IN THE FLORIDA SUPREME COURT

CASE NO.: SC12-75

NORTH CARILLON, LLC,

Defendant /Appellant,

v.

CRC 603, LLC and CRC 1103, LLC,

Plaintiffs /Appellees.
_____/

L.T. CASE NO.: 3D10-2230
3D10-2231

APPELLEES' ANSWER BRIEF

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Preface

"Purchaser" refers collectively to the Plaintiffs/Appellees in this case, CRC 603, LLC and CRC 1103, LLC. "Developer" refers to appellant North Carillon, LLC. "Division" means the Florida Division of Condominiums, Timeshares, and Mobile Homes. "Initial Deposit" refers to deposits representing the first 10% of the purchase price of the condominium unit. "Excess Deposit" refers to the additional deposits in excess of 10% of the purchase price. "*CRC*" refers to the Third DCA opinion that is the subject of this appeal.

Introduction

The Developer goes far beyond the record, solely to impugn the Purchaser and scare the Court into thinking that, absent reversal of the Third DCA's opinion *sub judice*, the proverbial "sky will fall" for real estate developers in Florida.

The Developer repeatedly mischaracterizes the Purchasers as "speculators" (four times in the first two pages of the Initial Brief), presumably unworthy of protection under the Constitution and laws of the State of Florida. [Initial Brief p. 1, 2, 6].[1] In *D & T Properties, Inc. v. Marina Grande*

[1] Of course, the Developer was not so disdainful of alleged "speculators" when it was collecting millions of dollars in preconstruction deposits from them. The Developer could have completely eliminated "speculators" by simply including

Associates, Ltd., 985 So. 2d 43, 46, 50 (Fla. 4th DCA 2008), the Fourth District properly rejected the litigation tactic of demonizing preconstruction condo contract purchasers:

> Finally, the developer impugned the buyer's motives for the cancellation, contending that D & T Properties was a speculator seeking to avoid a drop in resale value in a falling market….
>
> * * *
>
> We also concur with the trial court that a buyer's motivation is irrelevant in deciding whether the buyer has the right to cancel under the statute. As the trial judge observed, the buyer's right to cancel turns on whether the statutory test is satisfied, not on whether the buyer seeks "to void the agreement due to the loss of resale value caused by a downturn in the real estate market."

The Developer, again *without an iota of record support*, dramatizes this appeal with its assertions that the Third DCA's opinion could practically bring about the demise of the entire real estate industry as we know it, with developers being "forced out of business, into bankruptcy, and permanently ruined." [Initial Brief p. 2, 6].

In appealing to the emotions of this Court, the Developer erroneously suggests, *again without record evidence*, that all developers in Florida failed to establish two separate escrow accounts, and that this was "decades of industry

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occupancy requirements and resale restrictions in its purchase contract. It chose not to do so.

practice." [Initial Brief p. 18].[2] The Developer likewise ignores the current headlines from the legal and business pages, which document that Florida's developers have not only survived the market down-turn, but have already moved-on to the next wave of condominium development.[3] Indeed, to paraphrase Mark Twain, claims of the imminent death of the real estate development industry (propagated by Developer) have been greatly exaggerated.

Finally, the Developer's "sky is falling" narrative utterly ignores that prospective application of the 2010 amendment to §718.202 is not in dispute, and therefore this issue affects only a very finite and rapidly dwindling number of pending cases remaining from the 2005-06 construction boom.

STATEMENT OF THE CASE AND FACTS

The Developer's "statement of the case and facts" appears to be more of an effort to inject "facts" beyond the record into the case, rather than an effort to state the actual facts of this case. In fact, Developer's "statement of the case and facts" contains much more argument – primarily on irrelevant questions and issues – than an actual statement of the facts.

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[2] Samples of escrow agreements where developers properly established two separate escrow accounts are attached as Exhibits A - C of "Appellant's Response in Opposition to Motions for Certification and to Stay Mandate" in the Third DCA, dated December 1, 2011.

[3] *See* Exhibits D-G attached to "Appellant's Response in Opposition to Motions for Certification and to Stay Mandate" in the Third DCA, dated December 1, 2011.

For example, and *with no record support*, the Developer claims the Purchaser was a "speculator" that intended that the condo units would be "flipped at a profit." [Initial Brief p. 1]. The Developer then contradicts itself, acknowledging that the Purchaser intended to "buy and hold the condominium units," rather than "flipping" the units. [Initial Brief p. 3].

Similarly, the Developer includes in its "statement of the case and facts" allusions that the Third DCA's opinion permitted the Purchaser to "speculate risk-free," and argues that the Developer's violation of §718.202 should be disregarded because "no harm, no foul."

Factual Background

Although one would not know it from the Developer's Initial Brief, the record in this case is sparse, as the case was decided on a motion to dismiss, with no discovery and few factual allegations. The operative facts alleged are as follows:

- Purchasers are single-asset limited liability companies formed to purchase two condominium units in "North Carillon Beach," a luxury condominium development on Collins Avenue in Miami Beach. [R. 38, Second Amd. Comp. ¶ 2];

- The Purchaser and Developer contracted for the preconstruction purchase and sale of Units N-603 and N-1103 in May 2006, and the Purchaser delivered 20% of the purchase price to the Developer. [R. 40, Second Amd. Comp. ¶9 and exhibit "A" thereto];

- The transactions did not close. [R. 40, Second Amd. Comp. ¶ 9]; and

- The Developer deposited the Initial Deposits and Excess Deposits into the same escrow account. [R. 40, 43, Second Amd. Comp. ¶ 11, 22].

That is the totality of facts in the record on appeal.

I. SECTION 718.202 REQUIRED SEPARATE ESCROW ACCOUNTS

A. All Published Opinions Hold that the Plain Language of §718.202 Required the Establishment of Separate Escrow Accounts

First, the Developer's argument that §718.202 did not require separate escrow accounts because the statute did not use the words "two" or "separate" is contrary to *every published opinion* addressing this issue during the last 27 years. In addition to *CRC*, the conclusion that §718.202 required separate escrow accounts for the Initial Deposit and the Excess Deposit was reached in the following published opinions, in addition to numerous unreported trial court orders and judgments:

1. *Barrack v. State*, 462 So.2d 1196 (Fla. 4th DCA 1985) ("It might have been simpler and more to the point for the legislature to merely restrict use by a developer of any such purchase funds, *as opposed to specifying the type of escrow accounts* that should be utilized; however, we can understand that the enacting body foresaw payment into the *specified escrow accounts* as a key to all else that is required by the section.") (Emphasis added).

2. *In re Viking I, Inc.*, 95 BR 224 (Bankr. M.D. Fla. 1989) (Judge Paskay) ("The Statute [§718.202] requires the developer to establish one escrow account controlled by an escrow agent for down payments of up to 10% of the sale price received by the developer from the … purchaser and one escrow account likewise controlled by an escrow agent for payments in excess of 10% of the sale price received by the developer from the purchaser prior to

closing.");

3. *Double AA Intl. Inv. Group, Inc. v. Swire Pacific Holdings, Inc. et al*,674 F.Supp.2d 1344 (SD Fla. 2009) (Judge Altonoga);

4. *Double AA Intl. Inv. Group, Inc. v. Swire Pacific Holdings, Inc. et al*, 2010 U.S. Dist. LEXIS 30931 (S.D. Fla. 2010) (Judge Altonoga), *affirmed* in part, vacated in part on other grounds, 637 F.3d 1169 (11th Cir. 2011);

5. *Chusid v. Swire Pacific Holdings, Ltd*., Case # 09-23368-CIV, Docket entry # 61 (SD Fla. 2010) (Judge Lenard) ("…Section 718.202 requires a condominium developer to maintain all pre-construction deposits, in excess of 10% of the purchase price, in a special escrow account…The failure to comply with the provisions of this section renders the contract voidable by the buyer,…");

6. *McKissack v. Swire Pacific*, 2010 U.S. Dist. Lexis 96615 (SD Fla. Sept. 15, 2010) (Judge Cooke) ("… Section 718.202 requires a condominium developer to maintain all pre-construction deposits, in excess of 10% of the purchase price, in a special escrow account…The failure to comply with the provisions of this section renders the contract voidable by the buyer,…");

7. *Kaufman v. Swire Pacific Holdings, Inc.*, 2011 U.S. Dist. LEXIS 148489 (S.D. Fla. 2011) (Judge King) ("Therefore Defendant is incorrect in contending that Florida law did not require Swire's escrow agent to establish two separate accounts to hold Kaufman's deposits. According to the terms of F.S. § 718.202, Swire's failure to maintain separate accounts for Plaintiff's escrow deposits renders the Agreement voidable and requires return of the escrow deposits.");

8. *In re Harbour East Development, Ltd.*, 2011 Bankr. LEXIS 2509 (Bktcy. S.D. Fla. 2011) (Judge Kristol) ("The Court further finds that Harbour East violated *section 718.202(3)* by failing to establish separate escrow accounts to hold Plaintiffs' deposits….Because both deposits amounted to greater than 10 percent of the respective purchase prices for the units under contract, the failure to establish two separate accounts for each deposit violated *section*

718.202(3).");

9. *In re Mona Lisa at Celebration, LLC*, 22 Fla. L. Weekly Fed. B575a (Bankr. MD Fla. 2012) (Judge Jennemann) ("Subsection (2) of §718.202 requires a developer to place all deposits received prior to completion of construction *in excess of 10%* of the purchase price of a unit into a separate escrow account….);

Like the aforementioned cases, this Court should hold that, prior to the 2010 amendment of §718.202, developers were required to establish two separate escrow accounts for the Purchaser's deposits.

B. The Developer Advocates a Statutory Interpretation that Ignores Part of §718.202

The Developer erroneously argues that the Third DCA "violate[d] the bedrock principle of statutory construction" by purportedly adding terms to §718.202 by holding that the Initial Deposit and the Excess Deposit were required to be deposited into separate accounts. [Initial Brief p. 10-11].

To the contrary, it is the Developer who seeks to violate a bedrock principle of statutory construction by essentially ignoring the requirement that the Excess Deposit be paid into a "special" escrow account. As this Court has stated:

> 'a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.' *Id.* (quoting *State v. Goode, 830 So. 2d 817, 824 (Fla. 2002)*). "[R]elated statutory provisions must be read together to achieve a consistent whole, and . . . '[w]here possible, courts must give full effect to all statutory provisions and construe related statutory

provisions in harmony with one another.'"

Heart of Adoptions, Inc. v. JA, 963 So.2d 189, 198-99 (Fla. 2007); *American Home Assurance Co. v. Plaza Materials Corp*., 908 So.2d 360, 373 (Fla. 2005) (Cantero, J., dissenting) (all subsections of a statute must be read in *para materia*).

The Developer's argument that a plain reading of the pre-2010 statute did not require a separate special escrow account for the Excess Deposit simply ignores the legislature's use of the term "special escrow account" in §718.202(2). This Court, like the numerous courts that have interpreted §718.202, simply cannot ignore the legislature's use of the term "special escrow account" in §718.202(2).

"<u>Special Accounts</u>"

Implicit in the Developer's ignoring the term "special escrow account" is that there is no distinction between a "special" bank account and a general bank account, and that they can be one and the same bank account. While §718.202 does not define "special escrow account," Florida law has long-recognized a distinction between a "general account" and a "special account."

When the identical money is given to a bank for **some specified or particular purpose**, such deposits are special or specific, and the ownership of the deposit remains in the depositor, with the bank becoming a bailee, trustee, or

agent for the depositor. *Collins v. State*, 15 So 214, 217-218 (Fla. 1894); *Bank of West Orange v. Associates Discount Corp.*, 197 So.2d 858, 861 (Fla. 4th DCA 1967) (a deposit for a specific purpose is special and title remains with the depositor); *Belford Trucking v. Zagar*, 243 So.2d 646 (Fla. 4th DCA 1970) (Money is capable of identification…where the deposit is special and the identical money is to be kept for the party making the deposit).[4]

The deposit of money that has not been placed in a special account or identified to the bank as being for a special or specific purpose, however, is a general deposit or account, rather than a special deposit or account, creating a

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[4] In addition to the cited legal authorities, all available Florida treatises reach the same conclusion. FLORIDA JURISPRUDENCE, 2D. contains a section entitled "**Special Escrow Account**" and notes that all deposits in excess of 10% for a preconstruction condominium (under §718.202) or a preconstruction cooperative (under §719.202) "must be held in a special escrow account controlled by an escrow agent and generally may not be used by the developer prior to closing the transaction." 10 FLA. JUR 2D CONDOMINIUMS, ETC. §209. (Emphasis added).

Boyer's FLORIDA'S REAL ESTATE TRANSACTIONS, Vol. 5, §190.61[4][b] is entitled "**Special Account**" and provides: "All money paid by a purchaser to a developer prior to completion of construction, on a contract for the purchase of a condominium unit, in excess of 10 percent of the sales price required to be escrowed, must be held in a special account by the developer." (Emphasis added).

The Florida Bar's FLORIDA CONDOMINIUM LAW AND PRACTICE, 3D ed., §7.10 states: "If the developer is entitled to use in excess of 10% of the deposits for construction purposes . . . these funds are held in a special escrow account and can be released only on a written statement from the developer that a construction has commenced and that no part of the funds will be used for salaries, commissions, or expenses of salespersons or for advertising purposes." (Emphasis added).

debtor-creditor relationship between the depositor and the bank, rather than the bailee/trustee relationship with a special account. *Coyle v. Pan American Bank of Miami*, 377 So.2d 213, 216 (Fla. 3d DCA 1979) ("The law is equally well-settled that a deposit in a bank made in the ordinary course of business is presumed to be a general account.").

Significantly, in order to establish an account or deposit as being special, rather than general, the depositor must establish that the depository bank was aware of the special or specific use for which the money was intended when the account was established or deposit made. *Bank of West Orange, supra*; *Coyle, supra*.

Consequently, a special deposit cannot be commingled in the same account with any other type of deposit; doing so will destroy the special deposit's specific purpose, and the account will not be a special account, but rather a general account.

The §718.202(2) special escrow account is a *special account* precisely because the funds deposited into that account are dedicated funds earmarked for the construction of the condominium.

The requirement of keeping money designated for construction separate from money that the Developer is not permitted to touch is analagous to the requirement that a lawyer is required to keep trust funds separate from operating

funds. In fact, no Florida lawyer can dispute that he or she is required to maintain a separate trust account – separate from the operating account – which may hold money belonging to multiple clients.

Just as the lawyer in this analogy can pay his or her expenses from the operating account but not from the trust account, the real estate developer can pay some of its operating expenses (i.e., construction costs), from the account holding the Excess Deposit, but NOT from the bank account holding the Initial Deposit. This Initial Deposit must remain in a separate escrow account for the purchaser's protection.

Simply stated, the legislature required separate accounts to protect purchasers, the express purpose of Chapter 718 and §718.202, as the Developer concedes.[5] [Initial Brief p. 22].

C. The Legislative History of §718.202 Confirms the Developer was Required to Establish Separate Escrow Accounts

In *Double AA*, *supra,* the trial court undertook a scholarly and painstaking 44-page analysis of §718.202, including every statutory amendment from 1970 to 2010, and concluded:

This historical analysis leads to the same conclusion the Court

[5] This court has said statutes intended to protect the public should be liberally construed in favor of the public. *Samara Devel. Corp. v. Marlow*, 556 So.2d 1097, 1100 (Fla. 1990). *See also, Asbury Arms Devel. Corp. v. Fla. Dept. of Bus. & Prof. Reg.,* 456 So.2d 1291, 1293 (Fla. 2nd DCA 1984)(the protections of a statute designed to protect the public cannot be waived).

> arrived at in the Summary Judgment Order under a plain reading of the law: the Florida Legislature requires developers and their escrow agents to maintain separate accounts for the protected [Initial] deposit, [and] the construction [Excess] deposit…

Although §718.202 does not define "special" account, the initial version of the statute, codified at §711.25 (1971), makes clear that the legislature meant "special account" to be a separate account for a specific purpose. Section one of the original statute required that preconstruction deposits "…shall be held in a special account by the seller…and shall not be commingled with the funds of the seller…" Reading these two clauses from the same sentence in *para materia* shows that the legislature clearly intended "special account" to mean exactly as both common sense and case law defined it: an account intended for *a specified* purpose.

The Developer cannot reasonably argue that an account for a specified or particular purpose need *not* be separate and distinct from any other accounts holding money for any other purpose. This account was to be ***separate*** from the account with the developer's money in it, and this was clear ***without*** using the words "two" or "separate." In fact, doing so would have been redundant.

The Developer, unlike the *Double AA* court, ignores some portions of the statute, ignores the context of other language and statutory changes, and argues for words to be interpreted contrary to their plain meaning, ordinary usage, and

common sense. [6]

1970 Statute. The Developer asserts that the 1970 version of the statute did not require "two separate *escrow* accounts." [Initial Brief p. 12-13] (emphasis added). The Purchaser agrees – because the 1970 statute said nothing at all about "escrow" accounts. What is clear, however, is that the 1970 legislature required two separate accounts – without using the words two or separate – by requiring preconstruction deposits be kept in a *special* account and not commingled with the developer's other funds. While the Developer concedes the deposits could not be commingled and had to be kept separate, it nevertheless implies that this requirement did not mean a developer was required to keep "two" or "separate" accounts. This implication defies all logic and common sense.

1974 Statute. The Developer next suggests that the reference to "special account" in the statute's 1974 amendment means only that the statute required the initial deposit and excess deposit "to be held by different parties." [Initial Brief p. 13]. It is axiomatic that requiring the initial deposit and excess deposit to be held by *different parties* necessarily meant that the deposits would be held in

[6] The Developer's argument on the meaning and interpretation of "special account" in §718.202 bears little, if any, resemblance to the arguments advanced at the Third DCA, where the Developer suggested that the *Double AA* court was "confused" for treating the word "account" in the banking context, rather than the bookkeeping context. [Answer Brief at Third DCA p. 16].

two separate accounts. Nothing in the 1974 statute even remotely suggests that the legislature changed the meaning of "special" account in subsection two from meaning anything other than a "separate" account, as is clear from the 1970 version of the statute.

1976 Statute. In 1976, the legislature made several changes to the statute, again increasing purchaser protection. These changes increased the amount of the Initial Deposit that the developer could not use for construction from 5% to 10%, and inserted the word "escrow" between "special" and "account" in subsection two, making clear that the special account for the Excess Deposit, like the account for the Initial Deposit, was to be an escrow account. Like the 1974 statutory changes, nothing else even remotely suggests that the legislature changed the meaning of "special" in subsection two from meaning anything other than a separate account, as is clear from the 1970 version of the statute.[7]

1984 Statute. The legislature once again increased consumer protection in 1984. While the Developer argues that the only relevant substantive change in the 1984 amendment was to change control of the Excess Deposit from the developer to an independent escrow agent, in fact it did much more. The 1984

[7] The legislature also "imposed strict liability on the developer in favor of the buyer" in the 1976 amendment. *Double AA* at p. 34. Consequently, *Double AA* rejected the developer's argument that because the Initial Deposit was not lost, no claim could be asserted to void the purchase contract; *ie*., "no harm, no foul." 2010 U.S. Dist Lexis 30931 at p. 63-64.

amendments:

- required that the special escrow account for the Excess Deposit must be established in the same manner as the escrow account holding the Initial Deposit;

- omitted the sentence from subsection (1) that "The escrowed funds may be deposited in separate accounts or in common escrow or trust accounts or commingled with other escrow or trust accounts handled by or received the escrow agent;" and

- added new subsection(8) defining the requirements for escrow agents and how escrow money may be invested, expressly stating that it applied – in the plural - to "all escrow accounts required by this section."

As the *Double AA* court observed, the legislature's reference to multiple accounts reflected its intent that the Initial Deposit and the Excess Deposit "continue to be treated separately." *Id*. at 40. Any other construction of the 1984 version of §718.202 renders portions thereof superfluous.

While §718.202 and its predecessor statutes were amended several times over a 40-year span, eventually requiring use of an independent escrow agent and adding other provisions, all amendments – until the 2010 amendment – progressively increased purchaser protections and rights. Moreover, all amendments retained the adjective "special" when describing the accounts for purchaser deposits. The term "special" always had the same meaning and intent – keeping some or all of purchasers' deposits in a ***separate*** account from other deposits. Thus, all versions of the statute always required "two" or "separate" accounts, without ever needing to use those words.

D. *Lowry* Does Not Support Retroactive Application of the 2010 Amendment

The Developer argues that the Third DCA "ignored" *Lowry v. Parole Comm'n*, 473 So.2d 1248 (Fla. 1985). *Lowry* held that when an amendment to a statute is "enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." The Third DCA didn't "ignore" *Lowry*; it is simply inapplicable to this case.

1. The 2010 Amendment was Not Enacted Shortly After Controversy Arose About the Interpretation of §718.202

The interpretation of §718.202 requiring "two" or "separate" accounts for the Initial Deposit and Excess Deposit was not a mere "four months" before the 2010 statutory amendment. Instead, courts began interpreting §718.202 as requiring "two" or "separate" accounts *25 years* before the 2010 amendment. Therefore, one cannot reasonably argue that the 2010 statutory amendment was made "soon after controversies as to the interpretation" of the statute began.

In *Barrack v. State*, 462 So.2d 1196 (Fla. 4th DCA 1985), the court stated:

> It might have been simpler and more to the point for the legislature to merely restrict use by a developer of any such purchase funds, as opposed to specifying the type of escrow **accounts** that should be utilized; however, we can understand that the enacting body foresaw payment into the specified escrow **accounts** as a key to all else that is required by the section.

[Emphasis added].

Four years after *Barrack*, this exact issue was addressed in *In re Viking I, Inc.*, 95 BR 225, 226-27 (MD Fla. 1989), where the court interpreted §718.202 as follows:

> The Statute [§718.202] requires the developer to establish one escrow account controlled by an escrow agent for down payments of up to 10% of the sale price received by the developer… and one escrow account likewise controlled by an escrow agent for payments in excess of 10% of the sale price received by the developer….

The *Viking* court rejected the Division's argument that the developer complied with §718.202, therefore concluding that the purchaser's deposits were part of the developer's bankruptcy estate, rather than the property of the unit purchasers.

Where courts interpreted §718.202 as requiring separate escrow accounts more than 25 years before *Double AA*, it cannot be reasonably argued that controversy as to the interpretation of the statute arose only four months before the 2010 amendment. Therefore *Lowry* is inapplicable.

2. *Lowry* has Been Limited by This Court's Subsequent Opinions

Lowry is also inapplicable to this case because it has been limited by this Court in analagous circumstances. In *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995), this Court limited *Lowry* as follows:

> We did state in *Lowry* that a clarifying amendment to a statute that is enacted soon after controversies as to the interpretation of a statute arise may be considered as a legislative interpretation of the original law and not as a substantive change. It would be absurd, however, to

> consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

In this case, where the original legislation was enacted between 26 - 40 years prior to the 2010 amendment, and the interpretation of §718.202 as requiring "two" or "separate" accounts began 25 years before the 2010 amendment, the suggestion that this amendment is merely a "clarification" of the statute is "absurd." *Laforet* at p. 61. *Lowry* is inapplicable to this case.

Finally, the Appellees dispute the assertion that using a single escrow account represents "decades of industry practice." [Initial Brief p. 18]. There is absolutely no record evidence supporting the claim that this was "industry practice." In fact, many developers properly followed the law and established separate escrow accounts for the Initial Deposit and Excess Deposit. *See* FN # 2, *supra*.

E. The Agency that Enforces §718.202 Did *Not* Opine that the Statute Does *Not* Require Two Separate Escrow Accounts

The Developer erroneously argues that the informal legal opinion (the "ILO"), rejected by both the Third DCA below and *Double AA*, was authored by "the agency that enforces section 718.202," and therefore is entitled to deference. The Developer further misstates that the DBPR opined that §718.202 did not require two separate escrow accounts, when the author actually interpreted the statute as calling for exactly that.

1. Chapter 718 is Not Administered Directly by the DBPR

Courts may give deference to an agency opinion because an agency charged with "enforcement and interpretation" of a subject matter will generally have a "unique combination of technical knowledge and practical experience" in administering laws under its charge." *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So.2d 1204, 1215-1216 (Fla. 2006) (Cantero, J., *dissenting* in part).

Contrary to the Developer's claim, the Department of Business and Professional Regulation ("DBPR") is not the agency charged with administering and enforcing §718.202. Instead, the Division is the agency charged with administering chapter 718. *Fla. Stat.* §718.501 (1) ("The division may enforce and ensure compliance with the provisions of this chapter and rules relating to the development, construction, sale, lease, ownership, operation, and management of residential condominium units.").

DBPR was created pursuant to *Fla. Stat.* §20.165. Eleven (11) specific "divisions," including the Division, were established under DBPR, with each division to have its own director to "directly administer the division." §§20.165(2) and (3).[8] Significantly, the DBPR has no demonstrated (or even claimed) knowledge, expertise or experience interpreting or enforcing Chapter

[8] The eleven divisions under the DBPR include regulation of diverse areas such as alcohol, tobacco, architects, sports agents, auctioneers, barbers, boxing, accountants, cosmetology, geologists, Harbour pilots, pari-mutual wagering, yacht brokers, veterinarians, talent agencies, etc.

718 or §718.202, nor is it directly involved in administering Chapter 718.

Whether participating in litigation (*In re Viking, supra*), or issuing an opinion on the interpretation of Chapter 718, the Division, not the DBPR, is the entity that appears or opines, not the DBPR. In fact, the Division has its own procedure for issuing declaratory statements and opinions, which are published on the Division's website.[9] These opinions are signed by the Division, not the DBPR.

2. Agency Deference is Inappropriate When Special Agency Expertise is Not Required

Even if DBPR was the agency charged with administering and enforcing §718.202, a court need not defer to an agency's construction or application of a statute if special agency expertise is not required. *Fla. Hosp. (Adventist Health. Etc.) v. State of Fla. et al*, 823 So.2d 844 (Fla. 1st DCA 2002).

In this case, special agency expertise is simply not required to construe or apply §718.202. As stated above, every published opinion addressing §718.202 has concluded that two separate accounts were required. *See Double AA, Viking, Barrack, Chusid, McKissack, Kaufman, Harbour East, Mona Lisa, supra*.

Where special agency expertise was not required to interpret or apply §718.202, this Court should not defer to the ILO.

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[9] *See* http://www.myfloridalicense.com/dbpr/lsc/LSC-home-declaratory_statement_general.html

3. There is No Evidence that the Division or DBPR Maintained a Consistent Policy that §718.202 Required Only One Escrow Account

The *Double AA* court cited to Justice Cantero's dissenting opinion in *McKenzie Check Advance of Florida, LLC v. Betts*, 928 So.2d 1204, 1215-16 (2006) on whether agency deference was appropriate in connection with the ILO. 2010 U.S. Dist. Lexis 30931 at p. 50.

In his *dissent* in *McKenzie*, *id*. at 1215, Justice Cantero set-forth the standards for agency deference, in relevant part, as follows:

> We have not required that, to be entitled to deference, an agency's statutory interpretation be exhaustively articulated in a formal rule. To the contrary, we have deferred to a rule supported by an affidavit from an agency official who attested after the fact that the Department of Revenue had "consistently maintained [a] policy" since the inception of a given tax. [citation omitted]. *Thus, when we have reliable evidence that the implementing agency maintained a consistent interpretation of its statute during the time the statute was in effect…that interpretation should be followed if it meets the requirements for administrative deference*.

[Emphasis added].

The *Double AA* court agreed that agency deference was appropriate "as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence," but concluded that the ILO was *not* consistent with legislative intent, nor supported by substantial, competent evidence. *Double AA*, 2010 U.S. Dist. LEXIS 30931 at p. 52.

In this case, like in *Double AA*, there was no evidence whatsoever that

either the Division or DBPR "consistently maintained a policy" or interpretation that §718.202 required only one escrow account for both the Initial Deposit and Excess Deposit. Significantly, the ILO does not appear anywhere on the Division's website, nor has the Division ever adopted the ILO as the Division's interpretation of §718.202. Although the ILO was drafted in 1999, it has never been adopted as an official rule, statement, interpretation or opinion of any agency.

Had the ILO been consistent with the Division's or the DBPR's interpretation of §718.202, one can only ask why no official rule, opinion or interpretation was ever promulgated or adopted by either the Division or DBPR, especially after the *Viking* decision in 1985, which construed §718.202 as requiring two separate escrow accounts.

The Third DCA rejected giving deference to the ILO, and this Court should as well.

4. The Drafter of the ILO Interpreted §718.202 as Requiring Separate Accounts

The drafter of the ILO, like every published opinion interpreting §718.202, correctly determined that §718.202 required two separate escrow accounts, stating, in relevant part:

> An interpretation of the statute would seem to define a special escrow account as a separate and distinct account established for payments in excess of 10 percent of the sales price. This account is

> in addition to the escrow account that is established for the 10 percent deposits…The provisions of 718.202…require the establishment of ***separate*** escrow accounts for funds in excess of ten percent of the purchase price. [Emphasis added].

Consequently, any argument that the drafter of the ILO determined that §718.202 did not require separate escrow accounts is contrary to the ILO itself.

5. Agency Deference is Inappropriate Where Its Interpretation Conflicts with the Plain and Ordinary Meaning of the Statute

Like many words in the English language, the word "account" has more than one meaning. One meaning is "an amount of money deposited with a bank, as in a checking or savings account: *My account is with Third National*." An alternative definition is "*Bookkeeping* **.a.** a formal record of the debits and credits relating to the person, business, etc., named at the head of the ledger account. **b.** a balance of a specified period's receipts and expenditures." *See* www.dictionary.com.

In all pre-2010 versions of §718.202, read in context, it cannot reasonably be argued that "account" meant anything other than the former banking definition, rather than the later bookkeeping definition. This is clear from the context:

> §718.202(1): "…*shall pay into an escrow account* all payments up to 10 percent…

> §718.202(2): "All payments which are in excess of the 10 percent …*shall be held in a special escrow account*…

The drafter of the ILO, after initially confirming that the statute required two separate accounts, stated that separate accounts "may not be the common practice." She then devised a scheme to excuse a developer's failure to comply with the two-escrow-account requirement by re-defining "account" in the bookkeeping context, rather than in the banking context. This scheme was purportedly based on hearsay conversations with a Division financial administrator, Jon Peet, predicated upon supposed "good accounting principles."

This was intellectually dishonest and contrary to the plain meaning of the use of the word "account," in context. Section 718.202 is not about "good accounting principles," nor about whether permitting separate bookkeeping records in lieu of requiring two separate escrow accounts satisfied "good accounting principles." Rather, §718.202 was about protecting a purchaser's earnest-money deposits from being used improperly by a developer. Maintaining separate bookkeeping records offers no such protection.

While the undisputed purpose of §718.202 is to protect purchasers, the drafter of the ILO put the interests of a developer who failed to comply with §718.202 ahead of the intended purchaser protection, thereby eliminating

protections adopted by the Florida legislature.[10] Stated differently, the drafter sought to change the statute to conform to what she perceived as "current practice" in 1999, at the expense of legislative safeguards.[11]

The *Double AA* court thoroughly examined the ILO, acknowledging that agency statements may be treated by courts as authoritative, given great deference, or given no weight at all. The *Double AA* court determined that the ILO was not entitled to any deference at all where it was not the product of formal rule-making, was not an agency rule, was not consistent with legislative intent, and was not supported by substantial, competent evidence.

Just as the *CRC* and *Double AA* courts rejected the ILO as being erroneous and contrary to law, and therefore entitled to no deference, this Court should reach the identical conclusion.

F. THE RULE OF LENITY IS INAPPLICABLE TO THIS CASE

The Developer argues, for the first time, that the rule of lenity requires §718.202 to be construed in its favor. The rule of lenity, however, is inapplicable to this case for numerous reasons:

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[10] *First Sarasota Serv. Corp. v. Ramar Group Holdings, Inc., et al.*, 450 So.2d 875 (Fla. 2nd DCA 1984).

[11] This argument was the Developer's primary argument at the Third DCA; however, it has not been directly asserted in the Initial Brief, other than arguing that the ILO should have been followed, and the conclusory (and erroneous) statement that separate escrow accounts offered no greater protection than keeping separate bookkeeping records. [Initial Brief p. 18, 22].

1. The rule of lenity, at best, could apply only to the criminal subsection of the statute, §718.202(7), which is not at issue in this case;

2. Section §718.202(7) is not susceptible to differing constructions, the prerequisite to invocation of the rule of lenity. §775.021(1), *Fla. Stat*.; *Barrack, 462 So.2d* at *1197* (rejecting argument that §718.202(7) was "ambiguous and arbitrary," and holding that "the section provides in precise and easily understood terms a condominium developer's obligations with reference to receiving and handling condominium parcel purchase funds.);

3. The rule of lenity applies only in the criminal context. *Florida Bar v. St. Louis*, 967 So.2d 108, 122 (Fla. 2007). This is a civil proceeding, and therefore the rule of lenity does not apply;

4. The rule of lenity is inapplicable because the Developer is not subject to criminal prosecution; criminal prosecution was required to "be commenced within 3 years" after the Developer failed to establish separate escrow accounts, which, at the latest, was in 2006 when the parties entered in the purchase contracts and the Developer failed to deposit the Initial and Excess Deposits into separate escrow accounts. §775.15 (2)(b), *Fla. Stat*.;

5. The entirety of §718.202 is clear and unambiguous, thereby precluding application of the rule of lenity. *Barrack, 462 So.2d* at *1197*; and

6. Applying the rule of lenity to the entirety of §718.202, in the manner argued by the Developer, ignores the "basic rule of statutory construction" that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless. *Heart of Adoptions,* 963 So.2d at 198-99.

The rule of lenity simply has no relevance or application to this case.

II. THE THIRD DCA CORRECTLY CONCLUDED THAT THE 2010 AMENDMENT TO §718.202 COULD NOT BE APPLIED RETROACTIVELY

The Third DCA, while incorrectly finding that the "Legislature expressed an intention that the 2010 amendment be applied retroactively," nevertheless correctly concluded that the 2010 amendment could not be applied retroactively because doing so would impair vested contractual rights. The Developer completely ignores any analysis of vested rights, instead arguing, erroneously, that the 2010 amendment is "procedural," and therefore should be applied retroactively.

This Court has "long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds." *In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006); *In re Turner*, 76 So. 3d 898, 901 (Fla. 2011). In this case, if the Court determines that the 2010 amendment did not express a clear legislative intent of retroactivity, then the amendment is presumed to apply prospectively only, thereby permitting this Court to affirm the Third DCA without reaching the question of unconstitutional impairment of contractual rights. This Court should do exactly that!

A. <u>The Legislature Did Not Express a Clear Intent of Retroactivity</u>

The legislature's statement that it intended the 2010 Amendment "to

clarify existing law" is *not* tantamount to a legislative statement that the legislature intended the 2010 Amendment to apply retroactively. Indeed, no Florida cases have so held.

Florida law is well-settled that "in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One*, 986 So. 2d 1279, 1284 (Fla. 2008)*; State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995) ("*Laforet*"); *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983).[12] "This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights." *Lavazzoli* at 323.

As the Fourth DCA observed in a scholarly analysis of applying laws retroactively: "[t]hroughout history, courts and legal commentators have generally looked with disapproval and extreme caution at the retroactive application of laws." *Raphael v. Schecter et al*., 18 So.3d 1152, 1155 (Fla. 4th DCA 2009). In its analysis, the *Raphael* court quoted treatises and the United States Supreme Court, emphasizing that it is a "fundamental principle of jurisprudence that retroactive application of new laws is usually unfair," that

[12] The presumption against retroactive legislation is consistent with American jurisprudence. As the U.S. Supreme court recently reiterated, the "presumption against retroactive legislation…embodies a legal doctrine centuries older than our Republic." *Vartelas v. Holder*, 132 S. Ct. 1479, 1486; 182 L. Ed. 2d 473; 23 Fla. L. Weekly Fed. S237 (2012) [citations omitted].

retroactivity is "generally disfavored in the law," and that retrospective laws are, "as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." [Citations omitted]. In fact, the Fourth DCA acknowledged: "[i]t is therefore well settled that retrospective laws are "generally unjust." *Id.* [citation omitted].

The 2010 statutory amendment was recently analyzed in *In Re Harbour East Dev., Ltd.*, 2011 Bankr. Lexis 2509 (Bankr. S.D. Fla. June 11, 2011), where the court determined that the 2010 amendment "bears no legislative intent – much less 'clear legislative intent'- that the amendment operates retroactively." The *Harbour* East court simply did not consider a statement of intent to "clarify existing law" to be the equivalent of "clear legislative intent" of retroactivity.

Harbour East was correctly decided. The legislature has demonstrated time and again that it can clearly and directly state when it intends statutory amendments to apply retroactively. Where the legislature does not do so, the courts should not do so for the legislature, and should instead defer to the legislature by concluding that had it intended statutory amendments to apply retroactively, it would have said so. Where there was no clear legislative intent of retroactivity, the 2010 amendment is presumed to apply prospectively only.

Where there was no clear legislative statement of retroactivity, this Court cannot conclude that the Third DCA's refusal to give the 2010 Amendment retroactive application was erroneous, and the Court need not address the constitutional issue of impairment of contractual rights.

B. The Court is Not Bound by Statements of Legislative Intent Uttered Long After Enactment of the Statute

The statement that the 2010 amendment was a "clarification" of §718.202 is not binding on this Court. In *State v. Lanier*, 464 So.2d 1192 (Fla. 1985), this Court stated: "…we are not bound by statements of legislative intent uttered subsequent to either the enactment of a statute or the actions which allegedly violate the statute." Both circumstances are present in this case.

First, there is no dispute that the 2010 statement of "clarification" was made *decades after* the provisions requiring separate accounts for the Initial Deposit and the Excess Deposit. Likewise, there can be no dispute that the "clarification" statement was made by the legislature in 2010, years *after* the "actions which allegedly violate the statute." Consequently, the Court is not bound by the statement of "clarification," and therefore should not apply the statute retroactively.

C. A Statutory Amendment *Decades* After Enactment of the Original Statute Cannot be Deemed a Clarification

In *Laforet*, 658 So.2d 55, this Court addressed whether a legislative amendment enacted 10 years after the original statute could be applied retroactively as a "clarification" of existing law. This Court rejected this argument, stating "[j]ust because the Legislature labels something as being remedial, however, does not make it so." *Id*. at 61. The Court then stated:

> It would be absurd, … to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

Id. at 62. The Court then cited its' prior precedent in *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989), reiterating that "subsequent legislatures, under the guise of 'clarification' cannot nullify retroactively what a prior legislature clearly intended." *See also State v. Knowles*, 402 So.2d 1155, 1157 (Fla. 1981) (rejecting argument that a statutory amendment regarding waiver of sovereign immunity should be applied retroactively as a "clarification" of the prior statute, stating "[w]hile we acknowledge the legislature's right to enact curative statutes which overcome procedural deficiencies in earlier acts, the 1980 statute is clearly not of that genre."

More recently, in *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So.2d 1204 (Fla. 2006), this Court rejected the argument that a statutory

amendment enacted seven (7) years after the original statute could be deemed a "clarification" of original legislative intent.

As in *Laforet*, *Kaisner*, and *McKenzie*, the Third DCA addressed this identical issue in *Ramicharitar v. Derosins*, 35 So.3d 94 (Fla. 3d DCA 2010), rejecting the argument that a statutory amendment enacted 29 years after the original statute could be applied retroactively as a "clarification" of original legislative intent, stating "it would be absurd to consider the 2003 revision as a clarification of the Legislature's original intent in 1974."

In this case, where the 2010 legislature enacted a statutory amendment purporting to "clarify" what prior legislatures did between 26 and 40 years ago, this is nothing more than a subsequent legislature attempting to retroactively nullify the actions of a prior legislature under the guise of a clarification, in direct contravention of well-settled Florida law. *Laforet*; *Kaisner*; *McKenzie*; *Ramicharitar*. The 2010 amendment can in no way, shape or form be characterized as a "clarification" of original intent, and therefore cannot be applied retroactively as a matter of law.

D. Retroactive Application of the 2010 Amendment Would Impair Vested Contractual Rights

The Developer completely misses the mark in its analysis of whether the 2010 Amendment impairs vested rights, and therefore cannot be applied retroactively:

> The Third DCA construed CRC's "right" as a "legally sufficient, fully-accrued cause of action to void the purchase contracts and obtain a refund of their deposits." Id. at 660. But that finding makes a substantive right out of a purchaser's desire— asserted for the first time nearly two years after the Complaint was filed—to have his or her deposits accounted for in two accounts instead of one.

The Developer's argument is nonsensical; this case is not about whether the Purchaser "desire[d]…to have his or her deposits accounted for in two separate accounts instead of one," but rather whether §718.202 required the Developer to deposit the Initial Deposit and Excess Deposit into separate escrow accounts.

Substantive v. Procedural

The Developer errs in characterizing §718.202 as procedural, rather than substantive, by conflating the concepts of *duties and rights* with legislative purpose. Florida law is well-settled that "substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994).

The 2010 amendment effectively eliminated a developer's *duty* and obligation to establish and maintain two separate escrow accounts. Likewise, the amendment eliminated a purchaser's *right* to have his or her Initial Deposit segregated and maintained in a separate escrow account from the Excess

Deposit, as well as the right to void the agreement if the developer failed to do so. In fact, if depositing the Initial and Excess Deposits into two separate accounts was not a substantive *duty* of the developer and substantive *right* for the buyer, then there was no sense in the legislature providing the buyer with a *remedy* for violation of this duty/right, which it did in §718.202(5). The reason for this point is obvious: remedies do not exist in the law absent substantive rights, duties and obligations.

Rather than address the Developer's *duty* to establish two separate escrow accounts, and the Purchaser's *right* to have its deposits held in separate escrow accounts, the Developer instead addresses the "substantive purpose" of §718.202. The Developer argues that the only substantive right in §718.202 was the "right to the benefits of an independent escrow agent," and suggests that the requirement of a separate, "special" escrow account was unnecessary because buyers are sufficiently protected by having an independent escrow agent. [Initial Brief at p. 22].

This argument, however, is contrary to the legislature having provided not only the right to an independent escrow agent, but also the right to separate escrow accounts for the Initial and Excess Deposits, and to void the contract if the developer violated these protections. With all due respect to the Developer, the legislature was free to impose greater protections for purchasers than merely

an independent escrow agent -- and it did so. While the Developer was likewise free to hire lobbyists to have the law changed (which it did with lightning speed after *Double AA*), such changes cannot be applied retroactively to eliminate the rights and remedies of buyers who contracted years earlier.

This identical issue was addressed in *Harbour East.*, 2011 Bankr. Lexis 2509 at p. 9-10, which stated:

> The statue at issue is a substantive statute, as opposed to procedural statute, because the amendment eliminates the developer's duty to establish two separate escrow accounts, as well as the buyer's right to revoke the purchase contract where the developer establishes only one account.

In this case, like in *Harbour East* and *CRC*, the elimination of the Purchaser's substantive rights in the 2010 amendment can be deemed only as substantive, and not merely procedural, thereby prohibiting retroactive application of the 2010 Amendment.

Impairment of Vested Rights

Assuming the version of §718.202 in effect prior to 2010 required two separate escrow accounts, then there can be no dispute that the Purchaser had the right to void the purchase contract prior to the 2010 amendment. Therefore, the issue is whether the 2010 amendment, which created an alternate method for the Developer to comply with §718.202, could be applied retroactively to

"undo" or defeat the Purchaser's right to void the contract that existed before the amendment.

Florida courts refuse to permit retroactive application of a statutory amendment if doing so impairs vested rights, which violates Florida's constitution. *Laforet*, 658 So.2d 55; *Cohn v. The Grand Condominium Assoc.*, 62 So.3d 1120 (Fla. 2011); *State v. Knowles*, 402 So.2d 1155 (Fla. 1981).

Knowles is dispositive of this issue. In *Knowles*, *id.* at 1157-58, the State of Florida argued that a statutory amendment granting sovereign immunity should be applied retroactively as a clarification of the statute. After rejecting that the amendment was a clarification, the court stated:

> In our *Talmadge* decision, we held that the original statute did not grant employees immunity. The appellants offer nothing to document their assertion that the 1980 statute can recharacterize the law as originally enacted. Although the legislature may well have reacted to our *Talmadge* decision, that fact alone does not revitalize an earlier, omitted legislative purpose. In fact, the legislature's grant of only partial, rather than full retroactivity suggests exactly the opposite.
>
> We have already determined in *Talmadge*, as best we could, that the immunization of employees was not the legislature's original plan. We searched long and hard to recreate the legislature's will, and taking all factors into account we concluded in *Talmadge* that section 768.28 had indemnified, but not immunized public employees from personal responsibility. Given the *Talmadge* decision, we can hardly accept an unsupported suggestion that the 1980 enactment really constituted either a clarification of earlier intent, or a restatement of what had always been the law. Given *Talmadge*, the 1980 statute can only be what it purports to be [sic] a declaration of public policy by the legislature that the state will henceforth substitute its liability to

> injured persons for the liability of public employees who are merely negligent.
>
> …To determine whether that problem implicates the maxim that retroactive legislation may not impair vested rights, we need first investigate whether Knowles had a "vested" right of some sort a right to sue Gregg (as the district court said), a right to full recompense for his injuries, or a right to the jury's award. That investigation can best be launched by considering the change in Knowles' position which a retroactive application of the 1980 statute would engender.
>
> * * *
>
> The detriment to Knowles from an application of the 1980 change would be his loss of the ability to be recompensed fully...
>
> …As a matter of principle, it is indisputable that a retroactive application of the 1980 law has taken from Knowles something of value, and that nothing of value has been substituted or otherwise provided.
>
> * * *
>
> Quoting Mr. Justice Holmes in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339, 42 S. Ct. 325, 66 L. Ed. 647 (1922):
>
> > Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed.
>
> We hold, as in *Forbes*, that it cannot.

In addition to *CRC*, other courts have also examined the issue of vested rights, reaching the same conclusion as in *CRC*. In *Harbour East*, 2011 Bankr. Lexis 2509 at p. 9-10, the court held:

> The Court finds that Plaintiffs' rights had vested at the time the deposits were placed into a single escrow account; if the amendment is applied retroactively, it would impair these vested rights.

> Accordingly, the Court will not retroactively apply the 2010 amendment to section 718.202, Fla Stat. The Court will enforce the Plaintiffs' substantive right to void the purchase contracts.

This identical issue was also analyzed in a detailed final judgment entered by a Miami-Dade County trial court in 2010 in *Saltzman et al v. BCRE Brickell, LLC*, Case # 09-50954-CA-23 (11th Jud. Cir. Dec. 3, 2010), where, on virtually indistinguishable facts, Judge Victoria Sigler held that §718.202 required two separate bank accounts, and denied retroactive application of the 2010 amendment based on vested rights:

> At the operative time in this case, the Plaintiffs' deposits were not put into two separate accounts, to wit, an escrow account and a special escrow account. By failing to do this, the Purchasers obtained vested rights, to wit, the right to void the purchase agreements pursuant to §718.202(5).
>
> Given the finding that the Plaintiffs' rights had vested at the time the deposits were placed into a single escrow account, the Court will not retroactively apply the 2010 amendment to §718.202. The Court will enforce the Purchasers' substantive right to void the purchase contracts.

A copy of the *Saltzman* judgment is attached hereto as Appendix "A."

In this case, once the Developer failed to establish a special separate escrow account for the Excess Deposit, and instead deposited the Excess Deposit into the escrow account created for the Initial Deposit, the Purchaser had the **vested** right to void its purchase agreement under the clear and unambiguous language of the operative version of §718.202. In fact, the Purchaser exercised

that right, thereby entitling the Purchaser to the return of its deposits. Applying the 2010 legislative enactment retroactively would have the effect of defeating this **vested** right, thereby making retroactive application of the statute unconstitutional under Florida law. *Id*.

E. Requiring Separate Accounts Protects the Purchaser

The Developer erroneously claims that "[n]o substantive difference exists between separately accounting for purchase deposits in one account, or keeping them in two accounts." [Initial Brief p. 22]. This claim could not be further from the truth. In fact, there is a substantial difference between "separately accounting" for Purchaser's deposits and "keeping them in two accounts." The difference, of course, is greater purchaser protection.

As the court in *Barrack v. State*, *supra*, observed,

> "The wisdom of the legislature in its effort to protect an unsuspecting segment of society can be seen from the facts of this case. It might have been simpler and more to the point for the legislature to merely restrict use by a developer of any such purchase funds, as opposed to specifying the type of escrow accounts that should be utilized; however, we can understand that the enacting body foresaw payment into the specified escrow accounts as a key to all else that is required by the section."

Indeed, the legislature understood that requiring separate accounts provided greater consumer protection, the express purpose of Chapter 718, Florida Statutes. *First Sarasota Serv. Corp. v. Miller, 450 So. 2d 875, 878 (Fla. 2d DCA 1984)*. Requiring separate accounts, as opposed to "separate

accounting," provides greater purchaser protection for the following reasons.

First, if all of the deposits are commingled into a single bank account, purchasers are at greater risk in the event the developer fails and ends up in bankruptcy proceedings. In bankruptcy, if the developer has not properly segregated the bank account holding money that it can use for construction purposes (the Excess Deposit) from the account it cannot touch (holding the Initial Deposit), both accounts would be treated as property of the bankrupt developer's estate, and therefore subject to the claims of the developer's secured creditors.

This exact issue was addressed in *Viking*, *supra*, where the Division argued that the accounts were treated in a manner sufficient to establish them as property of the purchasers, rather than the bankruptcy estate, and therefore the deposits should be returned to the State for the benefit of the purchasers. The *Viking* court disagreed, concluding that where the developer failed to establish separate accounts for the Initial Deposits and the Excess Deposits, the accounts were not treated in a manner sufficient to be excluded as property of the bankrupt developer's estate.

Second, Florida law recognizes the right of a contractor to seek an equitable lien on undisbursed construction loan funds—or to maintain an interpleader action against the fund—for unpaid labor, services, or materials. *See*

Kinney v. Allied Home Builders, Inc., 403 So.2d 440, 441 (Fla. 2d DCA 1981). By maintaining the deposits in separate bank accounts, any unpaid contractors or suppliers can lien the account holding the Excess Deposit, which is intended to pay for construction, without liening the Initial Deposit account. By depositing both the Initial Deposit and the Excess Deposit into the same account, purchasers' Initial Deposits are put at risk of unpaid contractors' equitable lien claims, regardless of whether the deposits were "accounted for" separately in the bookkeeping sense.

Third, and similar to the preceding reason, in the event of an IRS levy against the Developer, keeping the deposits in separate accounts will immunize the Initial Deposit, which the Developer can't get until closing, from the Developer's construction funds, which may be subject to levy.

Fourth, if all of the deposits are commingled into a single bank account, purchasers are at greater risk if the bank or depository institution fails because the FDIC insurance applicable to the account is treated very differently than if the Excess Deposit is maintained in a separate bank account.[13] Stated differently, if the Initial Deposit and Excess Deposit are placed in separate bank accounts, then the FDIC insurance limits per person would apply to each purchaser, rather than being aggregagated and maxed-out as deposits belonging

[13] This risk is significant, as 413 banks failed in the United States since 2009. *See* http://www.fdic.gov/bank/individual/failed/banklist.html.

to the developer. *See* FDIC Advisory Opinion 05-04 (July 6, 2005), a copy of which is attached as Exhibit "A" to the Purchaser's Reply Brief in the Third DCA.[14]

Fifth, special account holders are entitled to be paid in full before general unsecured creditors in the event of bank insolvency. *Merrill Lynch Mortg. Capital v. Federal Deposit Insurance Corp.*, 293 F.Supp.2d 98, 102 (D.C. 2003).

Sixth, a bank cannot utilize its contractual or statutory power to set-off claims owed by a developer to the bank against a special account. *Bank of West Orange, supra; Coyle, supra*; *Carl v. Republic Security Bank,* 282 F.Supp.2d 1358, 1367 (S.D. Fla. 2003).

Seventh, and finally, requiring the Excess Deposits to be deposited into a separate account preserves all of a purchaser's legal remedies in instances where an unscrupulous developer defrauds condominium purchasers. In that instance, a contract purchaser can maintain tort claims such as civil theft and conversion only if the developer deposited the money into a separate and identifiable bank account separate from other deposits. *See Escudero v. Hasbun,* 689 So.2d 1144 (Fla. 3d DCA 1997); *Rosen v. Marlin*, 486 So.2d 623 (Fla. 3d DCA 1986); *Belford Trucking v. Zagar*, 243 So.2d 646 (Fla. 4th DCA 1970) ("Money is capable of identification…where the deposit is special and the identical money is

[14] http://www.fdic.gov/regulations/laws/rules/4000-3380.html#fdic400088-48.

to be kept for the party making the deposit…").

The Developer's unsupported claim that there is "[n]o substantive difference…between separately accounting for purchase deposits in one account, or keeping them in two accounts" is simply wrong.

CONCLUSION

The clear and unambiguous language of §718.202, as well as every published opinion interpreting it, required two separate escrow accounts. The Purchaser alleged the failure to maintain separate escrow accounts entitled it to cancel the purchase agreement and have its deposit returned. Accordingly, the Purchaser stated a cause of action for relief.

Moreover, the 2010 amendment cannot be applied retroactively for numerous reasons, including that doing so would unconstitutionally impair the Purchaser's vested rights. However, even if the Court were to apply the amendment retroactively, there is no evidence that the Developer maintained separate accounting records, making dismissal on this basis improper. Therefore, the Third DCA should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on June 21, 2012 on Jason R. Block, Esq., Renner Vogel Mandler & Rodriguez, P.A., 100 Southeast Second Street, # 2900, Miami, FL 33131, Raoul G. Cantero, Esq., Southeast Financial Center, Ste. 4900, 200 South Biscayne Boulevard, Miami, FL 33131, John W. Little, III, Gunster Yoakley & Stewart, P.A., 777 S. Flagler Driven, # 500E, West Palm Beach, FL 33401; and Kenneth B. Bell, Esq. , Clark, Partington, et al., P.O. Box 13010 (32591-3010) 125 West Romana Street, # 800, Pensacola, FL 32502.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I certify that the foregoing Brief was prepared using Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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