



**LITCHFORD &  
CHRISTOPHER**  
PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

# Legal News for Clients

Winter 2010 Edition

390 North Orange Avenue  
Post Office Box 1549  
Orlando, Florida 32802

Phone:  
(407) 422-6600

Fax:  
(407) 841-0325

Website:  
[www.litchris.com](http://www.litchris.com)

## Inside this issue:

Too Good to Be True.....1

Noncompete clauses..2

Frankenstein Wills.....3

Two New Attorneys...3

25th Anniversary.....4

Contact Us.....4



**GENEVA GROUP INTERNATIONAL**  
Independent Member

## IF IT SOUNDS TOO GOOD TO BE TRUE . . . HEAR IT FROM YOUR LAWYER, NOT THE COURT

If an investment opportunity sounds too good to be true, get independent legal advice. This admonition is repeated by Florida courts in many cases, including the Third District Court of Appeal's recent opinion in *Saralegui v. Sacher, Zelman, Van Sant Paul, Beily, Hartman & Waldman, P.A.*, 19 So.3d 1048 (Fla. 3d DCA 2009).

Gustavo Trelles and Jose Saralegui were foreign individuals solicited by a friend to meet with Miami attorney Martin Doyle. They met to discuss investing in Doyle's corporate clients. According to Doyle, for a \$300,000 investment, Trelles would receive \$450,000 within 30 days. The transaction would be guaranteed by Doyle's law firm. Trelles signed a written contract with Doyle, who signed as "Trustee" for his corporate client. Trelles then wired the \$300,000 to Doyle's law firm. Saralegui entered into a similar arrangement with Doyle. He signed a contract under which he would invest \$200,000 and receive back \$280,000 within 25 days. The due date passed without repayment to Trelles or Saralegui. They then jointly filed a lawsuit against Doyle, Doyle's law firm, and the two corporate clients. The trial court entered judgment against Trelles and Saralegui denying their claims against the law firm and the corporate clients for breach of contract and negligent misrepresentation.

The Third District Court of Appeal affirmed the trial

court's ruling that the contracts were unenforceable based on its finding that the "investments" were better characterized as simple loans, loans that violated the laws concerning illegal interest rates. The court noted that the most telling evidence was the terms of repayment. No stock, partnership interests, or other equity was issued in return for the investment. The amount and date of repayment were absolute and not dependent on the success of the underlying venture. Most significantly, the effective rate of interest to be collected far exceeded the maximum allowable rate provided by law.

Under Florida law, a return of annual simple interest exceeding 25% constitutes criminal usury. See § 687.071, Fla. Stat. (2009). The return promised Trelles would have been greater than 600%, while Saralegui's return would have been more than 580%. As the court observed, "the rest is arithmetic." The usurious nature of the loans precluded Trelles and Saralegui from recovering damages from the law firm or Doyle.

As the court reminded us, ignorance of the law is not a defense. Even if a lender is unaware of the usury laws or is mistaken as to the maximum allowable rates, a court will not allow the lender to recover unpaid interest and principal on a loan that violates the usury laws. Furthermore, the lender may face additional penalties, including

criminal charges. The court noted, however, that a defrauded lender is not without recourse. The perpetrator of the fraud may be liable for fraud, conversion, civil theft, or a variety of other legal claims based on the particular circumstances of the case. Moreover, a defrauding attorney such as Doyle may be permanently disbarred from the Florida Bar.

The Third District concluded with this word of warning:

"Unfortunately, citizens of other countries may be familiar with transactions in their own countries in which lawyers and law firms wear multiple hats as principals, brokers or intermediaries, and legal advisors in business transactions, but our system draws clear distinctions among those roles and clear boundaries between the legal representation of a lender and a borrower. Had [Trelles and Saralegui] retained a Florida lawyer to give them independent advice before making these loans, the facially-obvious usury and questionable trusteeship proposed by Doyle on behalf of the borrowing entity surely would have caused legal eyebrows to rise and the investors to flee."

For the security of your assets and investments, you are cautioned to seek independent legal advice when evaluating significant investments or transactions. It is better to hear from your own lawyer that the deal is just too good to be true than to wait and hear it from the court when judgment is entered against you.

## DO YOUR POTENTIAL EMPLOYEES HAVE A NON-COMPETE WITH THEIR FORMER EMPLOYERS?

Before you hire employees for your business, you should check to see if those employees have contracts containing a noncompete clause with a former employer. A noncompete clause generally prohibits an employee from pursuing a similar profession or trade in competition against his or her former employer for a certain period of time. As an employer, if you hire an employee that is currently bound by a noncompete covenant, then you may be facing a lawsuit from the employee's former employer. After hiring two employees with binding noncompete clauses, Denise Bauer faced such a lawsuit in *Bauer v. DILIB, Inc.*, 16 So.3d 318 (Fla. 4th DCA 2009).

DILIB, the former employer, sued its two ex employees and their new employer, Bauer. DILIB sought a temporary injunction to prevent its two former employees from violating their noncompete clauses and to preclude Bauer from aiding and abetting in that violation. After a hearing, the trial court granted DILIB's motion for temporary injunction and prohibited Bauer from employing DILIB's two former employees. In compliance with the trial court's order, Bauer terminated those employees.

Thereafter, Bauer consented to have the trial court convert the temporary injunction into a permanent injunction. That effectively ended the lawsuit. DILIB then filed a motion to recover its attorneys' fees and costs from Bauer.

In the American legal system, a party is generally not entitled to recover its

attorneys' fees in a lawsuit, even if it wins. A party may only recover its attorneys' fees if there is a contract or statute specifically authorizing the recovery of fees. In this case, DILIB argued that section 542.335(1)(k), Fla. Stat., entitled it to recover its fees from Bauer. That law provides, in part, "[A] court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant." The trial court therefore entered an order awarding DILIB its attorneys' fees from Bauer. Bauer filed an appeal to the Florida Fourth District Court of Appeal.

The appellate court reversed, finding that DILIB was not entitled to recover its attorneys' fees from Bauer. The Fourth District held that section 542.335(1)(k), Fla. Stat., only applies to the parties who entered into the contract containing the noncompete clause. Simply put, the statute only allows an employee or the former employer to recover their fees from one another. It does not allow either of those parties to recover fees from a party that never signed the contract with the noncompete clause - i.e. a subsequent employer. The appeals court recognized that it was proper for the trial court to enjoin Bauer from aiding and abetting in violation of the noncompete clauses. The court emphasized, however, that DILIB was not actually enforcing the noncompete clauses against Bauer. Bauer never signed those contracts.

Finally, the Fourth District Court of Appeal noted that the Fifth District Court of Appeal,

in *Sun Group Enterprises, Inc. v. DeWitte*, 890 So.2d 410 (Fla. 5th DCA 2004), had allowed a former employer to recover appellate attorneys' fees from its former employees and their subsequent employer. The Fourth District observed, however, that the Fifth District had not provided any discussion or reasoning to support its decision to award appellate attorneys' fees. As such, the court in *Bauer v. DILIB* certified to the Florida Supreme Court that there was a conflict between its opinion and the Fifth District's opinion in *Sun Group Enterprises, Inc. v. DeWitte*. This is essentially a request to the Florida Supreme Court to resolve the conflict between the two districts and decide the issue one way or the other.

Unless the Florida Supreme Court resolves such a conflict, it makes a difference which district has jurisdiction over your lawsuit. The Fifth District covers thirteen counties, including Orange, Osceola, Volusia, Seminole, Lake, and Brevard Counties. The Fourth District covers Palm Beach, Broward, St. Lucie, Martin, Indian River, and Okeechobee Counties. If your business is located in one of the counties that is covered by the Fifth District, the binding case law is *Sun Group Enterprises, Inc. v. DeWitte*, which allows a former employer to recover attorneys' fees from a subsequent employer. For businesses located in the Fifth District, it is critical that you take care not to hire employees with contracts containing noncompete clauses with their former employers. If you employ someone before such a clause has expired, you risk not only an injunction, but also an award of attorneys' fees against you.

*"As an employer, if you hire an employee that is currently bound by a noncompete covenant, then you may be facing a lawsuit from the employee's former employer."*

## THE FRANKENSTEIN EFFECT: YOUR WILL AND THE DOCTRINE OF DRR

Most sizable estates require many years and much hard work to build. All this invested time, energy, and hard-earned dollars should go into shaping an estate plan that reflects your wishes for the disposition of your assets after you have passed. Beware however. The possibility exists that your will, if found invalid in part or in whole, might end up being dissected and re-stitched by a well-meaning member of the judiciary. That was what happened to Mrs. Virginia Murphy's will in *Carey v. Rocke*, 18 So.3d 1266 (Fla. 2d DCA 2009).

The doctrine of dependent relative revocation ("DRR"), discussed in the seminal case, *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002 (Fla. 5th DCA 2005), provides that if an individual makes a will that is found to be invalid after his or her death, then that individual's previous will may be reestablished. However, the previous will may only be reestablished if it appears that the deceased would have preferred his or her estate to be administered according to that previous will, rather than through the default rules that come into play when a person passes away without a will. These default rules are known as "intestacy."

In *Carey*, Mrs. Murphy's will contained a residuary clause in favor of her attorney and his legal assistant. That clause essentially left to the attorney and legal assistant everything in Mrs. Murphy's estate that was either not disposed of as a specific gift or required to pay claims against the estate. The trial court found that the attorney and assistant had unduly influenced Mrs. Murphy into giving them the remainder. The court thus declared this residuary clause in Mrs. Murphy's will to be invalid. Having done so, the trial court determined that the residuary estate would have to be passed by intestacy rather than according to the terms of Mrs. Murphy's will.

The trial court's holding was appealed. Upon hearing the case, the appellate court sent it back to the trial court on one issue. It said the doctrine of DRR should have been considered in deciding whether Mrs. Murphy's residuary estate should pass by intestacy. It is notable that the appellate court cautioned the trial court to apply the doctrine of dependent relative revocation only with respect to the will's residuary clause.

Before this appeal, the doctrine of DRR had only been applied to wills in their en-

tirety. The case of Mrs. Murphy's will is interesting because the appellate court suggested that the trial court could, and perhaps should, have applied the doctrine of DRR only to the residuary clause of Mrs. Murphy's will rather than to her will as a whole. If the appellate court's suggestion is valid, then under Florida law, a court might be permitted to "Frankenstein" a will together. Portions of an individual's previous will could be judicially combined with the remainder of the most recent will.

The case of *Carey v. Rocke* underscores the importance of ensuring that your current will (1) truly and accurately reflects your intent and (2) does not run the risk of being invalidated if it is challenged in court after you are gone. You should always consider what you would like to happen to particular bequests if your primary expressed desires are found to be invalid. For example, you might want to provide for alternative gifts or state clearly that you prefer that the court implement a portion of your previous will rather than allowing certain property to pass by intestacy. Otherwise, like Mrs. Murphy's will, your will may end up "Frankensteined" by a court despite your best intentions.

*"The possibility exists that your will, if found invalid in part or in whole, might end up being dissected and re-stitched by a well-meaning member of the judiciary."*

## INTRODUCING KERI A. MCGOVERN AND MARISA E. ROSEN

If you visited our office recently, you may have noticed two new attorneys working diligently on your case. After passing the Florida bar exam administered in July 2009, Keri A. McGovern and Marisa E. Rosen both took their oaths of attorney and officially joined the firm as associate attorneys.

For more information on these two new attorneys, please visit the firm website for their full biographies.

Bank of America Center  
 390 North Orange Avenue  
 Post Office Box 1549  
 Orlando, Florida 32802

Phone:  
 (407) 422-6600

Fax:  
 (407) 841-0325

Website:  
[www.litchris.com](http://www.litchris.com)

---

Donald E. Christopher  
 Hal K. Litchford  
 Keith E. Rounsaville  
 Richard C. Swank  
 Christine M. Ho  
 David A. Beyer  
 Keri A. McGovern  
 Marisa E. Rosen

---

**Featured Areas of Practice**

Antitrust, Trade Regulation, and Unfair Competition

Appellate Practice

Business Litigation

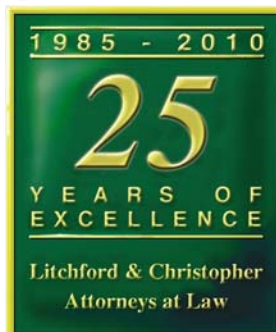
Corporate Control Disputes

Employment Litigation

Intellectual Property Litigation

Injunctions

Probate/Trust Litigation



Litchford & Christopher Professional Association is pleased to provide *Legal News for Clients*. If you have a topic for consideration, please contact Christine M. Ho at [cho@litchris.com](mailto:cho@litchris.com).

As always, we welcome you to contact any of our attorneys to discuss how the topics covered in this newsletter may affect your business or personal legal affairs.

*Legal News for Clients* is published periodically by Litchford & Christopher Professional Association. It contains summaries of court decisions and other materials in an effort to keep you abreast of recent developments in areas of the law in which the firm represents clients. Each edition, however, does not necessarily cover cases and information relevant to all of the firm’s practice areas. The substantive areas covered in each edition are selected by the firm’s lawyers at their discretion based on their views of the significance of the cases and other information available at the time of publication. The material covered in *Legal News for Clients* is condensed and is not intended to provide legal advice. While the information set forth in each article is accurate, every situation presents unique factual and legal considerations. Accordingly, we encourage you to consult an attorney for proper legal advice before taking any action based on the information summarized in *Legal News for Clients*. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. You may write to us at the address listed above, call us at (407) 422-6600, fax us at (407) 841-0325, or contact us through our website at [www.litchris.com](http://www.litchris.com).

© 2010, Litchford & Christopher Professional Association, 390 North Orange Avenue, Post Office Box 1549, Orlando, Florida 32802. All Rights Reserved.

**About our Firm**

Litchford & Christopher is a Florida law firm representing clients involved in difficult business disputes. We litigate disputes. The firm, established in 1985, is an “AV-rated” firm with clients of varying sizes – from small local businesses to national Fortune 500 corporations – and in diverse industries.