

Ditchmen

Online Magazine

September 2014

Issue 62

2014 Presidents Cup

September 26-28, 2014

Putting Contest

Closest to the Pin

Longest Drive

Daily Winners

****Cash Prizes****



PGA National Resort & Spa
Palm Beach Gardens, Florida

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President's Message



A mentor, business leader and fellow pipe layer once shared a speech with me by John D. Rockefeller, Jr., (1874-1960) in which he portrayed what was important in life. We all would benefit from a greater understanding of these core beliefs today so to, I would like to share them with you:

- I believe in the supreme worth of the individual and in his right to life, liberty and the pursuit of happiness.
 - I believe that every right implies a responsibility; every opportunity, an obligation; every possession a duty.
 - I believe that the law was made for man and not man for law; that government is the servant of the people and not their master.
 - I believe in the dignity of labor, whether with head or hand; that the world owes no man a living but that it owes every man an opportunity to make a living.
 - I believe that thrift is essential to well ordered living and that economy is a prime requisite of a sound financial structure, whether in government, business or personal affairs.
- I believe that truth and justice are fundamental to an enduring social order.
 - I believe in the sacredness of a promise, that a man's word should be as good as his bond, that character-not wealth or power or position-is of supreme worth.
 - I believe that the rendering of useful service is the common duty of mankind and that only in the purifying fire of service is the dross of selfishness consumed and the greatness of the human soul set free.
 - I believe in an all wise and all loving God, named by whatever name, and that the individual's highest fulfillment, greatest happiness and widest usefulness are to be found in living in harmony with his will.

Sincerely,

A handwritten signature in black ink, appearing to read 'LCA' with a stylized flourish extending to the right.

Lauren C. Atwell



NUCA of Florida Presidents Cup Golf Tournament

Date: September 26-28, 2014

Place: PGA National Resort and Spa

Early registration ends August 31, 2014.

There will be prizes for first and second place each day, as well as longest drive, closest to the pin, and putting contest.

SPONSORSHIP OPPORTUNITIES

- Hospitality Suite Gold Sponsor | \$1,000
- Hospitality Suite Silver Sponsor | \$500
- Hospitality Suite Bronze Sponsor | \$250
- Beverage Cart Sponsor | \$350
- Cigar Sponsor | \$250
- Mulligan Sponsor | \$100
- Putting Contest Sponsor | \$100



Send in your completed registration form to the NUCA of Florida office at
113 E. College Avenue, Suite 200, Tallahassee, FL 32301
or to Sydney Phillips at sphillips@wilsonmgmt.com



2014 NUCA of Florida Presidents Cup Golf Tournament Registration Form

PGA National Resort and Spa ♦ Palm Beach Gardens, Florida
September 26- 28, 2014



☐ Name _____ Company Name _____
Address _____ City _____ State _____ Zip _____
Email _____ Handicap _____

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☐ Name _____ Company Name _____
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Registration Fees:

Resort Double:

Registration: _____ people at **\$643.40** each (before August 31, 2014) for a total of \$ _____.
or
_____ people at **\$693.40** each (after September 1, 2014) for a total of \$ _____.

Survival Kit: _____ at **\$160.00** each for a total of \$ _____.

Sunday Option Skins: _____ team(s) at **\$50.00**.

Cottage Quad:

Registration: _____ people at **\$605.40** each (before August 31, 2014) for a total of \$ _____.
or
_____ people at **\$654.40** each (after September 1, 2014) for a total of \$ _____.

Survival Kit: _____ at **\$160.00** each for a total of \$ _____.

Sunday Option Skins: _____ team(s) at **\$50.00**.

☐ Mail a check made out to **NUCA of Florida** to:

**113 E. College Avenue, Suite 200
Tallahassee, FL 32301**

☐ Please email me an invoice at _____.

If you have any questions please contact Sydney Phillips at (850) 727-0628 or sphillips@wilsonmgmt.com.



2014 NUCA of Florida Presidents Cup Golf Tournament
Sponsor Registration Form
PGA National Resort and Spa ♦ Palm Beach Gardens, Florida
September 26- 28, 2014



The NUCA of Florida Presidents Cup Golf Tournament will be held at PGA National Resort & Spa in Palm Beach Gardens, Florida from September 26-28, 2014. NUCA of Florida has several sponsorship opportunities.

The following sponsorship opportunities are available:

- ☐ Hospitality Suite Gold Sponsor- \$1,000
 - Sponsors will be recognized on signage located in the Hospitality Suite throughout the tournament. The Hospitality Suite Sponsor will also be permitted to display their company's promotional items in the Hospitality Suite throughout the tournament.
- ☐ Hospitality Suite Silver Sponsor- \$500
 - Sponsors will be recognized on signage located in the Hospitality Suite.
- ☐ Hospitality Suite Bronze Sponsor- \$250
 - Sponsors will be recognized on signage located in the Hospitality Suite and throughout the tournament.
- ☐ Beverage Cart Sponsor- \$350
 - Sponsors will be recognized on signage on the beverage cart during tournament play.
- ☐ Cigar Sponsor- \$200
 - Tournament attendees will each receive a cigar on Saturday during play at the tournament. All sponsors will be recognized on signage located at hole number one.
- ☐ Mulligan Sponsor- \$100
 - Sponsors will be recognized on signage located at registration each day throughout the tournament.
- ☐ Putting Contest Sponsor- \$100
 - Sponsors will be recognized on signage located at registration each day throughout the tournament.

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NUCA of Central Florida Calendar of Events

September 18	Membership Social 5:30 - 7:30 — Ale House Restaurant Orlando
September 26	Fall Golf Tournament Rio Pinar Golf Club, Orlando
October 23	Board of Directors Meeting
November 17	Board of Directors Meeting
December 5	NUCA Central Florida Christmas Party

NUCA of North Florida Calendar of Events

September 18	Board Meeting September General Meeting
September 27	Fishing Tournament Northeast Florida Marlin Association, St. Augustine
October 7	Executive Committee Meeting
November 11	Executive Committee Meeting
November 13	Sporting Clay Challenge
November 20	Boar Meeting Election of Officers Meeting
December 11	Building Industry Holiday Party

NUCA of Northwest Florida Calendar of Events

September 11	Monthly Board Meeting Franco's
September 18	General Membership Meeting with EUCA
October 9	Monthly Board Meeting Franco's
October 10	Clay Shoot
November 13	Monthly Board Meeting Franco's

NUCA of Southwest Florida Calendar of Events

September 19-20	Annual Fishing Tournament Tween Waters Inn, Captiva Island
October 16	Membership Meeting Contractor Roundtables
November 19-20	“Racing for Success” Membership Recruitment
December 6	Holiday Party & Installation of Officers

SUCA Calendar of Events

September 11	Membership Dinner Meeting with Guest Speaker Representative Dana Young Maggiano's, Tampa
September 19	SUCA Fish Fry Al Lopez Park, Tampa
October 31	Clay Shoot Tampa Bay Sporting Clays, Land O Lakes
December 5	SUCA Installation Banquet Glazer Children's Museum, Tampa

UCA of South Florida Calendar of Events

November 7	UCA of South Florida Annual Scholarship Golf Tournament Palm Beach National in Lake Worth
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Upcoming CILB Meetings

October 8-10	Tampa
November 12-14	Altamonte Springs

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NUCA of Southwest Florida Chapter News

NFL Football Season Starts September 4th! NUCA of Southwest Florida is excited to offer Football Mania Sweepstakes Tickets! Football Mania is an exciting sweepstakes based on professional football. Winning cash prizes is based on the total number of points of the teams that are printed on each ticket each week for 17 weeks. Prizes are awarded for the highest points and lowest points scored each week. Each ticket also gives the holder digital music and book downloads, tickets are \$20.00 each.

Where else can you have a chance to win in a football pool for \$1.18 a week?

To obtain your tickets contact Mike McDonnell of Oldcastle Precast @ 239/872-0503 or the NUCA Southwest Florida office, we'll be glad to get them delivered.

NUCA Southwest Florida 2014 Fishing Tournament will be held at Tween Waters Inn on beautiful Captiva Island, FL on September 19th & 20th. Come join us for fun in the sun, great Southwest Florida Fishing, family & friends. Several prizes will be awarded, many door prizes and a Chinese auction. Sponsorship and Registration forms are available on our website www.nucaswfl.com or contact the NUCA SW FL office at nucaswfl@gmail.com

Looking forward to seeing you there!

FTBA Southwest Social - Fort Myers

Thursday, September 04, 2014 5:00 PM - 7:00 PM

Bar Louie (Gulf Coast Town Center)

10035 Gulf Center Drive #100

Fort Myers, FL 33913

239-432-0389

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NUCA SW FL Membership Meeting – October 16, 2014

Guest Speaker: MSGT. Tim May of the FHP/CVE Troop – Fort Myers, FL

Commercial Vehicle Compliances and Safety

Location: Holiday Inn – Airport @ Town Center

9931 Interstate Commerce Drive, Fort Myers, FL 33913

For additional information please contact NUCA Southwest Florida.



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FLORIDA OFFICE OF
INSURANCE REGULATION

NEWS FROM THE OFFICE

Office Statement on Annual Workers' Compensation Rate Filing

TALLAHASSEE – The Office of Insurance Regulation today received the 2015 Florida workers' compensation rate filing by the National Council on Compensation Insurance (NCCI), which proposes a statewide average rate decrease of 2.5% - the first decrease in four years.

NCCI, which is a licensed rating organization authorized to make rate filings on behalf of insurers, reports fewer claims and a lower amount of loss is responsible for the proposed rate decrease. For more information about the NCCI filing, please read the NCCI Statement.

The statewide average rate change is based on changes to five industry groups: Manufacturing, Contracting, Office and Clerical, Goods and Services, and Miscellaneous. The Office will now review the filing to ensure the proposed changes are not excessive, inadequate, or unfairly discriminatory. The Office will also evaluate its potential effects on the insurance marketplace and employers, who are required by law to carry this insurance on their employees.

The Office anticipates conducting a public hearing on this rate filing in October 2014 and will release additional information about the hearing in the coming weeks. A rate order will follow, usually within three weeks. The new rates would become effective January 1, 2015.

Florida's workers' compensation market remains one of the most competitive, efficient, and affordable, thanks in large part to the 2003 legislative reforms. Since that time, Florida's rates have dropped from first- or second-highest in the nation to 29th. Workers' comp rates are 56% lower than they were in 2003. The market continues to expand, with four of the top 10 writers based in Florida.

Contact

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Amy Bogner
(850) 413-2515

Amy.Bogner@flor.com

About the Florida Office of Insurance Regulation

The Florida Office of Insurance Regulation has primary responsibility for regulation, compliance and enforcement of statutes related to the business of insurance and the monitoring of industry markets. For more information about the Office, please visit www.flor.com or follow us on Twitter @FLOIR_comm and Facebook.

Workers Compensation Law Ruled Unconstitutional

By Kari Hebrank, Wilson & Associates

On August 13, 2014, a Miami-Dade circuit court judge ruled that Florida's workers' compensation law was unconstitutional, claiming that medical care and wage-loss benefits had been cut to the point that the statute violates employees' "fundamental" rights.

Judge Jorge E. Cueto said the current workers' compensation laws force injured workers into a flawed system that doesn't provide adequate medical care or dollars to replace lost wages. "The benefits in the act have been so decimated," Cueto wrote, "that it no longer provides a reasonable alternative" to filing suit in civil court.

In 2003, the Florida Legislature passed reforms to the workers' compensation system which has resulted in a comprehensive reduction in workers' compensation rates for employers of over 56 percent.

Legislature Releases Interim Committee Meeting Schedule

By Kari Hebrank, Wilson & Associates

The Florida Legislature will convene in November for the Organizational Session, the event that occurs during election years. This is the official time when all new lawmakers will be sworn-in, find out where their office space will be in the Capitol and receive committee assignments. After the Organizational Session, lawmakers will begin interim committee meetings which provide an opportunity for legislators to hear presentations from agency officials and stakeholders, draft and file legislation and debate newly-filed bills in committee meetings. Interestingly, the leadership has decided that they will not hold any committee meetings during the month of December. The 2015 Regular Session begins on March 3, 2015. The interim schedule is as follows:

2014 - 2015 Interim Committee Meeting Schedule

December 2014 No Meetings

January 2015 Week of the 5th

January 2015 Week of the 20th

February 2015 Week of the 2nd

February 2015 Week of the 9th

February 2015 Week of the 16th



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Stop Giving Money Away!

By George Hedley

Every dollar counts and every penny wasted is precious. Losing small change on your construction projects can add up to thousands of dollars at the end of the year. So what are you to do? Maximizing profit must be a top priority right along with getting your projects completed on-time. By setting aside a little time to focus on increasing your net profit will boost your bottom-line and allow you to make a lot more money. When you're too busy working on the jobs, scheduling crews, or doing work tasks, you don't take or have enough time to focus on finances, financial tools, and strategies which can help you hit your goals. Consider implementing these two proven strategies to maximize your bottom-line and grow your bank balance.

Accurate general conditions!

General conditions in construction include the onsite administration, supervision, temporary facilities, temporary protection, and soft costs required to get your projects built. Estimating accurate general conditions for projects can be a simple task when the estimator is accountable to get it right. Most estimators use unit prices which are rarely checked against the actual final job costs. For example, creating a budget for temporary toilets seems easy. An eight month job should cost 8 times \$100 per month = \$800. But when the field superintendent sees there are 40 men on the job, more than one toilet and more than one servicing a week is required. This might increase the actual job cost by as much as \$200 per month. These extra costs will add up to lots of lost cash.

The estimator's number one job and accountability is to calculate an accurate estimate of what it will cost to build each project. After every job he or she must look at the actual job costs to see if he miscalculated or underestimated any of the project line items. Before you price every job, the estimator should get with the project manager, field superintendent or foreman to determine what will be required to run the project he is currently bidding. Take a hard look to determine if you are charging the right price for:

- Project manager, superintendent, and their vehicles
- Project photos, sign, as-built drawings, etc.
- Temporary facilities, trailers, toilets, sanitation, etc.
- Temporary utilities, electricity, power poles, water, phones, etc.
- Temporary fencing, gates, barricades, site lighting, heating, etc.
- Safety, first aid, shoring, access roads, security guards, etc.
- Water quality control, dust control, etc.
- Trash, cleanup, window washing, final punch-list, etc.

Charge for all the changes on change orders!

Change orders are written documents amending the original contract agreement between parties memorializing an additional or changed scope, price, time, schedule, terms, or work item on a construction project. Most often they require additional money for the additional work required by the change.

As contractors, if you had ten dollars for every extra work

item your company, project manager, field superintendent, or foreman did without a signed change order before the work was performed, could you have retired several years ago? When your customer asks for extra work, why is it so hard to get it in writing? Everyone knows the contract requires signatures on change orders prior to starting extra work. But when you postpone getting a formal approval for extra work until days, weeks or months after the event occurred, you have no leverage with your customer. And when you have no leverage, your customer is in a great position to settle or offer a reduced discounted price with you, change their mind, or decide the additional work wasn't really extra and should have been included in the original contract.

To avoid this problem, present a complete cost breakdown for every proposed change order your customer requests in advance of starting the work. Use a standardized format, cost template, and rate sheet to make sure you include everything the additional work actually costs. Every time extra work is performed, the followings costs occur:

- Project management to process the paperwork
- Supervision to supervise the work
- Accounting to process the payment
- General condition costs as the job will take longer:
- Trailer, toilets, water & utilities
- Power & power poles
- Trucks & equipment
- Small tools, ladders, bins, etc.
- Small items, nuts, bolts, hardware, etc.
- Temporary facilities, fencing, protection, barricades, etc.
- Liability insurance
- Overhead & profit

Don't short change your company by not asking for everything you deserve. I see most change order requests presented as labor, materials, and hard costs plus a markup without extra required soft costs for the many items listed above. If your company does \$5,000,000 in annual sales of which \$250,000 is performed as change orders or on a cost plus basis, not charging for everything you spend can cost you as much as \$25,000 or more per year in lost revenue or net profit for things that you actually had to pay for.

Making money is not easy in construction. Look for every advantage you have to boost your net profit margin. Take the time to implement these tools and send me an email of the other tools you use to increase your net numbers. Email: GH@HardhatPresentations.com to get your copy of 'Project Management Forms For Contractors.'

About the Author

George Hedley works with contractors, entrepreneurs and business owners to build profitable growing companies. As a construction company owner, he has built over 500 projects valued at over \$500 million and was named Construction Entrepreneur of the Year. He is a leading construction business expert, professional business coach, popular professional speaker, best-selling author of "Get Your Business To Work!" and presenter at his Hardhat BIZSCHOOL online university. To find out how George can help your company, sign up for

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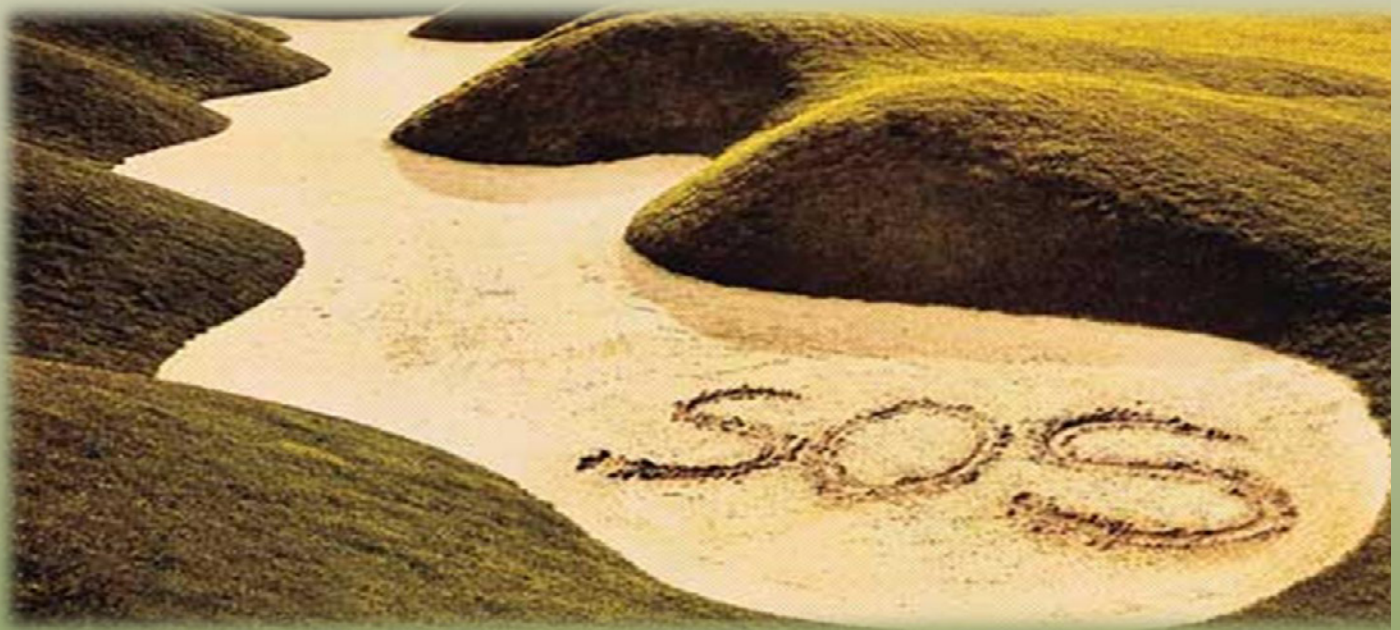


Tyler's part-time work experience has included serving as a life guard and swim instructor, interning in a physical therapy office and he currently works as a live video producer for CBS Sportsline. His hobbies involve Crossfit, automobiles and photography.

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Phone: _____ Email: _____

Names of Players:

1. _____ 2. _____ (Cart 1)
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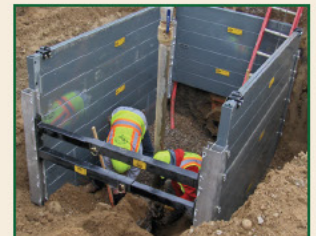
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How big is your buildup of past members?

By Joe Rominiecki
Sep 3, 2014

Even if your association is growing, the churn of recruitment and lapsed members means you likely have more past members than active ones. What should your relationship be with them?



Pop quiz: How many former members does your association have in its database? And how does that number compare to your current membership total?

Not being a practicing association membership professional—rather, just a guy who writes about it—I’d never considered this question before. It’s one of those fundamental but down-in-the-weeds metrics that is not among the top-level, headline-drawing benchmarks associations tend to track, so I couldn’t have ventured a guess. Not until last week, at least.

I have never seen an association that didn’t have a file of former members that is at least twice as large as their current membership.

In a discussion thread about researching the demographics of members versus nonmembers on ASAE’s Collaborate forum in August [login required], Kevin Whorton, president of Whorton Marketing & Research, shared a story of an association he consulted with that was surprised to learn that 40 percent of the members it had attracted in the previous 15 years were “one and dones” who joined for a year and didn’t renew. And he followed that story with the suggestion that most associations don’t realize their pool of past members is likely larger than their number of current members. I spoke with Whorton Tuesday to explore this further.

[Continue Reading](#)

Get To Know Your W&A Team Member - Megan Roca

1. Tell us about your role at Wilson & Associates.

I started working at Wilson & Associates in May of 2014. I support client meetings and event programs.

2. What is your educational background?

I'm a senior at Florida State University and I will be graduating in December of 2014 with my B.S. in Hospitality Management.

3. What was your first job?

I was a secretary for Lili Estefan, who is the host of El Gordo y la Flaca on Univision.

4. What is your favorite travel location?

The Bahamas, I love tanning and going out on the boat.

5. Do you have any pets?

Yes, I have an English Bulldog back home.

6. What are you currently reading?

I just started reading "On Becoming a Leader" by Warren Bennis.

7. Grill master or reservations?

Reservations, I love trying new restaurants.

8. What are your hobbies or interests outside of work?

I really enjoy rollerblading.

9. What is your favorite movie?

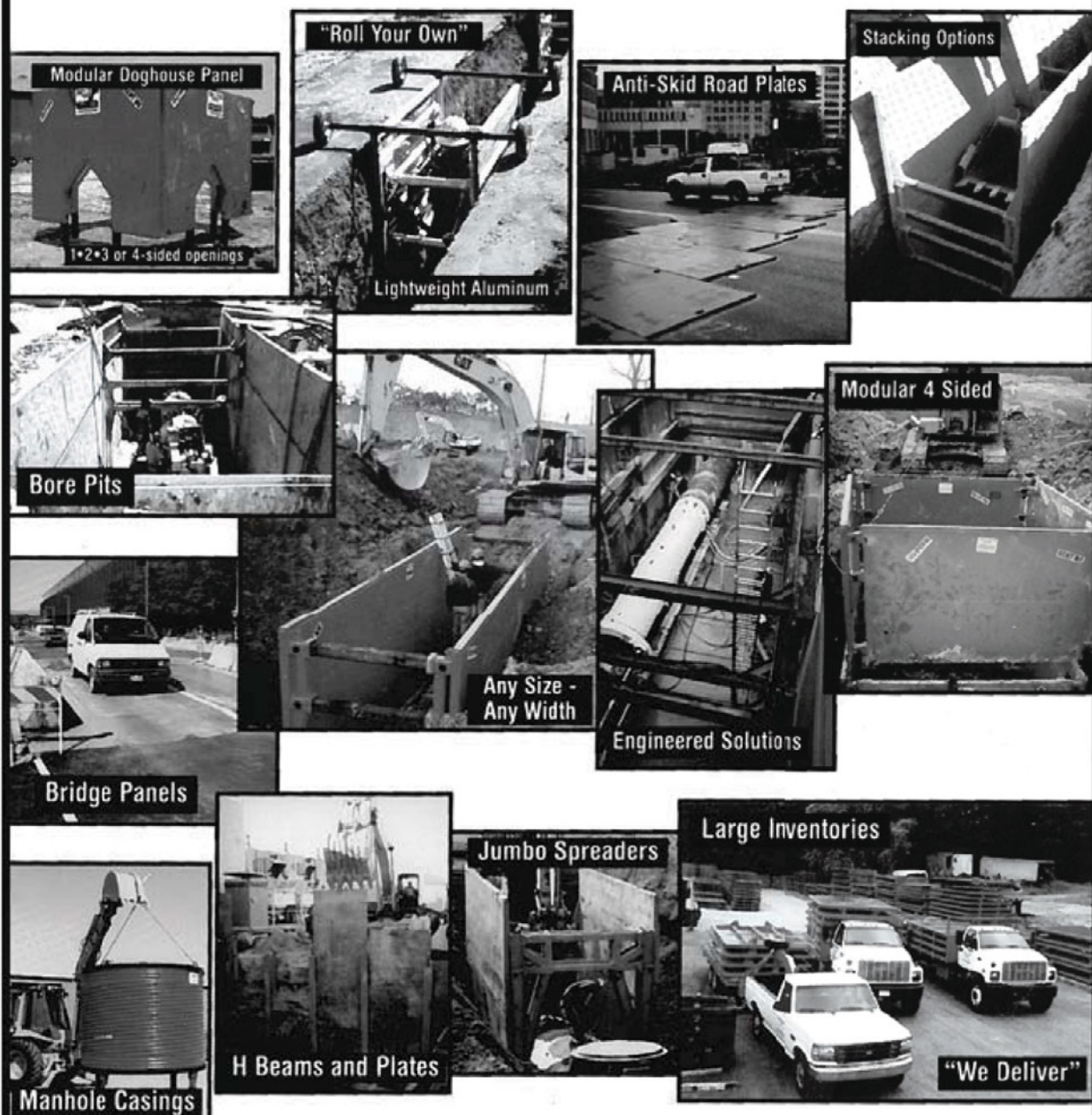
The Notebook, I could watch it over and over again.

10. Do you have any "guilty pleasure" TV Shows?

I love watching Scandal on ABC.

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Thank you to everyone at the NUCA of FL/
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Your efforts to support education is
tremendous. I, and my family, truly
appreciate your support in my higher
education endeavors. Thank you!

Sincerely,
Shelbi Smolak

NUCA Central Florida Report

NUCA of Central Florida will hold a Membership Social on Thursday, September 18th at Miller's Ale House in Orlando. Members and Guests are invited to relax and enjoy the evening with us - Enjoy delicious hors d'oeuvres, beer & wine on us while networking in a casual, fun atmosphere. There is NO CHARGE for this event; however, please RSVP as soon as possible to reserve your space at this event.

Our 2014 Fall Golf Tournament will be held Friday, October 3, 2014 at the Rio Pinar Country Club in Orlando. The registration fee is \$95 and includes: Driving Range, greens fee, cart, prizes for 1st, 2nd, and 3rd places as well as lunch and raffle prizes. Various levels of sponsorship opportunities are available, please contact the NUCA of Central Florida office for more information.

Congratulations to our 2014 J. Mitchell Ellington Scholarship recipients:

Morgan Bates — Morgan is the daughter of Christine and Douglas Bates (J.D. Weber Construction Company). A recent graduate of University High School, she is enrolled at Daytona State College where she is pursuing her Associates Degree.

Michael Litchfield — Michael is the son of Sarah and Rodd Litchfield (Rinker Materials Concrete Pipe Division). Michael graduated from Lake Mary Preparatory High School, and he is currently attending the University of Central Florida and majoring in Engineering.

Amy Nelson — Amy is the daughter of Nancy and James Nelson (HD Supply Waterworks). Amy graduated from the Indian River Charter High School this year and is now attending the University of Florida pursuing a degree in Journalism/Communications.

Jake Ryan Williams — Jake is the son of Marci & David Williams (Xylem Water Solutions USA, Inc.). Jake graduated from Fleming Island High School and is now attending Florida State University. As he begins his academic career, Jake is deciding on a major of either Finance or Engineering.

We wish Jake, Amy, Michael and Morgan much success with a bright future!

Finally, a big thank you to everyone who attended the 2014 Friends & Family Weekend, at the beautiful Vero Beach Hotel & Spa August 1 – 3rd. We really appreciate our sponsors who make the weekend possible:

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John Platt Jr, President

Atlantic Wire & Rigging

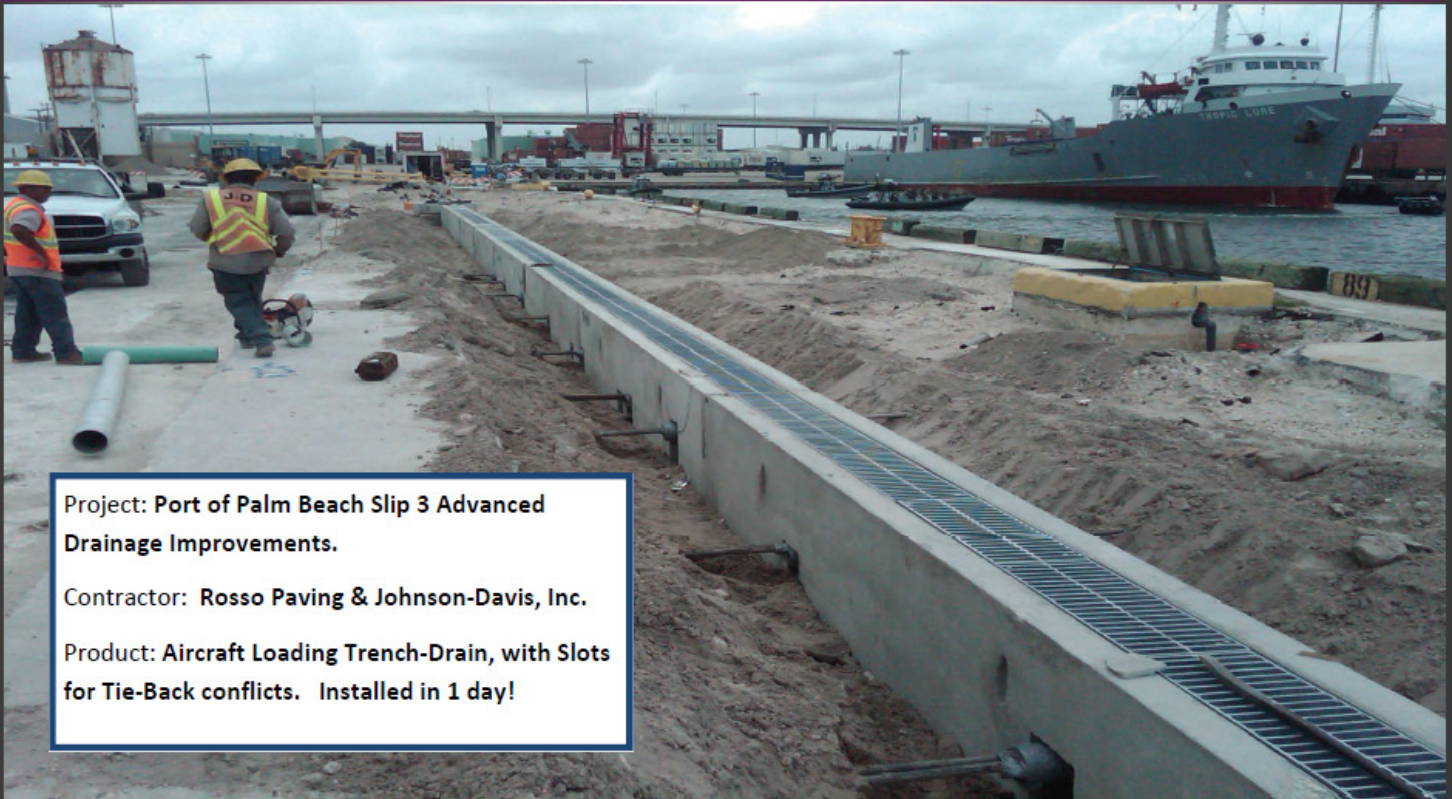
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CILB Upholds 2000 Attorney General Opinion Regarding Scope of Work of a Certified Underground Utility and Excavation Contractor

At the August CILB meeting, the board heard a petition for a Declaratory Statement from a City of Orlando Plumbing Inspector who sought clarification on s. 489.105(n), F.S., as to whether “at property line” within the statute is intended to prohibit the Underground Utility and Excavation Contractor from continuing beyond the property line on a single-occupancy commercial property; and if so, is a plumbing Contractor required to perform the work beyond the property line? Robert Moody, the Underground Utility and Excavation Contractor CILB representative addressed the board on the petition. He cited long standing industry practice on the issue and referred the board to an October 2000 Assistant Attorney General Opinion regarding the scope of work of a Certified Underground Utility and Excavation Contractor. Many NUCA of Florida members will remember the ongoing dispute between the Underground Utility and Excavation Contractors and Plumbing Contractors over the point of termination of utility lines and the installation of backflow devices. After many meetings, an agreement was reached between NUCA of Florida (formerly UUCF) and the Florida Association of Plumbing, Heating & Cooling Contractors (FAPHCC). That 2000 agreement was then provided as a written opinion by the CILB Assistant Attorney General. NUCA of Florida has since used that written opinion to assist local jurisdictions in providing a uniform interpretation of the point of termination of utility lines.

After hearing comments from others on the board, the board concluded that an Underground Utility and Excavation Contractor can perform work to either within five (5) foot of the building or up to the secondary water meter, whichever is further from the building on a single-occupancy commercial property. The board also concluded that a licensed Plumbing Contractor can perform the same work. The final order on this petition essentially embodies the October 2000 Assistant Attorney General Opinion. Please contact me at rbkershner@att.net if you would like a copy of the October 2000 Assistant Attorney General Opinion or Final Order on the August 2014 Declaratory Statement.

Industrial Facilities Specialty Contractor License Category Adopted

We have been monitoring this proposed rule for about a year. As initially drafted, the proposed rule included “utility” in the definition. This was a major concern for NUCA of Florida members as it was way too broad and left open to interpretation. I have been successful in working with the CILB and “utility” has been removed from the final rule. This new Specialty Contractor rule has been adopted and took effect on Monday, August 18, 2014. I have provided a copy of the rule below.

61G4-15.039 Industrial Facilities Specialty Contractor License Category.

1. *Scope of Rule. The purpose of this rule is to provide for certification of industrial facility specialty contractors as a*

limited subset of the general contractor.

2. *Definition. An industrial facility specialty contractor is a contractor who is qualified and certified by the board to perform any work involving the construction, repair, demolition, modification, and alteration of uninhabitable industrial structures used solely to house manufactured industrial equipment being installed therein by the contractor for energy production, gas production, or chemical production; and construction of habitable or uninhabitable attached accessory use structures not exceeding 1500 square feet used solely to house related operating and controlling equipment. An industrial facility specialty contractor shall be unlimited in his or her ability to enter contracts for the scopes of work described herein and who may perform such work permitted under this rule, except as otherwise expressly provided in Section*
3. *An industrial facility specialty contractor shall be required to subcontract all work above that falls within the scopes of work set forth in Sections 489.105(3)(b)-(p) or , or for fire protection systems under Section , to a licensee who holds a state certification or registration in the respective category of work.*
4. *Nothing in this rule shall be deemed to restrict or limit in any manner the scope of work authorized by law of other contractor classifications.*

CILB Considers Increasing Penalty Ranges

The CILB held a workshop in May to discuss 61G4-17.001 F.A.C. Penalty Ranges. In August, proposed changes were provided to the CILB and interested parties. CILB Executive Director Drew Winters asked that board members to review and be prepared to make comments and discuss at the September meeting.

CILB Welcomes Two New Board Members

Two new Board members were welcomed during the last two months. Joining the CILB are Jason Wolf, Division I Consumer member, and Hector Castro, General Contractor member.

Looking ahead to the 2015 Legislative Session

Florida’s lawmakers will return to Tallahassee on November 18 for an Organizational Session, which includes swearing in members and formally installing Senator Andy Gardiner(R-Orlando) as Senate President and Representative Steve Crisafulli (R-Merritt Island) as Speaker of the House, provided Crisafulli wins re-election November 4 in HD 51.

Lawmakers will not hold interim committee meetings in December. Interim Committees meetings have been scheduled for the weeks of January 5, January 20, February 2, February 9, and February 16. The 2015 regular session will start March 3, 2015.

Paradigm Shift in Florida’s Lien Law Coming

I shared in my Final Legislative Report and with the NUCA of Florida Board of Directors at the conference that we could be

facing a serious challenge to Florida's Construction Lien Law. As I reported, an amendment was filed during the final days of the 2014 Legislative Session that would have eliminated lien rights on residential construction for non-privity lienors. The chief architect of this amendment was Representative Richard Corcoran (R – Lutz), a powerful member of House leadership who is slated to be Speaker in 2016.

Although the harmful amendment was ultimately withdrawn and did not appear again during the 2014 Session, Representative Corcoran made it abundantly clear that this is a top priority for him. I recently met with Representative Corcoran in his district office to discuss his concerns as it relates to consumers and the construction lien law.

Though a proposal has not been drafted, Representative Corcoran laid out his concerns and possible remedies to protect homeowners from paying twice for services and goods. Representative Corcoran envisions his proposal to affect residential construction only; it will not apply to “second homes.”

I did discuss site improvements with Representative Corcoran as it relates to subdivision development. He seemed agreeable that current law would stand for those improvements. Currently, the Florida Construction Lien Law specifically addresses where services or materials are provided for the purpose of making a site suitable for construction of an improvement. Under s. 713.04 F.S. any lienor who, regardless of privity, performs services or furnishes material to real property for the purpose of making it suitable as the site for the construction of an improvement or improvements shall be entitled to a lien on the real property for any money that is owed.

Though it would appear NUCA of Florida members may not be impacted by the Representative's proposal, his effort to protect the “consumer” has the effect of dividing the construction industry, pitting homebuilders and developers against subcontractors and suppliers. I will be having a follow up meeting with Representative Corcoran later in September. I will provide an update on this issue at that time.

Pay-When-Paid Clauses

By

George E. Spofford, IV

GrayRobinson, P.A.

Florida Offices Statewide

george.spofford@gray-robinson.com

“Pay-when-paid” clauses have been a part of the construction contract landscape for decades. It has been a while since I have provided information on the different types of pay-when-paid clauses and a refresher is overdue. Failure to recognize the different types of pay-when-paid clauses or failure to appreciate the significance of an enforceable clause could be very expensive.

In the early 1990's, there was a flurry of litigation in Florida concerning the enforceability of pay-when-paid clauses. The litigation did not answer all questions regarding which pay-when-paid clauses are enforceable, but guidelines were developed and subsequent court decisions have been fairly consistent with the early cases. This article is intended to provide a better understanding of the law concerning pay-when-paid clauses so NUCA of Florida members can more readily identify clauses that are enforceable. Recognizing an enforceable clause will enable you to make an informed decision whether to sign a contract that has pay-when-paid clause.

A pay-when-paid clause allows the prime contractor to refrain from paying for subcontracted work until the owner has paid the prime contractor for the work. The same logic applies between subcontractors and their sub-subcontractors or any other lower tier. The obvious advantage to the upper tier is the avoidance of financing the lower tier's work.

There are generally two types of pay-when-paid clauses. The first type is more accurately described as a “pay-if-paid” clause and is intended to shift the entire risk of nonpayment by the owner from the prime contractor to the subcontractor.

Think of a true pay-if-paid clause as a “pay-if-and-only-if-I-get-paid-do-you-get-paid” clause, which shifts the entire risk on non-payment by the owner to the subcontractor. The second type is more of a “pay-within-a-reasonable-period-of-time” clause, which merely controls the timing of the subcontractor's payment as the prime contractor must eventually pay even if the owner does not. Obviously, the first type, “pay-if-paid,” provides more protection for the prime contractor. It is that type of clause that has spawned litigation and is often difficult to enforce. It is the enforceable pay-if-paid clause of which the subcontractor needs to be wary.

True pay-if-paid clauses are disfavored by Florida courts because the courts do not want subcontractors to be treated unfairly. Florida courts will only enforce a pay-if-paid clause that unambiguously and expressly states that the risk of nonpayment by the owner is assumed by the subcontractor. If the clause is deemed ambiguous, it will be deemed to be a pay-within-a-reasonable-period-of-time clause, and the prime contractor must pay the subcontractor, even if the owner has not.

In *OBS Company, Inc v Pare Construction Corporation*, 558 So. 2d 404 (Fla. 1990), the Florida Supreme Court ruled that an apparently unambiguous subcontract pay-if-paid clause was defective because the subcontract incorporated by reference the prime contract which required the prime contractor to pay its subcontractors before the owner was required to pay the prime. Obviously, the prime contract requirement that the subcontractors be paid prior to the owner's payment to the prime was inconsistent with the subcontract clause allowing

the prime contractor to refrain from paying the subcontractors until the owner has paid. The inconsistent provisions rendered the subcontract pay-if-paid clause ambiguous, and thus unenforceable, according to the OBS court. See also, *Harris Air Systems v. Gentrar Inc.*, 578 So. 2d 879 (Fla. 1st DCA 1991).

In *Bentley Construction Development & Engineering, Inc. v. All Phase Electric & Maintenance, Inc.*, 562 So.2d 800 (Fla. 2d DCA 1990), the contract stated that "Subcontractors shall be entitled to receive all progress payments and the final payment within ten working days after contractor receives payment from the owner " (emphasis added). Seems pretty clear, right? Not so. The Bentley court explained that the pay-when-paid clause was ambiguous because it failed to expressly state that the owner's payment was a "condition precedent" to the subcontractor's right to receive payment, or that the subcontractor's right to receive payment was "contingent upon" the prime contractor's receipt of payment. According to the court, the clause should have used the magic words "condition precedent", "contingent", or "some comparable emphatic statement before the clause will be deemed sufficiently clear to permit judicial enforcement." The Bentley subcontract provision would appear to be clear and unambiguous even without the use of the magic words "condition precedent" or "contingent upon," and illustrates the lengths to which Florida courts will go to avoid shifting the risk of nonpayment to subcontractors.

The defect identified in OBS is still commonly encountered and in some cases even use of the magic words prescribed by Bentley will not work. For example, in *International Engineering Services, Inc. v. Scherer Construction of Central Florida*, 74 So.3d 531 (Fla. 5th DCA 2011), the court ruled that the pay-when-paid provision contained in the contract was ambiguous and unenforceable. The pay-when-paid clause in *International* stated that,

Notwithstanding anything contained in any of the Contract Documents to the contrary, Subcontractor agrees that all progress payments and final payment to Subcontractor are contingent upon and subject to... contractor's receipt of payment from Owner. Subcontractor agrees to accept the risk of non-payment if Contractor is not paid... for any reason. Subcontractor further agrees that Owner's payment to Contractor... shall be an express condition precedent to any obligation of Contractor to make any progress payment, retainages, or final payment to Subcontractor....

(Emphasis is added)

The clause used all of the magic words identified in Bentley and court acknowledged that the above clause was unambiguous and would have been enforced as a true "pay-if-and-only-if-I-get-paid-do-you-get-paid" clause, but for one problem. The subcontract incorporated the prime contract which stated that before the owner had to pay the prime contractor, the prime had to pay all subcontractors. I.e., the prime cannot obtain payment from the owner until the prime pays the subs, but the subs have no right to payment until the owner pays the prime. The two provisions conflict with each other, which made the pay-when-paid clause ambiguous. It was OBS all over again, but with a twist because the contract used the "magic words" required by Bentley.

So, the lesson to be learned, is that for a pay-when-paid clause to be deemed a pay-if-and-only-if-I-get-paid-do-you-get-paid clause, it needs to use the magic words "contingent upon" and "condition precedent" and the subcontract should not incorporate the prime contract, or at least not the prime contract payment terms.

Even if the pay-if-paid clause is enforced and the prime contractor need not pay, the prime contractor's surety probably will not enjoy the same protection. In 1990 the OBS court intimated that it would be against public policy for a surety to avoid its bond obligation via an enforceable pay-if-paid clause. In 2003 the *Everett Painting Company, Inc. v. Padula & Wadsworth Construction, Inc.*, 856 So. 2d 1059 (Fla. 4th DCA 2003) court expressly stated what the OBS had hinted at, and held that a surety may not hide behind a pay-if-paid clause. The exception is that if the payment bond is issued under Florida Statutes, Section 713.245, Conditional Bonds, and the subcontract has an enforceable pay-if-paid clause, then the surety can use the clause. But, a conditional payment bond is only allowed on private, not public works, projects. This is good news for subcontractors (and bad news for sureties and bond indemnitors) as subcontractors can probably obtain payment from the prime contractor's surety even if their subcontract contains a valid pay-if-paid clause.

Space constraints prevent a full discussion of this issue, but there are certain factors to keep in mind when dealing with pay-if-paid clauses. First, it is advisable to heed the Bentley court's suggestion and use the magic words to expressly state the prime contractor's receipt of payment for the subcontractor's work is a "condition precedent" to the subcontractor's right of payment, and that the subcontractor's payment is "contingent upon" payment by the owner. Second, if the prime contract is incorporated by reference into the subcontract (which is common), then steps must be taken to eliminate any conflict or inconsistency between the subcontract pay-if-paid clause and the prime contract.

George Spofford is a shareholder in the Tampa office of the GrayRobinson law firm. Spofford has represented the construction industry since 1985 and serves as General Counsel to the UUCF. GrayRobinson, P.A. (Gray-Robinson.com) is a full-service business law firm with over 275 attorneys and 10 offices across Florida. If any member has specific questions relating to this topic or any topic they would like to see addressed in future editions, please feel free to contact George at (813) 273-5000 or george.spofford@gray-robinson.com.

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Office Approves Removal of up to 427,584 Policies from Citizens

TALLAHASSEE, Fla. – The Florida Office of Insurance Regulation (Office) has approved the removal of up to 425,357 personal residential policies and 2,227 commercial residential policies from Citizens Property Insurance Corporation (Citizens) by the following 14 companies:

- **American Integrity Insurance Company of Florida** – approved to remove up to 15,000 personal residential policies (14,637 Personal Lines Account (PLA)/363 Coastal Account (CA))
- **Avatar Property & Casualty Insurance Company** – approved to remove up to 10,000 personal residential PLA policies
- **Capitol Preferred Insurance Company** – approved to remove up to 30,000 personal residential PLA policies
- **Elements Property Insurance Company** – approved to remove up to 60,000 personal residential policies (54,000 PLA/6,000 CA)
- **Heritage Property & Casualty Insurance Company** – approved to remove up to 70,000 **personal residential policies** (62,500 PLA/7,500 CA) and up to 200 **commercial residential** Commercial Lines Account (CLA) policies
- **Mount Beacon Insurance Company** – approved to remove up to 47,900 personal residential PLA policies
- **Olympus Insurance Company** – approved to remove up to 30,000 personal residential policies (23,379 PLA/6,621 CA)
- **Safepoint Insurance Company** – approved to remove up to 18,000 personal residential policies (15,000 PLA/3,000 CA)
- **Southern Fidelity Insurance Company** – approved to remove up to 30,000 personal residential PLA policies
- **Southern Fidelity Property & Casualty Insurance Company** – approved to remove up to 30,000 personal residential PLA policies
- **Southern Oak Insurance Company** – approved to remove up to 10,000 personal residential policies (8,500 PLA/1,500 CA)
- **Tower Hill Signature Insurance Company** – approved to remove up to 6,164 personal residential policies (4,931 PLA/1,233 CA)

- **United Property & Casualty Insurance Company** – approved to remove up to 51,293 **personal residential policies** (42,573 PLA/8,720 CA) and up to 2,027 **commercial residential policies** (1,824 CLA/203 CA)
- **Universal Insurance Co. of North America** – approved to remove up to 17,000 personal residential PLA policies

Citizen's Personal Lines and Commercial Lines Accounts are mostly non-coastal properties and the Coastal Account are coastal properties. The take-out periods are November 18, 2014 for personal residential impacting both the PLA/CA policies and November 4, 2014 for commercial residential impacting both the CLA/CA policies. This is part of the state's ongoing effort to reduce the number of policies in Citizens and transfer them to the private insurance market.

Today's announcement brings the total number of policies approved for take-outs this year to 894,156 and the actual number of policies removed from Citizens as of August 30 of 2014 to 124,995. By statute, policyholders may choose to remain covered by Citizens; however, they may be at risk of higher assessments.

For more information, please visit the Office's "Take-Out Companies" webpage at: <http://www.floir.com/Sections/PandC/TakeoutCompanies.aspx>.

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About the Florida Office of Insurance Regulation

The Florida Office of Insurance Regulation has primary responsibility for regulation, compliance and enforcement of statutes related to the business of insurance and the monitoring of industry markets. For more information about the Office, please visit www.floir.com or follow us on Twitter @FLOIR_comm and Facebook.

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