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EDGE
FLORIDA LAW REPORT

BE WARY OF WATER LEAKS: MOLD MAY BE LURKING!

By Scott N. Gelfand

Have you ever experienced any problems in your home or business involving water seepage or leaks? If so, you may have a serious health and safety problem arising from microscopic organisms commonly known as mold. Failing to recognize and remedy the problem may cause the property owner to experience property damage, personal health injuries and potential liability to third parties who are adversely affected by the presence of the mold. Mold is a fungus which reproduces by creating spores or microscopic cells that generate in large numbers, often in chains that easily disperse into the air. If adequate moisture is present when a mold spore lands on a suitable food source, such as drywall located in a home or office, it begins to grow.

The growing mold spore emits an extension known as a hypha, which signifies the beginning of a mold colony. As a hypha grows, it elongates and splits, creating a network of hyphae known as a mycelium. Within days, a single spore can produce a mature mold colony containing millions of spores.

When certain species of mold grow and process nutrients, they produce chemicals called mycotoxins. Several mold species, including aspergillus, penicillium and stachybotrys, produce a wide variety of mycotoxins which are poisonous or toxic to virtually all persons who come in contact with them. Mycotoxins attack the nervous, respiratory and muscular systems and can enter the body either via ingestion, inhalation or direct skin contact and can lodge in the digestive tract, lungs or brain. Inhalation is known to be an even more potent route of exposure than ingestion.

Symptoms of mycotoxin exposure can include upper respiratory infections, coughs, sore throats, headaches, nausea, fybromyalgia, fatigue, hemorrhaging, convulsions, skin irritation, cancer and organ and tissue damage including liver, kidney and neurological disease. One type of aspergillus, aspergillus flavus, produces aflatoxins, which are notoriously potent animal carcinogens. Aspergillus is even more potent than stachybotrys, largely considered to be the most dangerous mold. While penicillium is not believed to be capable of producing aflatoxins, penicillium can produce more than 100 different classes of mycotoxins.

Apart from producing mycotoxins, mold spores cause allergic reactions in persons heavily exposed to high concentrations of localized spores.

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FLORIDA INTANGIBLE TAX LINGERS ON

By Stephen M. Newman

While Florida continues to enjoy a reputation as a tax haven, at least compared with many of its northern neighbors, reports of the demise of the annual tax on intangible personal property appear to be premature.

Florida imposes no individual income tax return. Instead, a "net worth" tax is imposed upon Florida residents. The tax is based upon the January 1 value of certain intangible assets; most notably (at least for many clients) are marketable securities. Generally, the tax is far less than the state income tax payable if the taxpayer resided in New York.

For at least the following three reasons, the Florida Intangible Personal Property Tax has been considered a relatively minor annoyance rather than a major tax concern:

1. Various categories of assets, including cash and Florida municipal bonds, are exempt. Thus, individuals moving to Florida can, with relative ease, restructure their portfolio to minimize or eliminate the tax.

2. The rate is low and has been dropping. Until recently, the tax was imposed at the rate of 2 mills: that is, $2,000 per $1,000,000 of taxable assets. In 1999, the rate was reduced to 1.5 mills. Last July, the Florida legislature further reduced the tax rate by one third to one mill. Effective next year, the exemptions are increased from $20,000 (single) and $40,000 (married couple) to $250,000 and $500,000 respectively. A new $250,000 exemption is also available to entities. Furthermore, the tax can be claimed as an itemized deduction on the individual federal return.

3. With their eyes wide open (although perhaps blinded by the bright Florida sunshine), the Florida legislature and Department of Revenue have approved creative "planning techniques" short term trusts and out of state partnerships, that have enabled very high net worth taxpayers to escape tax liability.

The purpose of this article is not to provide a comprehensive explanation of the Florida intangibles tax, but rather to give a sense of the current status of the tax and to explain some recent developments.

Until last year, trust assets were subject to the tax if the trust had a situs in Florida. As a result, and subject to exceptions for Florida banks, a tax could be imposed upon trust assets if the trustee were domiciled in Florida. This would be the case, with respect to a standard funded living trust or a testamentary trust with Florida residents acting as Trustees.

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Fortunately for Florida taxpayers, the tax on these trusts could easily be avoided if the taxpayer establishes an irrevocable, short term trust with either a Florida bank or an out of state individual or bank as trustee. Provided that the trust was drafted properly and the otherwise taxable assets were in fact owned by the trust on January 1, the trust assets would not be subject to the Florida intangible tax. Upon termination of the trust (the trust might last for perhaps a month, some attorneys prefer a somewhat longer term, and certain rulings of the Florida Department of Revenue suggest the permissibility of even shorter terms), the assets would revert to the grantor until the following December.

As a result of a change that became effective July 1, 2000, the requirement that the trustee be a non-Floridian (or a Florida bank) is eliminated. A new subparagraph (4) has been added to Section 199.183 of the Florida Statutes, providing that property owned, managed or controlled by a trustee is exempt from the annual intangible tax. Thus, Floridians are spared the excruciating inconvenience of locating an out of state relative or friend to act as Trustee and technically hold legal title to their assets for a brief interval. Furthermore, under the new law, no requirement exists that the assets be physically removed from the state, whereas previously some uncertainty existed on this point.

For some reason, the new law seems to have generated the erroneous impression among some non-Florida advisors that the short term trust is no longer a viable planning technique. On the contrary, the short term trust not only survives; it has been made more user friendly in the sense that any Floridian (with the likely exception of the grantor) can serve as trustee.

All that remains is the requirement that no Florida resident possess a taxable "beneficial interest" in the trust. Section 199.183 also provides that a resident who has a taxable beneficial interest is not exempt from the tax. Fortunately, Florida defines the term "beneficial interest" as a current right to income and either a power to revoke the trust or a general power of appointment; attributes that can easily be avoided in drafting the trust instrument. For example, in order that the Floridian not be totally without resources and forced to survive on "early bird" specials for the duration of the trust, legal advisors alert to these potential problems will provide in the trust document that distributions of income and principal can be made to the Floridian grantor in the discretion of the Trustee. (One caveat: the Florida Department of Revenue has ruled, as recently as last December, that if the taxpayer is the grantor, trustee and beneficiary of the trust, the trust assets are considered to have a taxable situs in Florida and are thus subject to the tax.)

Following last year's elections, those few Floridians not involved in complaining about the outcome of the election, litigating about the outcome of the election, or recounting the ballots, predicted the swift and certain end of the Florida intangible tax. Commonly accepted was the notion that instead of repealing the tax, the Florida legislature would reduce the taxable rate to zero. This would effectively eliminate the tax

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and yet preserve for future legislatures the option of simply raising the rate as an alternative to the presumably more difficult task of reinstating a repealed tax. At a minimum, those in the know predicted the rate would be reduced to .5 mills.

The Florida legislature has shown surprising reluctance to offer further tax relief to its beleaguered citizens. Repeal or reduction of the tax rate to zero has been rejected. A proposed reduction of the rate to .5 mills similarly failed to pass and apparently resulted in a compromise to reduce the rate to .75 mills. Even that limited reduction, however, evaporated at the very end of the legislative session. The rate for next year will remain at 1 mill. With the increased exemptions, a married couple with $1,000,000 of taxable assets will pay an intangible tax of $500. A couple with $5,000,000 of taxable assets will pay $4,500. Meanwhile, knowledgeable (and high-net-worth) Floridians have switched their attention from all of these maneuverings in Tallahassee and await with baited breath the fate of the Bush administration's proposal to repeal the federal estate tax. Stay tuned!

CONTRACTUAL AND STATUTORY PREVAILING PARTY ATTORNEY'S FEES PROVISIONS ARE IMPORTANT BUSINESS TOOLS

By Richard A. Goetz

A potentially powerful dispute resolution device in business dealings is the use of contractual and statutory provisions relating to the payment of attorney's fees, should parties in business wind up in dispute. In commercial contracts, a prevailing party attorney's fees provision (PPAFP) serves both an offensive and defensive function. Defensively, a PPAFP protects parties against the cost of being embroiled in a legal dispute, by requiring the "losing" party to reimburse the prevailing party for its attorney's fees and related costs in defending against the dispute. Offensively, a PPAFP permits a party who has been wronged by his or her adversary to defray the costs of rectifying the adversary's misconduct, by requiring the adversary to bear the attorney's fees and related costs incurred in rectifying the misconduct. Because of a PPAFP's offensive and defensive capabilities, the very existence of a PPAFP can also serve a prophylactic function. Often, parties to a PPAFP contract think

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twice before acting contrary to the contract terms, reluctant to incur the potential added expense of the other party's attorney's fees, should they be acting wrongfully.

In Florida, a party in litigation may still use the prospect of the payment of prevailing party attorney's fees, even without a contract containing a PPAFP. Two Florida statutory provisions address this (Section 768.79 of Florida's Statutes, entitled "Offer of Judgment and Demand for Judgment" and Florida's Rule of Civil Procedure 1.442, entitled "Proposals for Settlement"). They provide that a court shall award attorney's fees and related costs in favor of either a plaintiff or defendant who makes a monetary settlement offer that is not accepted by the adversary, and who does at least 25% better than the dollar amount of the rejected offer at the end of the litigation.

Florida's statutes are especially "settlement-friendly" because, not only can a defendant offer a settlement to a plaintiff (the procedure set forth in both the Federal Offer of Judgment Statute as well as in most states) but, a plaintiff can also demand a monetary judgment from a defendant. This significantly increases a plaintiff's leverage upon bringing a lawsuit. Since not only defendants but plaintiffs can use Florida's Offer of Judgment statutes, both plaintiffs and defendants can make offensive and defensive use of such statutes. They can also invoke them as negotiating tools and a means to resolve ongoing litigation. Of course, litigants and lawyers alike are well advised to choose carefully the amount of their offers of judgment. This is because, to be entitled to an award of attorney's fees, the offeror must fare at least 25% better than the amount of the offer, if rejected by the offeree.

All clients hope that attorney's fees and the costs of dispute resolution will be minimal. In a protracted dispute, such expenses can mount and become a significant tactical, as well as negotiating consideration, either when a PPAFP is involved or when the Florida Offer of Judgment statutes are invoked. Utilizing a PPAFP, or resorting to the Florida Offer of Judgment statutes, can give litigants greater ammunition, greater negotiating currency and, most of all, a quicker end to disputes in general.

SHOULD YOU INCLUDE PREEMPTIVE RIGHTS IN YOUR ARTICLES OF INCORPORATION?

By Anthony L. Dutton, Robert C. White, Jr., Christopher M. Trapani,and Kenneth A. Wenzel

Close corporations, as distinguished from large publicly-traded corporations, are usually composed of a small number of shareholders or principals, often related by friendship or kinship. Unlike shareholders of larger corporations, shareholders of a close corporation are quite concerned with maintaining control over the identity of new associates, with whom they frequently have a close working relationship. Preemptive rights address this concern of new entrant ownership in a close corporation.

The concept of preemptive rights is simple. Preemptive rights allow existing shareholders of a close corporation to purchase shares of any new issue of shares in direct proportion to the shares that they held prior to the new issue. Preemptive rights allow the percentage of a shareholder's ownership in a corporation to remain fixed while the absolute number of shares increases. In particular, preemptive rights protect an existing shareholder from dilution of his or her ownership interest via the issuance of new shares. Specifically, preemptive rights prevent large existing shareholders from increasing their share of ownership of the corporation and subsequently making decisions concerning corporate management that might adversely affect a small shareholder.

Most large publicly-traded corporations deny preemptive rights to their shareholders in their articles of incorporation. The shareholders of large publicly-held corporations typically do not possess preemptive rights, since it would make the issuance of new shares (a common practice less likely to involve collusion than in a close corporation) much more difficult and expensive. It is also important to note that preemptive rights most often apply only to common stock in a corporation, as opposed to preferred stock or other securities.

Under Florida law, however, if the shareholders desire preemptive rights, such a provision **must** be specifically inserted into the articles of incorporation, if incorporation occurred after 1976. The inclusion of a preemptive rights provision in a corporation's bylaws, or even a shareholder's agreement, does not guarantee these rights will be respected. If a preemptive rights provision is not contained in the articles of incorporation, they do not exist for any shareholder. The consequences of

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this can be severe. A shareholder could suffer a tangible dilution of his or her ownership interest. That is, the corporation could issue more shares to certain existing shareholders or new shareholders, while other shareholders retain their current number of shares.

Florida law differs markedly on this point with the law in many other states, which provide for preemptive rights automatically, regardless of their inclusion or omission in the articles of incorporation or corporate by-laws, unless they are expressly denied. Thus, if a corporation's certificate of incorporation is silent on the inclusion or exclusion of preemptive rights, that state's law assumes that the protections for preemptive rights remain in force. It is important that it is not required to issue new shares of stock proportionately to existing shareholders, and existing shareholders are under no obligation to buy.

One might legitimately wonder then, why Florida elects not to provide these protections automatically, rather than forcing the parties to include them in the articles of incorporation. First, the Florida rule has the advantage of deterring future litigation because of its greater clarity. Including preemptive rights automatically requires the courts to expend costly time and resources deciding when and how preemptive rights should apply when the corporation has provided no guidance itself on the issue. Under the Florida rule, fewer cases will arise for the judiciary to decide, since shareholders will have no claim if the articles of incorporation omit mention of preemptive rights. The Florida judiciary, thus, can channel its time and resources into other more pressing areas, ideally reducing costs for taxpayers over time. Second, the Florida rule forces more thoughtful and precise draftsmanship, since there is no legal safety net for failing to include preemptive rights.

The Florida statute on preemptive rights does allow for several exceptions which provide that, even if a preemptive rights provision is included in the articles of incorporation, the court will hold that provision invalid for the considered transaction. For instance, shares are often issued to employees or executives of the corporation as compensation. These shares are not covered by a preemptive rights provision in the articles of incorporation, nor are shares issued within six months after incorporation. Additionally, unless specifically provided for in the articles of incorporation, shares issued for services or property other than cash may not be subject to preemptive rights. Finally, shares issued in an effort to stimulate or facilitate a merger will generally not give rise to preemptive rights.

In drafting articles of incorporation in Florida, several precautions can be taken to lower the chances of litigation in the preemptive rights context. First, defining as precisely as possible the circumstances in which shareholders will or will not acquire preemptive rights, bearing in mind the possible exceptions, can help reduce the possibility of litigation dramatically. Next, defining the term, "unissued," in reference to future stock is also of central importance, since

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the Florida judiciary has offered ambiguous guidance on this point.

As an additional method for avoiding the dilution of a shareholder's voting interest, the articles of incorporation may contain a provision prohibiting additional shares from being issued except by unanimous consent of all shareholders. Similarly, a clause requiring unanimous agreement on the price of the new shares will help protect a shareholder from dilution.

Moreover, Florida law offers a variety of other causes of action for potentially collusive or fraudulent behavior by corporate officers or directors. However, a carefully-drafted preemptive rights provision can provide a close corporation with a worthwhile safeguard against dilution of ownership, while minimizing the potential exposure in litigation.

It should also be pointed out that preemptive rights may not be appropriate or prudent for all, or even many, close corporations. Preemptive rights may be unhelpful or even counterproductive for some corporations. It is advisable that a corporation's officers consult an attorney before deciding whether to include or exclude preemptive rights in the articles of incorporation.

PERSONAL REPRESENTATIVES FOR TORTS AND TORTIOUS PERSONAL REPRESENTATIVES OR "LOOK MOM, SOME STRANGER HAS PETITIONED TO HANDLE DADDY'S ESTATE"

By George F. deClaire

Under the Florida Probate Code, a person named in the will as designated personal representative is entitled to preference in appointment. Thereafter, persons selected by a majority in interest of the beneficially-interested persons have preference, failing which, any devisee may apply. If there is no will, preference is first given to the surviving spouse. Then the person selected by a majority in interest of the heirs, then the heir in nearest degree of kindred, followed by the guardian of property of a ward who, if competent, would be entitled to be selected or to select the personal representative(s). Yet, there is a big catch here. If nobody applies under either the testate or intestate procedures, the court may appoint any competent person it wishes, after proper notice has been given and if none of those referenced preferred parties come in and wish the appointment.

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COMMUNITY INVOLVEMENT

You may be interested in knowing the extent of the commitment by Hodgson Russ attorneys to local organizations and activities. Simply stated, the attorneys of Hodgson Russ are committed to investing their personal time and resources in our community. The following is a listing of our current involvements:

- Boca Raton Children's Museum
- Boca Raton Educational Television, Inc.
- Boca Raton Humane Society Foundation
- Boca/Sunrise Kiwanis Club
- Boca Raton Library Advisory Board
- Boca Raton Museum of Art
- Boca Raton Republican Club, Inc.
- Boca Raton Roundtable
- American Arbitration Association
- American Cancer Society
- American Immigration Lawyers Association (South Florida Chapter)
- Broward County Bar Association
- Broward County Estate Planning Council
- Business Development Board of Palm Beach County
- City of Lighthouse Pointe

- Community Foundation of Palm Beach and Martin Counties
- Dartmouth Club of Palm Beach County
- East Coast Estate Planning Council
- Economic Council of Palm Beach County, Inc.
- Education Commission of Palm Beach County, Inc.
- Florida Atlantic University Libraries
- Florida Philharmonic Orchestra
- George Snow Scholarship Fund
- Grand Orchid Housing Authority
- Greater Boca Raton Chamber of Commerce/1986 to Present
- Greater Boca Raton Estate Planning Council
- Harbour East Homeowners Association
- The Harid Conservatory
- Harvard Club of Broward County
- His Caring Place
- Hospice and Homecare by the Sea, Inc.
- Jewish Community Relations Committee
- Lynn University
- National Association of Securities Dealers
- Palm Beach Community College
- Palm Beach County Bar Association
- Palm Beach County Municipal League
- R.A. Ritter Foundation
- Republican Party of Palm Beach County
- Reserve Officers' Association of the United States
- Rotary Club of Boca Raton
- South Palm Beach County Bar Association
- Southeast Florida Library Information Network (SEFLIN)
- Sunburst Foundation
- Town of Highland Beach
- Yale Club of Broward County
- YMCA of Boca Raton

How could all that happen? It is a pretty abstruse set of circumstances. It is not, however, unusual in our probate avoidance-motivated society for persons to order their, or their parents' affairs so that there is no probate. Everything is in a living trust or in joint accounts or in a payable-upon-death account. So, they don't see any need for a probate and could conceivably ignore the notice that a person outside the enumerated preferred persons group was seeking the appointment. This is not all together uncommon where prior to the decedent's demise, he or she has been involved in an accident or has committed an act giving rise to a legal cause of action not filed until after death. Typically, the insurance company is a co-defendant along with an unnamed personal representative of the decedent. After the appointment of the real personal representative, his or her name is substituted by a routine pleading. Simple fender benders, well within the policy limits of the decedent's insurance, have a way of mushrooming into aggravated injuries which generous juries render judgments on, not infrequently in excess of the policy limits. Therefore, the decedent's family has to participate intelligently with insurance counsel in the defense of the case and be alert to the possibility that the policy limits may be exceeded.

Why is the tort feasee, the wronged party, suing a personal representative when there is no money in the estate? The answer is easy. By law, once a judgment is docketed, or even a legitimate claim presented for settlement, the personal representative has the right to call upon the trustee of a living trust to come forward with payment. Of course, there is no actual mechanism for creditors to charge trustees of living trusts directly. So, their only avenue is through the probate process. Perforce, once the family is on notice that a third-party stranger is applying for appointment as personal representative, they need to be diligent in getting a friendly party appointed because he or she will be in charge of the decision-making process. Also, family members may waive fees or agree upon modest fees. Strangers are entitled to a full statutory fee or one set by the court. It is nice to be in control and the only way to be in control of these two elements is to have a person of one's own choosing involved.

The foregoing situation is distinguished from another statutory provision closely aligned to it, traditionally called *executor de son tort*, i.e., executor of his tort. This is where the person acting as personal representative in reality is an intermeddler who has undertaken to handle the administration and distribution of an estate without being formally appointed. This person may have good or bad intentions, but under the law, must be responsible to third parties for so acting as to assets received. This is only common sense, since otherwise someone without credentials could cause limitless harm. Florida Statute 733.309 specifically distinguishes this situation from suing persons in possession of fraudulently-conveyed property by the decedent to

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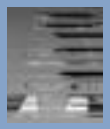
defeat legitimate claims of creditors. In that situation, the recipient may be innocent of any wrongdoing but, nonetheless, must disgorge the property because it was conveyed by an insolvent or soon to be insolvent decedent to prevent creditors from collecting.

GANODERMA BUTT ROT AND WHAT DOES THIS HAVE TO DO WITH PHYSICAL INSPECTIONS OF REAL PROPERTY?

By Nancy B. McAllister and James M. Hankins

By now, buyers and sellers of real property are well acquainted with "property inspections" in an impending transfer of ownership. Sellers are aware that they can expect buyer scrutiny of the condition of the property, be it a large commercial site of any kind (shopping center, office building, warehouse, or whatever) or a residential home purchase, large or small.

A common sense approach to a purchase requires the buyer to exercise some level of "due diligence," most frequently manifested in the inspection. An inspection should reveal any existing or anticipated defects, which will result in either increased expense or unpleasant surprise and the expense of the unpleasant surprise. In theory, an inspection should serve as a buyer protective measure and reveal to the buyer the nature of defects, repair or replacement work required and the extent of any likely expenses.



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These expenses are most often covered contractually by an allocation between the seller and buyer as to who will assume responsibility for a particular condition revealed by an inspection, and to what extent, if any, that responsibility is assumed. Will a seller pay for any and all repairs or replacements or only for some? If only for some, how much responsibility will the seller agree to bear? The issue is usually how much the seller is willing to spend to make the property "right" (the condition acceptable to the buyer). This allocation is then reflected in the contract. Except for an "as is" sale (where the seller assumes no responsibility for any defect in condition, and the buyer takes the property just as it is, defects and all), a buyer takes protection in the inspection.

However, rare indeed, is the contract (whether for the purchase of commercial or residential property) which protects against more than the systems and components of the physical structure itself. Equally rare is the inspection which involves more than a visual examination of the readily accessible systems and components of the physical structure. So, if the typical buyer of any kind of real property has the property inspected, what is almost universally left out of the contract and the inspection (indeed, spelled out as intentionally excluded)? The answer is **landscaping**.

As those in South Florida can attest, landscaping of all kinds (ornamentals, shrubs, trees, grass, etc.) is not an insignificant part of a decision to purchase. This applies to commercial as well as residential properties. Yet, no elements of landscaping are commonly covered by the typical contractual clause concerning the condition and inspection of the property (except to maintain the property in the same condition as it existed as of the date of the contract); nor will a physical inspection generally include any landscaping review.

The standard form of contract for sale and purchase (the "FAR/BAR Contract") approved by the Florida Association of Realtors and The Florida Bar is widely used for residential transactions in Florida. Yet, in the FAR/BAR Contract, the seller makes no warranty whatsoever as to the condition of the landscaping. No provision is made for an inspection of, nor any relief based on, the condition of the landscaping.

GANODERMA BUTT ROT

What does this have to do with Ganoderma butt rot? Ganoderma butt rot of palms is a lethal and incurable fungus disease affecting mature palms, including those in South Florida where palms are a dominant feature of the landscape - indeed, frequently, the "signature" of South Florida and a significant feature of many a property. The symptoms, including the withering, drooping and browning of fronds, progresses to death within 6 to 12 months. On the lower trunk of the palm, a "conk" (a bracket or fruiting body constituting the reproductive structure of the fungus), frequently appears following symptoms — visible proof of Ganoderma butt rot.

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The palm tree is the primary host of the Ganoderma disease. The list of palms thought to be resistant to the diseases grows shorter each year, as new species of palms succumb. The disease occurs in natural settings, as well as in highly-maintained landscapes. Soil type appears to have no relation to the disease either. Currently, no discernable pattern exists to provide clues as to why certain palms become infected and die from the disease.

COSTLY TREATMENT

The recommended treatment, however, reveals the insidiousness of the disease, and the monumental expense which may be incurred, not by any means limited to the loss of the diseased tree itself.

The entire palm, including as much of the stump and root system as possible, **must** be removed as soon as Ganoderma is identified. Diseased trees can snap and fall, presenting a safety hazard to persons and property. Particularly during hurricane season, diseased rotted palms are easily blown over in heavy winds.

Any material left after removing the tree will survive in the soil as a host for the fungus. It is thought that the fungus can survive in the soil up to 30 years, and perhaps indefinitely. Fumigation of the soil can be done, but the recommended treatment is soil removal, with fumigation of even the new replacement soil. Even this will not guarantee that any new palms will be able to survive disease-free.

Replacement palms planted in the same site where a palm died from Ganoderma butt rot will often become diseased and die. The standard recommendation, according to Michael Zimmerman of Zimmerman Tree Service in Lake Worth, is "to replace a diseased palm with any other tree or plant but a palm."

Removal and loss of the diseased tree(s), the recommendation to replace soil, and the inability ever to replace lost palms safely with palms of any variety are daunting. This is not only because of the expense, but because of the major aesthetic change wrought by the absence of once mature palms.

One recent case involving commercial property in Boca Raton resulted in the removal of one Ganoderma-infected Alexander Palm and nine palm trees immediately adjacent to the infected tree. Removal and excavation costs and replacement landscaping costs approached nearly $5,000. In another case, a residential purchaser in the northern portion of Palm Beach County discovered Ganoderma two days after closing. Subsequent investigation determined that the seller had actual knowledge of the diseased palm trees and failed to disclose it. The estimated cost of remediation in this residential transaction exceeded $30,000.

STEPS TO PROTECT BUYERS

This should bring to light for real property buyers some simple realities:

Have the property inspected, but also include landscaping conditions in the sale contract and in the inspector's report of the property's condition.

6 NEW ATTORNEYS IN 2001

ROBERT C. WHITE, JR.

Corporate & Securities Practice Group

Mr. White's experience includes representation of corporations, partnerships, limited liability companies, other business entities, management groups and individuals. These matters include public and private securities offerings, capital raising and venture capital transactions and mergers and acquisitions. He also handles matters such as asset and stock acquisitions and dispositions, mergers, stock option plans and employee benefits, employment and consulting agreements, corporate governance, loan transactions and reorganizations.

MITCHELL B. KIRSCHNER

Real Estate & Finance, Corporate & Securities, and Estates & Trusts Practice Groups

Mr. Kirschner's practice focuses primarily in the areas of corporate, real estate, commercial law and estate planning. Mr. Kirschner has devoted a considerable portion of his practice as leasing counsel to institutional landlords on a national basis.

JODI R. LUSTGARTEN

Estates & Trusts Practice Group

Ms. Lustgarten concentrates her practice in estate planning, probate and estate and trust administration, including counseling clients with respect to real estate, business planning and tax planning. Her experience includes drafting complex wills and trusts, probate, estate and gift taxation and private foundations. She is also experienced in corporate law (particularly counseling closely-held corporations, limited liability companies and partnerships), real estate and guardianships.

SCOTT N. GELFAND

Business Litigation Practice Group

Mr. Gelfand is a Commercial Litigator with a focus in Entertainment and Sports Law. His practice includes all aspects of litigation at both the trial and appellate levels, focusing primarily on complex commercial, business and sports litigation. Scott spends a great deal of his time in the courtroom, and he has tried cases in New York State and Federal Courts, as well as in many other jurisdictions and arbitration tribunals throughout the United States.

Like, the typical Florida residential form contract, which provides for a termite inspection and allocates the termite infestation risk between the parties, contracts for ***all*** kinds of real property should address the landscaping in view of costly arboreal diseases such as Ganoderma and others, like citrus canker and yellow palm disease (also known as "lethal yellowing").

Like the standard structural inspection, landscaping (especially palms) should be inspected by a professional for vital information on its condition. This should prevent the unpleasant surprise of the possible loss of mature palms and hefty landscaping replacement costs. A landscape inspection should include the sprinkler system as well, both to assess its mechanical integrity, and to determine if watering patterns are properly balanced and appropriate to the future health of the landscaping. [1]

Savvy buyers should check to see if anything does not look "quite right," and ask the sellers if there are any above-average landscaping maintenance requirements. Beyond this, informed buyers should consult their legal professionals about contractual protections against this deadly arboreal scourge. [2]

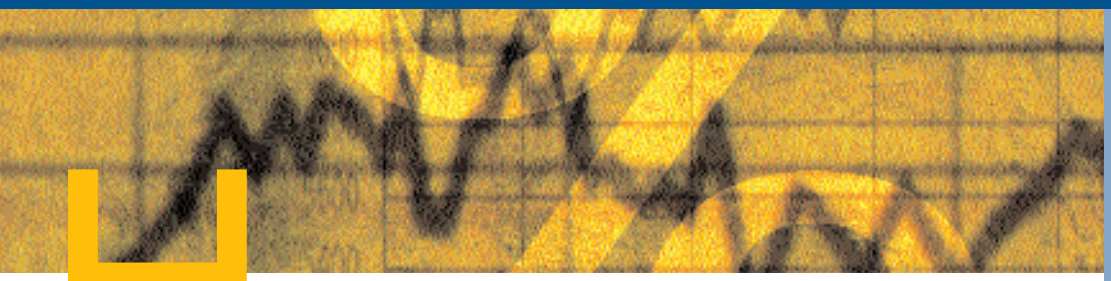
NOTE: A copy of this article and proposed revisions to the standardized FAR/BAR form of residential sale-purchase contract addressing landscaping issues drafted by Hodgson Russ LLP have been forwarded to the Florida Association of Realtors and the Real Estate Section of The Florida Bar.

The Real Estate Department of Hodgson Russ LLP will continue to monitor issues of concern to real property buyers, sellers and owners in the South Florida area. We will provide updates to developments in future real estate newsletters.

In the meantime, BUYER BEWARE!

[1] According to Michael Zimmerman of Zimmerman Tree Service, Ganoderma thrives under moist conditions, and palms which are consistently over-watered are all too frequently its victims.

[2] In the South Florida area, with respect to the residential home market, for example, landscaping will frequently represent 10% of the value of the home.



HAVE YOU CONSIDERED A TAX DEFERRED EXCHANGE OF REAL ESTATE?

By Mitchell B. Kirschner

Many pundits have declared that §1031 of the Internal Revenue Code, allowing for tax deferred exchanges of real estate, is a "gift by the IRS to real estate investors."

WHY DO A §1031 EXCHANGE?

When a seller (also referred to as "exchangor") is selling real property held for investment purposes, and when the seller is facing a large capital gain, that gain can be deferred by exchanging that "relinquished property" for "replacement property." Many sellers who would refuse to sell, or be unable to sell if they had to pay tax on the gain, will sell if they can do an exchange and defer the gain. The tax on the gain will be due when the seller later sells the replacement property. However, if the exchangor holds on to the replacement property or keeps exchanging it for other replacement property, no tax on capital gain will ever be due. The tax basis of the property will be stepped up to the then current market value when the exchangor dies or, if the exchangor is married, when either exchangor dies. So, for the person who utilizes tax deferred exchanges, the odds of ever paying tax on capital gains is low, both for the seller/exchangor and for his/her heirs.

WHAT KIND OF PROPERTY QUALIFIES?

The replacement property must be of "like kind" to the relinquished property. However, virtually any kind of investment real estate is considered like kind to any other. One can exchange an apartment for a farm, a warehouse for a vacant lot, or a strip mall for a rental house.

IS A SELLER'S PERSONAL RESIDENCE ELIGIBLE?

A seller's personal residence is not eligible for §1031 treatment, but it may be exempt from capital gains entirely. Likewise, a vacation cabin cannot be exchanged; however, it can be converted into rental over a period of years and then exchanged under §1031.

WHAT IS THE FORMULA TO FOLLOW?

To get full benefit of an exchange and defer all tax, the exchangor should trade

NEW ATTORNEYS IN 2001

CHRISTOPHER M. TRAPANI

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A large portion of Mr. Trapani's practice includes entity structuring for business and tax planning using corporations, limited liability companies, and trusts; negotiating and drafting legal documentation for complex business transactions; and, providing outside general counsel services to start-up and emerging growth companies.

KENNETH A. WENZEL

Real Estate & Finance Practice Group

Mr. Wenzel focuses his practice on representation of corporations and business entities in transactions involving corporate, commercial and real estate law. He also has significant experience representing not-for-profit corporations. Mr. Wenzel serves on the Board of Trustees of The Harid Conservatory, the Sunburst Foundation, Inc. and the YMCA of Boca Raton.

Mitchell B. Kirschner is certified by the Board of Legal Specialization and Education of The Florida Bar as a specialist in real estate law. His practice is concentrated in the areas of real estate law, with a heavy concentration in commercial lease negotiation and preparation for institutional landlords on a national basis. Mr. Kirschner has been a member of The Florida Bar since 1979. He is currently a director of The Unicorn Children's Foundation. Mr. Kirschner may be reached by E-mail at mkirschn@hodgsonruss.com.

for replacement property that is greater than, or at least equal in value to, that of the relinquished property, and the exchangor should spend all the sales proceeds on the replacement property. If the exchangor exchanges for a property of lesser value, or if the exchangor takes part of the cash out of the exchange, the exchange will still be valid. However, gain will be recognized (1) to the extent that the replacement value is of lesser value than the relinquished property, and (2) to the extent that the exchangor takes cash out of the exchange. The exchange will still be effective to defer the balance of gain.

HOW IS THE REPLACEMENT PROPERTY IDENTIFIED?

Not later than midnight of the 45th day after closing of sale of the relinquished property, the exchangor must identify the replacement property by sending written notice of the exchangor to an exchange intermediary or an escrow agent.

WHEN MUST THE EXCHANGOR CLOSE ON THE REPLACEMENT PROPERTY?

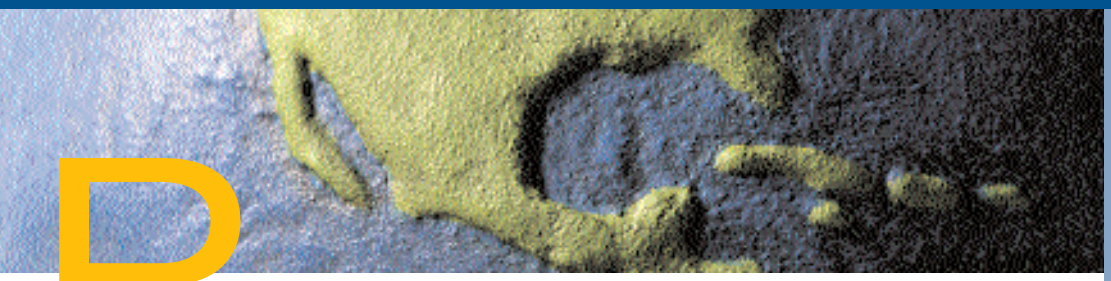
Not later than midnight of the 180th day after closing of sale of the relinquished property.

Note, however, that if the 45th or the 180th day falls on a weekend or holiday, there is no extension to the following workday.

WHAT IS THE EXCHANGE PROCESS?

The Real Estate Department at Hodgson Russ LLP can coordinate the exchange process for our clients. In a typical exchange, the exchangor or seller exchanges the relinquished property to an intermediary. The intermediary then sells the relinquished property to the relinquished property buyer and holds the sales proceeds in trust. The exchangor identifies the replacement property in 45 days and signs a purchase agreement to buy the replacement property from the replacement property seller and assigns that agreement to an intermediary. The intermediary buys the replacement property within 180 days and then transfers it to the exchangor in completion of the exchange. Hodgson Russ LLP can act as the intermediary. The legal issues involved in an exchange can be complex, and it is permissible for the lawyer to represent the exchangor as the exchangor's lawyer and act as intermediary. The lawyer can also act as escrow agent provided, however, that the lawyer has not represented the exchangor on other legal matters (except for previous exchanges and routine escrows) within the past two years.

They say that death and taxes are inevitable, but you might be able to beat the tax on capital gains if you utilize a tax-deferred exchange.



RECENT CHANGES IN IMMIGRATION POLICY

By Lisa M. Peraza with assistance from Tammy A. Wrisley

The U.S. has long been recognized as a welcome haven for visitors and immigrants. Due to recent events, the U.S. government has expressed that it will make every aggressive effort to "detain, prosecute or deport" any alien who engages in or supports terrorist activity. This has created several important changes.

The U.S. Attorney General established a Foreign Terrorist Tracking Task Force to ensure that all federal agencies coordinate programs to deny entry to, or to locate, detain, prosecute or deport, those foreigners associated with, engaged in or supporting terrorist activity. The U.S. Customs Service and the Immigration & Naturalization Service will immediately develop and implement enhanced investigative and intelligence analysis and sharing capabilities. New policies will be developed to end the abuse of student visas and to prohibit international students from receiving education and training in sensitive areas, including any study or research relating to development and use of weapons mass destruction.

Entry procedures will be tightened and coordinated with Canada and Mexico to ensure compatible immigration, customs and visa policies. The Office of Service Technology Policy, the U.S. Attorney General and the Central Intelligence Agency will investigate the use of the most advanced technology to enforce immigration laws and rapidly identify those individuals or groups engaging in or supporting terrorist activity, to deny them access to the U.S. and will investigate the development of a database with advanced data mining software. The State Department has instituted a new 20-day waiting period for visas to travel to the U.S. for men ages 16-45 from certain countries.

The INS has encouraged employers who lost employees and undocumented aliens who lost family members on September 11 to contact authorities and has guaranteed that the INS will not seek any information for immigration reasons. The State Department has initiated a policy to expedite travel visas for family members of victims of September 11.

Lisa M. Peraza is a senior associate in the Firm's Immigration Practice Group and has more than 11 years of experience as a practitioner of Immigration and Nationality Law. She has been a member of the New York State Bar Association since 1990 and became a member of The Florida Bar in 2001. Ms. Peraza may be reached by E-mail at lperaza@hodgsonruss.com.

Tammy A. Wrisley is a Paralegal in the Immigration Practice Group. Ms. Wrisley graduated from Canisius College with honors and from Hilbert College where she ranked first in her class in the legal assistant program. She has been an immigration paralegal for over four years.

TRAVEL ADVISORIES

Non-immigrants and immigrants are reminded that INS law requires them to carry passports and/or immigration documents which demonstrate that they are legally in the U.S., even if traveling domestically. U.S. citizens traveling abroad should consult the State Department Bureau of Consular Affairs at http://travel.state.gov or call 202-647-5225 prior to travel for the most up-to-date travel advisories, warnings and restrictions.

BOCA RATON LEGAL TEAM

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Certified by the Board of Legal Specialization and Education of The Florida Bar as a specialist in wills, trusts and estates.

AREAS OF PRACTICE:
Wills, Trusts, Estates and Probate; Trust Litigation

ADMITTED TO PRACTICE:
State of Florida, 1984
State of New York, 1984
United States District Court for the Southern District of Florida, 1988

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Business and Commercial Litigation; Employment Law

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State of Florida, 1995
U.S. District Court, Southern and Middle Districts of Florida

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State of Florida, 1983
United States District Court for the Southern District of Florida
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ADMITTED TO PRACTICE:
State of Florida, 1975
State of New York, 1974

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Wills, Estates and Estate Planning; Real Property Law; Corporation and Business Law

ADMITTED TO PRACTICE:
State of Florida, 1962
State of Michigan, 1956

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AREAS OF PRACTICE:
Corporate and General Business Law; Financing

ADMITTED TO PRACTICE:
State of New York, 1964
State of Florida, 1979
United States Court of International Trade

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AREAS OF PRACTICE:
Litigation, including Sports, Complex Commercial and Business Litigation

ADMITTED TO PRACTICE:
State of Florida, 2002
State of New York, 1991
U.S. Court of Appeals, Second and Ninth Circuits
U.S. District Court, Southern and Eastern Districts of New York
Pro Hac Vice Admissions in Dade County and Sarasota County Circuit Courts

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Business Litigation involving Contracts, Corporations, Real Estate, Intellectual Property, and Bankruptcy; Country Club/Not-for-Profit Law; Probate Litigation

ADMITTED TO PRACTICE:
State of Florida, 1979
State of New York, 1968
U.S. District Courts for the Southern (including Trial Bar) and Middle Districts of Florida, and Western District of New York
U.S. Court of Appeals for the Second, Fifth and Eleventh Circuits

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State of Florida, 1965
U.S. District Courts for the Southern and Middle Districts of Florida

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AREAS OF PRACTICE:
General Business Law; Real Estate, Condominium; Charitable Foundations and Trusts

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State of Florida, 1972
District of Columbia, 1980
United States District Court for the Southern District of Florida, 1973
United States Court of Appeals for the Eleventh Circuit, 1973
United States Supreme Court, 1980

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Taxation Law; Corporate Law; Estate Planning Law.

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State of Florida, 1974
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State of Florida, 1979
U.S. Court of Appeals for the Fifth District
U.S. District Court, Southern District

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Federal, Multistate and Local Tax Law

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State of Florida, 1983
State of New York, 1983

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AREAS OF PRACTICE:
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State of Florida, 1999
State of New York, 1990
State of New Jersey, 1989
U.S. District Court, Southern and Eastern Districts of New York

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State of New York, 1979
U.S. District Court for the Southern (1982), Eastern (1982), and Northern (1990) Districts of New York
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ADMITTED TO PRACTICE:
State of Florida, 1987
United States District Court for the Southern (1988) and Middle (1989) Districts of Florida
United States Court of Appeals, 11th Circuit (1991)

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ADMITTED TO PRACTICE:
State of Florida, 2001
State of New York, 1990
United States District Court for the Northern District of New York, 1990

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State of Florida, 1977
State of New York, 1958
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United States Supreme Court

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State of Florida, 1986
Commonwealth of Massachusetts, 1980
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State of Michigan, 1968

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Corporate Law; E-Commerce Transactions; Business and Estate Tax Planning; Business Litigation

ADMITTED TO PRACTICE:
State of Florida, 1990
U.S. District Court, Southern and Middle Districts of Florida
U.S. Tax Court

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State of Florida, 1982

ROBERT C. WHITE, Jr.

AREAS OF PRACTICE:
Corporate and Securities Law; Business Law

ADMITTED TO PRACTICE:
State of Florida, 1986

ABOUT OUR EDITOR

Larry Corman is a partner in the Firm's Business Litigation Practice Group. In 1983, Mr. Corman graduated from Harvard Law School, was admitted to The Florida Bar and joined the law firm of Hodgson Russ.

Continued from page 1

Allergic symptoms include runny noses, watery eyes, itching, skin irritation, chronic sinus infections and asthma.

The pervasive presence of poisonous mold and mold spores can render a home or work place completely unfit for occupancy. In addition, mold infestations can contaminate furniture, clothing, equipment and all other possessions. Cleaning articles of clothing often requires microbial remediation by a dry cleaning facility, which can cost thousands of dollars.

In severe cases, it may not be possible to salvage the home or workplace by conventional remediation methods or, in the alternative, the cost of such remediation would be so prohibitively expensive that the only possible fate for the contaminated premises is its destruction.

If your home or office has experienced water intrusion, you should have environmental testing experts inspect your property for mold as soon as possible. Just because you do not see or smell mold does not mean it is not present. Mold often grows on the inside of a wall, hidden from view. Therefore, expert testing is often required to confirm its existence. If mold is discovered, professional remediation will be necessary.

Failure to remedy a mold problem in a home or office can expose the property owner and tenant to personal injury or workers compensation claims by customers, vendors and employees or even uninvited guests who may suffer adverse health consequences due to mold exposure. If the water intrusion was the result of faulty construction, the property owner may have a claim against the negligent party.

Scott N. Gelfand is a member of the Firm's Business Litigation Practice Group. He is a former partner and Litigation Department Head with Meister, Seelig & Fein LLP, a New York City commercial boutique, with approximately 20 attorneys. In addition to two years with Meister, Seelig, & Fein, Scott has previous experience with Littman, Krooks, Roth & Ball P.C., and spent four years maintaining an independent practice. He has been a member of the New York State Bar since 1991 and was admitted to The Florida Bar in January of 2002. Mr. Gelfand may be reached at sgelfand@hodgsonruss.com.

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ABOUT HODGSON RUSS LLP

Established in 1817, Hodgson Russ is among the nation's oldest law firms. Our mission is to provide value to our clients through high-quality work, outstanding service, and attention to individual needs.

The Firm has more than 195 attorneys in eight offices located in Albany, Boca Raton, Buffalo, JFK International Airport, New York City, Newark, Palm Beach Gardens and Toronto. The attorneys of the Firm serve a wide range of clients, from individuals and not-for-profit organizations to privately held and multinational corporations, in all major areas of the law.

ABOUT THE BOCA RATON OFFICE

Hodgson Russ is one of Boca Raton's largest law firms. The Firm has been well established in the South Florida market since 1974, where in addition to its Boca Raton location, it also maintains an office in Palm Beach Gardens. Committed to providing the highest quality legal services to each of our clients, our attorneys focus their practices in all major areas of the law, including business, technology, banking, litigation, immigration, labor, employment, family law, trusts and estates, and tax. Several of our attorneys are certified as specialists by the Board of Legal Specialization and Education of The Florida Bar in the areas of Civil Trial Law, Wills, Trusts and Estates Law, Marital and Family Law, and Real Estate Law.

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