agreement containing an arbitration clause was bound as a matter of law to arbitrate the dispute regarding the guarantee.<sup>103</sup>

Where a party was appointed as the agent for a principal who was bound to a contract containing an arbitration clause, the agent must arbitrate all disputes relating to the contract.<sup>104</sup>

Arbitration provisions are binding on third-party beneficiaries of a contract that contains an arbitration provision, provided that the contract clearly expresses an intent to primarily and directly benefit the third party.<sup>105</sup>

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<sup>99</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (U.S. Feb. 21, 2006).

<sup>100</sup> *Sanchez v. Criden*, 899 So.2d 326 (Fla. 3d DCA 2005).

<sup>101</sup> See, e.g., *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (agency required non-signatory to arbitrate); see also *Qubty v. Nagda*, 817 So. 2d 952 (Fla. 5th DCA 2002) (investors suing stockbrokers compelled to arbitrate under third-party beneficiary theory); *Employers Ins. of Wausau v. Bright Metal Spec., Inc.*, 251 F.3d 1316 (11th Cir. 2001); *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089 (Fla. 4th DCA 2001); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993).

<sup>102</sup> See, e.g., *Benasra v. Marciano*, 112 Cal. Rptr. 2d 358 (2001) (president of corporation who signed contract in corporate capacity could not be compelled to arbitrate individually); see also *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (corporate parent not required to arbitrate on claim relating to subsidiary's arbitration agreement).

<sup>103</sup> *Berti v. Cedars Healthcare Group, Ltd.*, 812 So. 2d 580 (Fla. 3d DCA 2002).

<sup>104</sup> *Koehli v. BIP Int'l*, 870 So. 2d 940 (Fla. 1st DCA 2004).

<sup>105</sup> *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259 (Fla. 5th DCA 2002).

In the absence of a signature, a party may be bound by an arbitration clause contained in a contract if the party's conduct indicates that the party agreed to be bound by the contract in question.<sup>106</sup><sup>107</sup> One's intention to be bound by a contract containing an arbitration clause may be evidenced by one's performance under other provisions of the contract.<sup>108</sup>

Even if not joined in the arbitration, a surety on a construction bond can be bound by the results of an arbitration.<sup>109</sup>

#### F. Waiver of Right to Arbitrate

The right to arbitration under an agreement may be waived by taking actions inconsistent with the arbitration provision. The court (not the arbitrator) determines whether a party to an arbitration agreement has waived its contractual right to arbitration by its subsequent conduct.<sup>110</sup>

Where one party actively participates in litigation which is the subject of an arbitration agreement before moving to compel arbitration, that party is deemed to have waived any right to compel arbitration.<sup>111</sup>

Such a waiver will be found where the party files an answer or affirmative defenses, takes discovery or files any claim for affirmative relief in a lawsuit, including a counterclaim before moving to compel arbitration.<sup>112</sup>

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<sup>106</sup> *Thomson-CSF, S.A.*, 64 F.3d at 776.

<sup>107</sup> This rule of law appears to be an outgrowth of the general principle that one may be deemed to have accepted a written contract, which otherwise requires acceptance by a signature, by performing pursuant to its terms. See, e.g., *Bryan, Keefe & Co. v. Howell*, 109 So. 593 (Fla. 1926).

<sup>108</sup> *Chanchani v. Salomon/Smith Barney, Inc.*, No. 99 CIV 9219 RCC, 2001 WL 204214, at \*3 (S.D. N.Y. March 1, 2001); see also *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, No. 99 C 4704, 2001 WL 40900, at \*4 (N.D. Ill. Jan. 11, 2001) (party's attempts to comply with other terms of the contract bound the party by the arbitration provision in the same contract); *In the Matter of the Arbitration Between John Thallon & Co., Inc. and M&N Meat Co.*, 396 F.Supp. 1239 (E.D. N.Y. 1975) (party's participation in performance under other provisions of a contract evinced such party's intention to be bound by the contract's arbitration provision).

<sup>109</sup> *Fewox v. McMerit Constr. Co.*, 556 So. 2d 419, 425 (Fla. 2d DCA 1989).

<sup>110</sup> *Florida Educ. Ass'n/United v. Sachs*, 650 So. 2d 29 (Fla. 1995).

<sup>111</sup> *Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658 (Fla. 3d DCA 1982), *rev. den.*, 417 So. 2d 328 (Fla. 1981); see also *Ojus Indus., Inc. v. Mann*, 221 So. 2d 780 (Fla. 3d DCA 1969).

<sup>112</sup> *Coral 97 Assocs., Ltd. v. Chino Elec., Inc.*, 501 So. 2d 69 (Fla. 3d DCA 1987); see also *Winter v. Arvida Corp.*, 404 So. 2d 829 (Fla. 3d DCA 1981); but see *Avid Eng'g, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1 (Fla. 5th DCA 2001) (motion for arbitration and counterclaim at same time does not waive right).



G. Selection of Arbitrators for Non-AAA Arbitrations

If an agreement for arbitration provides a method for the appointment of arbitrators, that method must be followed as long as it is fundamentally fair.<sup>113</sup>

If there is no agreement regarding the appointment of the arbitrators or if the agreement fails, the Court, on application of a party, shall appoint one or a panel of three arbitrators.<sup>114</sup> Each of the arbitrators must either: (a) be a member of The Florida Bar, with the chief arbitrator being a member of The Florida Bar for at least five years; or (b) serve on the arbitration panel with the written consent of all parties.

H. AAA Arbitrator Selection Process

Following the demand for arbitration, the AAA typically sends each party a specially prepared list of proposed arbitrators to resolve the controversy. In compiling the list, the AAA draws from the applicable panel of arbitrators, considers geographical factors and is otherwise guided by the nature of the dispute. Biographical and fee information for each arbitrator is also enclosed with the list.

The parties are allowed a specified time period to study the list, strike names for good cause and then rank the remaining names in the order of preference.<sup>115</sup> The AAA administrator uses the parties' returned lists to select the top arbitrators based upon the parties' rankings. Additional information about the proposed arbitrators is available through the administrator.

If there are not a sufficient number of names from which to select the arbitration panel or individual arbitrator, the AAA may send out a second list or may make appointments without submitting additional lists. However, no arbitrator whose name was properly stricken by either party may be appointed in that event.

I. Arbitrators' Jurisdiction and Scope of Submission

An arbitrator exceeds his or her power when he or she goes beyond the authority granted by the parties through the operative document and

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<sup>113</sup>*Fla. Stat.* § 682.04 (2011).

<sup>114</sup>*Fla. Stat.* § 682.04 (2011); *Fla. R. Civ. P.* 1.810(a).

<sup>115</sup>While no authority can be found, the author suggests that good cause should be limited to similar grounds for disqualifying an arbitrator under the AAA's rules, as well as grounds for striking a prospective juror for cause.

decides an issue not within the scope of the arbitration clause or not pertinent to the resolution of the issues submitted to arbitration.<sup>116</sup>

J. Discovery in Arbitration

The parties may provide in the arbitration agreement for certain forms of discovery, either greater or less than those found in the Court's rules of discovery. The parties may also stipulate to discovery after the arbitration action is filed.

An arbitrator may permit a deposition to be taken for use at a hearing when a witness cannot be subpoenaed or is unable to attend the hearing. In absence of the parties' agreement, their incorporation of specific rules, such as the AAA's rules, or the demonstrated unavailability of the witness, there is no authority for the arbitrator to permit parties to take depositions.<sup>117</sup>

K. Final Arbitration Hearing

The hallmark of the arbitration hearing is its informality. One purpose of an agreement to arbitrate is to avoid the formal requisites of a court proceeding. Each party must be given an equal and fair opportunity to be heard and present evidence.

While the order of the proceedings is at the arbitrator's discretion, the hearing generally begins by each party giving an opening statement to clarify the issues. The complaining party presents evidence first, followed by the defending party's presentation of evidence. Each party also has the opportunity to cross-examine opposing witnesses.<sup>118</sup>

The technical rules of evidence do not apply to arbitration hearings. Hearsay evidence is admissible, leading questions may be asked, the best evidence rule is irrelevant and witnesses need not be qualified as "experts."<sup>119</sup>

L. The Arbitration Award

At a minimum, an arbitration award must be:

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<sup>116</sup>*Chandra v. Bradstreet*, 727 So. 2d 372 (Fla. 5th DCA 1999), *rev. den.*, 741 So. 2d 1134 (Fla. 1999); *see also Applewhite v. Sheen Fin. Res., Inc.*, 608 So. 2d 80 (Fla. 4th DCA 1992).

<sup>117</sup>*Fla. Stat.* § 682.08 (2011).

<sup>118</sup>*Fla. Stat.* § 682.06(2) (2011).

<sup>119</sup>*Fla. R. Civ. P.* 1.820(c).

- a. In writing;
- b. Signed by the arbitrators joining in the award; and
- c. Delivered by the arbitrator to each party, personally or by registered or certified mail (unless otherwise agreed, such as set forth in the AAA's Commercial Arbitration Rules).<sup>120</sup>

The arbitrators are not required to make specific findings of fact and conclusions of law, unless the arbitration agreement expressly requires them to do so or a Court remands the matter to the arbitrators for express findings to be made before any confirmation of the award will be entered.<sup>121</sup>

Where an arbitration agreement does not expressly grant the arbitrators the jurisdiction to determine entitlement to and assessment of attorney's fees to the prevailing party, they have no jurisdiction to do so and this is a matter to be determined by the court in any confirmation proceeding.<sup>122</sup>

#### M. Post-Arbitration Proceedings

Modification. Pursuant to *Florida Statute* § 682.14, a binding arbitration award may be modified upon application made within 90 days after delivery of a copy of the award to the applicant, where:

- a. There is an evident miscalculation of figures in the award;
- b. There is an evident mistake in the description of any property referred to in the award; or
- c. The award was based upon a matter not submitted to the arbitrators and the award may be corrected without affecting the merits of the decision upon the issues submitted.

Vacation. A binding arbitration award may be vacated where an application to the court is made within 90 days after the delivery of a copy of the award to the applicant upon one of the following grounds:

- a. The award was procured by corruption, fraud or other undue means.

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<sup>120</sup> *Fla. Stat.* § 682.09 (2011).

<sup>121</sup> *Fla. R. Civ. P.* 1.820(g)(3).

<sup>122</sup> *Fla. Stat.* § 682.11 (2011).

- b. There was evident partiality by an arbitrator who was appointed as a neutral arbitrator or there was corruption in any of the arbitrators or misconduct prejudicing the rights of any party.
- c. The arbitrator exceeded his/her powers (i.e., jurisdiction).
- d. The arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise substantially prejudiced the rights of a party.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.<sup>123</sup>

Appeal. An appeal may be taken from:

- a. An order denying an application to compel arbitration.<sup>124</sup>
- b. An order granting an application to stay arbitration.<sup>125</sup>
- c. An order confirming or denying confirmation of an award.<sup>126</sup>
- d. An order modifying or correcting an award.<sup>127</sup>
- e. An order vacating an award without directing a rehearing.<sup>128</sup>
- f. A judgment or decree entered pursuant to *Florida Statute* § 682.20.<sup>129</sup>

Upon application of a party to the arbitration, the Court shall confirm an award unless, within the statutory time limits, sufficient grounds are asserted for vacating or modifying or correcting the award. Except where

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<sup>123</sup> *Fla. Stat.* § 682.13(1) (2011).

<sup>124</sup> *Fla. Stat.* § 682.20(1)(a) (2011).

<sup>125</sup> *Fla. Stat.* § 682.20(1)(b) (2011).

<sup>126</sup> *Fla. Stat.* § 682.20(1)(c) (2011).

<sup>127</sup> *Fla. Stat.* § 682.20(1)(d) (2011).

<sup>128</sup> *Fla. Stat.* § 682.20(1)(e) (2011).

<sup>129</sup> *Fla. Stat.* § 682.20(1)(f) (2011).

the Court finds that one of the enumerated grounds apply to vacate an award, the Court has no authority to overturn an award.<sup>130</sup>

## VI. VOLUNTARY BINDING TRIAL RESOLUTION

### A. The VTR Process

Florida Statute § 44.104, entitled “Voluntary binding arbitration and voluntary trial resolution” provides for private attorneys to be appointed with the parties’ agreement to decide their legal disputes.

Parties may enter into a voluntary trial resolution (“VTR”) agreement to have most disputes determined by a private attorney.<sup>131</sup> The private attorney acts as the trial court judge for the case, subject to most of the same rules of Court and with appellate review of legal issues.

Pursuant to the VTR agreement, the Court appoints a private lawyer as the Trial Resolution Judge (“TRJ”) to conduct the proceedings of an action and determine the case on its merits generally as if litigated before the Court.<sup>132</sup>

### B. The VTR Agreement

To be enforceable, the VTR agreement must be in writing and signed by the parties. The legal dispute may not involve any constitutional issue, child custody, child support or visitation issues.<sup>133</sup>

The VTR agreement may be signed before or after litigation is commenced and should provide for the compensation of the TRJ.<sup>134</sup>

The following is a sample contract clause for submitting all permissible controversies that may arise between the parties to an agreement to voluntary trial resolution:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding voluntary trial resolution pursuant to Chapter 44, Florida Statutes, including, without limitation, the procedures set forth in Florida Statute § 44.104, and final

<sup>130</sup> *Am. Reliance Ins. Co. v. Devecht*, 820 So. 2d 378 (Fla. 3d DCA 2002).

<sup>131</sup> *Fla. Stat.* § 44.104(1) (2011).

<sup>132</sup> *Fla. Stat.* § 44.104(2) (2011); *Fla. Stat.* § 44.104(8) (2011).

<sup>133</sup> *Fla. Stat.* §§ 44.104(1), 44.104(14) (2011).

<sup>134</sup> *Fla. Stat.* § 44.104(2) (2011).

judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

Subject to the exceptions stated in *Florida Statute* § 44.104, the parties to an existing dispute or pending lawsuit may also submit their controversy to voluntary trial resolution by use of the following agreed application to the Court:

We, the undersigned parties, hereby jointly agree and apply to the Court for binding voluntary trial resolution pursuant to Chapter 44, Florida Statutes, including, without limitation, the procedures set forth in Florida Statute § 44.104, for the following controversy: *(Describe the dispute or identify an existing lawsuit)*, and final judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

We further agree that *(Insert name and address of trial resolution judge)* shall be appointed by the Court as the trial resolution judge for the above-described controversy, who shall be compensated in accordance with that certain agreement between the parties, a copy of which is attached hereto as Exhibit "A."

C. The Trial Resolution Judge

The TRJ must be a licensed member of The Florida Bar in good standing for more than five (5) years.<sup>135</sup> If the VTR agreement does not specifically identify the TRJ and the parties cannot otherwise agree, the Court will appoint the TRJ as the case requires.<sup>136</sup>

D. Benefits of VTR

The parties may jointly appoint a TRJ who is a qualified, experienced specialist (Florida Bar Board Certified) in the area of the legal dispute.

*Only attorneys certified by The Florida Bar are allowed to identify themselves as "Florida Bar Board Certified" or as a "specialist."* Certification is the highest level of recognition by The Florida Bar of the competency and experience of attorneys in the areas of law approved for

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<sup>135</sup> *Fla. Stat.* § 44.104(2) (2011).

<sup>136</sup> *Fla. Stat.* § 44.104(2) (2011).

certification by the Supreme Court of Florida. Not all qualified lawyers are certified, but those who are board certified have taken the extra step to have their competence and experience recognized.

The parties' rights to procedural due process, rules of Court and appellate rights (except for findings of fact) are preserved as with most litigation. The filing of an application for VTR tolls the applicable statute of limitations.<sup>137</sup>

The TRJ must follow the applicable law; failing which he or she may be reversed on appeal.<sup>138</sup> However, the harmless error doctrine is applicable for any appeal from a final determination rendered by a TRJ for a dispute submitted to VTR.<sup>139</sup>

The parties have full availability to discovery and motion practice.<sup>140</sup>

The parties should have greater flexibility for hearings and trials before the TRJ.

E. Burdens/Costs of VTR

The fees of the TRJ can become sizable for any large, complex case.

There is no limitation on discovery as in arbitration.

**VII. COLLECTION ISSUES**

A. Attachment, Garnishment & Levy.

A writ of attachment creates a lien against the non-exempt real or personal property before or after a debt becomes due. A writ of attachment may be obtained when a debt is due where the debtor:

1. Will fraudulently part with the property before judgment can be obtained against him or her.
2. Is actually removing the property out of the state.
3. Is about to remove the property out of the state.

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<sup>137</sup> *Fla. Stat.* § 44.104(6) (2011).

<sup>138</sup> *Fla. Stat.* § 44.104(10)(a) (2011).

<sup>139</sup> *Fla. Stat.* § 44.104 (12) (2011).

<sup>140</sup> *Fla. R. Civ. P.* 1.710(c).

4. Resides out of the state.
5. Is actually moving himself or herself out of the state.
6. Is about to move himself or herself out of the state.
7. Is absconding.
8. Is concealing himself or herself.
9. Is secreting the property.
10. Is fraudulently disposing of the property.
11. Is actually removing himself or herself beyond the limits of the judicial circuit in which he or she resides.
12. Is about to remove himself or herself out of the limits of such judicial circuit.

Any creditor may have an attachment on a debt not due, when the debtor:

1. Is actually removing the property out of the state.
2. Is fraudulently disposing of the property to avoid the payment of his or her debts.
3. Is fraudulently secreting the property to avoid payment of his or her debts.<sup>141</sup>

Once the writ is issued and served, the creditor must complete the lawsuit and then execute upon the property through a sheriff's sale.<sup>142</sup> Before any writ of attachment will issue, the creditor must post a bond equal to double the debt demanded. This bond will be security for the debtor should the court later determine the writ was improperly obtained.<sup>143</sup>

After a monetary judgment is obtained, a writ of garnishment is available to a creditor to collect non-exempt money owed to a buyer by a third-party.

After judgment has been obtained against the defendant but before the writ of garnishment is issued, the plaintiff, or the plaintiff's agent or attorney, shall file a motion (which shall not be verified or negative

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<sup>141</sup> *Fla. Stat.* § 76.05 (2011).

<sup>142</sup> *Fla. Stat.* § 76.14 (2011) *et seq.*

<sup>143</sup> *See Fla. Stat.* § 76.12 (2011).



defendant's exemptions) stating the amount of the judgment. The motion may be filed and the writ issued either before or after the return of execution.<sup>144</sup>

Even before a monetary judgment is obtained, a writ of garnishment is available to a creditor to collect non-exempt money owed to the debtor by a third-party upon compliance with the following procedure:

(2) To obtain issuance of the writ, the plaintiff, or the plaintiff's agent or attorney, shall file in the court where the action is pending a verified motion or affidavit alleging by specific facts the nature of the cause of action; the amount of the debt and that the debt for which the plaintiff sues is just, due, and unpaid; that the garnishment is not sued out to injure either the defendant or the garnishee; and that the plaintiff believes that the defendant will not have in his or her possession, after execution is issued, tangible or intangible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy the plaintiff's claim. The writ of garnishment shall set forth a notice to the defendant of the right to an immediate hearing for dissolution of such writ pursuant to s. 77.07. Upon issuance of the writ of garnishment, the clerk of the court shall provide by mail a copy of the writ to the defendant.

(3) Except when the plaintiff has had an attachment writ issued, no writ of garnishment before judgment shall issue until the plaintiff, or the plaintiff's agent or attorney, gives a bond with surety to be approved by the clerk payable to the defendant in at least double the amount of the debt demanded, conditioned to pay all costs, damages, and attorney's fees that the defendant sustains in consequence of the plaintiff's improperly suing out the writ of garnishment. A garnishment bond is not void or voidable because of an informality in it, nor shall the obligors be discharged because of the informality, even though the garnishment is dissolved because of the informality.

(4) The motion or pleading need not negative any exemptions of the defendant.<sup>145</sup>

A continuing writ of garnishment is similarly available to collect a debtor's non-exempt wages, provided the debtor is not considered the "head of household."

Notwithstanding any other provision of this chapter, if salary or wages are to be garnished to satisfy a judgment, the court shall issue a continuing

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<sup>144</sup> *Fla. Stat.* § 77.03 (2011).

<sup>145</sup> *Fla. Stat.* § 77.031 (2011).

writ of garnishment to the judgment debtor's employer which provides for the periodic payment of a portion of the salary or wages of the judgment debtor as the salary or wages become due until the judgment is satisfied or until otherwise provided by court order....<sup>146</sup>

**B. Fraudulent Transfers & Tracing Assets.**

A corporate buyer may go out of business and default on its contract for sale with the seller. The seller may then obtain a monetary judgment against the corporate buyer only to learn that the corporation no longer has any assets to satisfy the judgment. If the corporation had substantial assets at one time, it is prudent for the seller to learn how those assets were disposed of by the buyer. Given the right facts, the individual principals of the corporate buyer and other persons who received the corporate assets may be liable for the seller's judgment.

Several statutory tools are available to attack a fraudulent transfer, including setting aside the transfer and levying upon the assets transferred or other substitute property of the transferee. The following are the operable fraudulent transfer statutes:

**56.29. Proceedings supplementary.**

(6)(a) When, within 1 year before the service of process on him or her, defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors.

(b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. This does not authorize seizure of property exempted from levy and sale under execution or property which has passed to a bona fide purchaser for value and without notice. Any person aggrieved by the levy may proceed under ss. 56.16-56.20.<sup>147</sup>

**726.105. Transfers fraudulent as to present and future creditors.**

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<sup>146</sup> *Fla. Stat.* § 77.0305 (2011).

<sup>147</sup> *Fla. Stat.* § 56.29(6) (2011).

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.<sup>148</sup>

**726.106. Transfers fraudulent as to present creditors.**

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.<sup>149</sup>

In addition to setting aside a fraudulent transfer, a corporation's shareholders may be liable for the corporation's debts to the extent that they received any distributions of the corporation's assets at a time when they knew or should have known that the corporation had the outstanding debts. "[T]he properties of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon it or right of priority out of it in preference to any shareholder of the corporation."<sup>150</sup> A corporation is required to maintain a sufficient amount of its funds to pay the claims of its creditors, including its contingent creditors.<sup>151</sup>

Similarly, Florida Statutes will hold the directors of a corporation personally liable for any distributions to shareholders that the directors affirmatively authorize in violation

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<sup>148</sup> *Fla. Stat.* § 726.105 (2011).

<sup>149</sup> *Fla. Stat.* § 726.106 (2011).

<sup>150</sup> *Beach v. Williamson*, 83 So. 860, 863 (Fla. 1919); see also *U.S. Fire Ins. Co. v. Morejon*, 338 So. 2d 223, 224 (Fla. 3d DCA 1976), *cert. den.* 345 So. 2d 426 (Fla. 1977).

<sup>151</sup> See *U.S. Fire Ins. Co.*, 338 So. 2d at 224; see also *Diamond Int'l Corp. v. SJH Enter., Inc.*, 487 So. 2d 1089, 1091 (Fla. 5th DCA 1986).

of Florida law. The directors of a corporation may be personally liable for distributions if the effect of which precludes the corporation's ability to pay its debts as they become due. "No distribution may be made **if, after giving it effect**. (a) The corporation would not be able to pay its debts **as they become due** in the usual course of business; or (b) The corporation's total assets would be less than the sum of its total liabilities. . . ." <sup>152</sup> Any director who votes for or assents to a distribution made in violation of Florida Statutes is personally liable for the amount of the distribution that exceeds what could have been distributed in accordance with Florida law. <sup>153</sup>

### C. Piercing the Corporate Veil.

One of the advantages of doing business through a corporation is that its shareholders are not liable for the corporation's debts. Nevertheless, this corporate shield or veil may be pierced under limited circumstances.

Florida courts will hold a corporation's shareholders liable for the corporation's debts where the corporation was organized or used to mislead its creditors, to perpetrate a fraud on the corporation's creditors or the corporation has been used for some illegal purpose. <sup>154</sup> The mere ownership of a corporation by one or a handful of shareholders, however, is an insufficient reason to pierce the corporate veil. <sup>155</sup>

"A critical issue in the determination of whether the corporate veil will be pierced for the imposition of personal liability is whether the corporate entity was organized or operated for an improper or fraudulent purpose." <sup>156</sup> Unless there is a showing that a corporation was formed or employed for an unlawful or improper purpose, such as subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some betrayal of trust, the corporate veil cannot be pierced. <sup>157</sup>

The rule of law to hold a parent corporation liable for the debts of its subsidiary is similar to the above rules. "[T]o pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent

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<sup>152</sup> Fla. Stat. § 607.06401(3)(a)-(b) (2011) (emphasis added).

<sup>153</sup> Fla. Stat. § 607.0834(1).

<sup>154</sup> *Advertects, Inc. v. Sawyer Indus.*, 84 So. 2d 21, 23 (Fla. 1955); see also *Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n*, 539 So. 2d 1131, 1133 (Fla. 1989); *Gen. Builders Corp. of Ft. Lauderdale, Inc. v. Sisk*, 461 So. 2d 104, 104 (Fla. 1984); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1121 (Fla. 1984); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 852 (Fla. 1971); *McFadden Ford, Inc. v. Mancuso*, 766 So. 2d 241, 242 (Fla. 4th DCA 2000).

<sup>155</sup> *Advertects, Inc.*, 84 So. 2d at 23.

<sup>156</sup> *Kanov v. Bitz*, 660 So. 2d 1165, 1166 (Fla. 3d DCA 1995).

<sup>157</sup> See *Aztec Motel, Inc.*, 251 So. 2d at 852; see also *Munder v. Circle One Condo., Inc.*, 596 So. 2d 144, 145 (Fla. 4th DCA 1992).

corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them.”<sup>158</sup>

### **VIII. BUSINESS PRACTICES TO AVOID (AND WIN) DISPUTES**

Legal disputes are won and lost based upon various factors, including the quality and persuasiveness of the evidence. Although a seller’s or buyer’s termination of a contract for sale must comply with the pre-requisites of the contract for sale and Florida law, proving the presence of lawful grounds to terminate the contract is a separate issue of concern.

At a minimum, sellers and buyers should prepare contemporaneous memoranda or telephone logs of all substantive conversations regarding the negotiation and performance of contracts for sale. Even better, confirming letters create a stronger evidentiary position in the event of a dispute.

This practice serves two functions. First, a confirming letter provides a written instrument for the parties to refer back to in the event of a good faith misunderstanding. Second, a confirming letter, log or memorandum is physical evidence of the facts at the time they occurred. This physical evidence, if made contemporaneous with the conversation and in the normal course of business, is generally admissible in court. When faced with a “he said, she said” claim or defense, the party who also has a contemporaneous document evidencing the conversation will more often than not prevail in the dispute. Some examples of these practices are reflected in the Appendix.

### **IX. DISCLAIMER**

**This commentary is for informational purposes only, is not legal advice and does not establish an attorney-client relationship. You should seek appropriate legal advice from a licensed attorney before making any decision based on these comments. The hiring of a lawyer is an important decision that should not be based solely upon advertisements.**

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<sup>158</sup>*Ocala Breeders’ Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA 1999); *see also USP Real Estate Inv. Trust v. Disc. Auto Parts, Inc.*, 570 So. 2d 386, 390 (Fla. 1st DCA 1990).

**APPENDIX**

**Memorandum**

To: XYZ file  
From: ABC  
Date: June 15, 2001

Re: Conference with John Doe, Broker for XYZ Corp.

This morning, I met with John Doe, broker for XYZ corp. We discussed the fact that XYZ has failed to make its deposit for the contract for sale on the Zoomer Property. He stated that his client, Jason Roe of XYZ Corp., did not have any good reason for not making the deposit, which was now over 90 days past due. I told John that, if the deposit was not made within 10 days, I would declare a breach of the contract.

John assured me that the payment would be made by that date.

*ABC's signature*  
*June 15, 2004*

**ABC Corp. Telephone Log**

ABC Employee Name: ABC  
ABC Account: XYZ corp.

<u>Date</u>	<u>Name of Caller</u>	<u>Log of Discussion</u>
6/15/01	ABC	I called John Doe today about XYZ's failure to make the deposit due on the contract for sale. I told him that the deposit was over 90 days past due and the matter would be turned over to our lawyer, unless we received the deposit within ten days. John assured me that the payment would be made by that date. I told John that I could not give his client any further extensions. John acknowledged this. Nothing further was discussed.

*ABC's signature*

ABC's Letterhead

June 15, 2004

John Doe, Broker for XYZ Corp.  
Address

Re: XYZ Corp's account number with ABC

Dear Mr. Doe:

Thank you for meeting with me this morning. As we discussed, XYZ has failed to make its deposit for the contract for sale on the Zoomer Property. I appreciate your candid statement that your client, XYZ Corp., did not have any good reason for not making the deposit, which is now over 90 days past due. I told you that, if the payment was not made within 10 days, I will be forced to declare a breach of the contract. In response, you advised that the payment would be made by that date. Please allow me to reiterate that I cannot give your client any further extensions on this matter.

Very truly yours,

*ABC's signature*  
Print Name and Title

cc. Gary S. Salzman, Esq.