THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 25, 1998

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/25/98	SM RI FR	Unfavorable

Re: SB 44 - Senator Pat Thomas
Relief of Wewahitchka State Bank

THIS IS AN EQUITABLE CLAIM SOUNDING IN NEGLIGENCE AGAINST THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION FOR $45,000 TO REIMBURSE WEWAHITCHKA STATE BANK FOR BUSINESS LOSSES INCURRED IN CONNECTION WITH PERFECTING A LIEN IN AN ALCOHOLIC BEVERAGE LICENSE.

STATEMENT OF CLAIM: This is the case of the liquor license that ran dry.

On August 27, 1993, the claimant, Wewahitchka State Bank, through its lawyer, sought to record a lien in a liquor license with Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, thereby perfecting the bank's interest in the license which had been pledged by Hulon and Janice Motley and Motley Grocery Co., Inc., as security for a loan. For reasons discussed in detail below (see "Findings of Fact"), the lien was never properly recorded.

In late 1996, the bank realized that it did not have an acknowledgment of recordation in its files. A series of correspondence ensued between the bank and the division, which resulted on April 4, 1997, in the filing and

perfection of a newly-created lien in the liquor license in favor of the bank.

This period of security for the bank was short-lived; on April 11, 1997, Motley Grocery filed a petition in federal court for Chapter 7 bankruptcy protection. Because the bank's perfection fell within the 90-day Preference Period immediately preceding the filing of the bankruptcy petition, the Bankruptcy Trustee, pursuant to federal law, filed a Complaint to avoid the bank's lien in the liquor license. The bank ultimately settled the dispute with the Trustee, accepting a payment of $10,000 in exchange for not pursuing its claim. The Bankruptcy Trustee sold the liquor license for $55,000. The bank claims that it is entitled to the other $45,000, the additional amount it would have recovered had the division properly recorded and perfected its lien in 1993.

FINDINGS OF FACT:

1. The claimant, Wewahitchka State Bank (the bank), is a Florida banking corporation, with its principal place of business in Wewahitchka, Gulf County, Florida.

2. The Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the division), is an agency of the State of Florida authorized to implement the Beverage Laws and Tobacco Laws pursuant to Chapters 210, 561, 562, 563, 564, 565, 567, 568, and 569, F.S.

3. On August 24, 1993, the bank executed a real estate mortgage in the sum of $102,128.96 with Hulon and Janice Motley and Motley Grocery Co., Inc., d/b/a Rainbow Food & Liquors ("Motley Grocery"), a business located at the time in Port St. Joe, Florida.

4. Pursuant to the mortgage, Motley Grocery executed a standard promissory note, a security agreement, and a UCC-1 financial statement.

5. In the security agreement, Motley Grocery pledged alcohol beverage license No. 33-00032 3-DPS ("the

liquor license"), along with inventory and equipment, as collateral for the bank loan.

6. Motley Grocery purchased the liquor license from James Ball and Richard Blaho, d/b/a St. Joe Package Store.

7. In May 1988, Ball and Blaho had pledged the liquor license to I.W. and Lina Duren as collateral for an $80,000 loan, and executed a UCC-1 financial statement in favor of the Durens evidencing the same. The Durens' lien in the liquor license was properly recorded with the division in June, 1988.

8. On or about August 24, 1993, the Durens (through their estate) executed a UCC-3 Statement of Change form, which terminated the Durens' security interest in the liquor license.

9. On or about August 24, 1993, the bank hired a lawyer on a transactional basis to assist with the loan transaction with Motley Grocery and to record and perfect the bank's lien in the liquor license.

10. The bank's lawyer is an active member of the Florida Bar, admitted in 1962, with a general practice in the areas of government law, real estate, probate and personal injury.

11. This case hinges on an August 27, 1993, letter from the bank's lawyer to the division, and the subsequent actions of various persons which were either taken or not taken pursuant to that letter.

12. The bank's lawyer's August 27, 1993 letter was received by the division on September 3, 1993.

13. There is conflicting testimony concerning alleged conversations which preceded August 27, 1993, between the bank's lawyer and Ms. Eileen Klinger, a division employee, concerning the procedures for recording a lien in an alcoholic beverage license. The bank's lawyer claims that he prepared the August 27 submission in response to Ms. Klinger's

direction. Ms. Klinger does not recall having had any conversations with the bank's lawyer concerning the bank's lien. She testified convincingly that she has never told anyone that they were not required to submit a division form or a recording fee for registration of a lien, and that it was standard practice when answering inquiries to first ask "Do you have a copy of the lien recording form."

14. In any event, the testimony concerning these alleged conversations between the bank's lawyer and Ms. Klinger fails to provide any specific guidance in interpreting the August 27, 1993 letter.

15. The bank's lawyer failed to conduct a legal analysis to determine the requirements for recording a lien with the division in preparation for drafting the August 27, 1993 letter. Likewise, the bank's lawyer cannot recall reading the section of Florida law which governed the recordation and perfection of security interests and liens in alcoholic beverage licenses (§561.65(4), F.S. (1993)) proximate to that date.

16. Florida law in 1993 clearly provided that "in order to perfect a lien or security interest in a spirituous alcoholic beverage license. . . the party which holds the lien or security interest, within 90 days of the date of creation of the lien or security interest, shall record the same with the division *on or with forms authorized by the division* . . . ." § 561.65(4), F.S. (1993). At that time, the authorized division form (DBR 739L) included specific instructions on how to file a liquor license lien with the division.

17. The August 27, 1993 letter is poorly-drafted and ambiguous.

18. The August 27 letter is more in the nature of providing information to the division than requesting specific relief. The letter generally discusses two issues, the termination of the prior lien in the liquor license in favor of the Durens and the newly-created lien in favor of the bank.

19. Specifically, the August 27 letter:

    a. *Informs* the division that there is a recorded financial statement (UCC-1) evidencing the bank's lien in the liquor license.
    b. *Discusses* the sale of the liquor license from St. Joe Package Store and James Ball to Motley Grocery.
    c. *Puts the division on notice* that: the lawyer is aware of a "recorded mortgage" between Ball and the Durens; and, that the Durens are deceased and their estates have been paid in full for the mortgage.
    d. *Directs* that if the division has "any questions or need(s) any forms executed," it should contact the bank's lawyer. However, since the letter never specifically requests that the division do anything, it is unclear whether this request pertains to the termination of the prior lien in favor of the Durens or the newly-created lien in favor of the bank, or both.
    e. *Asks* the division, "during the interim," which presumably means pending the filing of any necessary forms, to have its records reflect a lien on the liquor license in favor of the bank.

20. The August 27 letter specifically *does not request* that the division record either: a satisfaction of the Durens' existing lien in the liquor license; or, the newly-created lien in favor of the bank.

21. The August 27 letter also contained a number of enclosures, including: the UCC-3 statement of change form terminating the Durens' security interest in the liquor license; and, the UCC-1 financial statement indicating the bank's lien in the liquor license.

22. The August 27 submission *did not contain the statutorily-required form (Division Form DBR 739L)* necessary to record the bank's new lien. Nor did the submission include the $5 recording fee, which the form instructions identify as a requirement for filing a liquor license lien.

23. Although the bank's lawyer's intent in sending the August 27 letter may have been to have the division: (1) record a satisfaction of the Durens' existing lien in the liquor license; and (2) record, and thereby perfect, the newly-created lien in favor of Wewahitchka State Bank, the letter never specifically and unconditionally asks or directs the division to take either action.

24. During cross-examination, the bank's lawyer indicated that recording the bank's lien was not a priority item and that his legal practice was very busy and he had a lot of cases going at the same time.

25. The August 27 submission relied on action or advice of division personnel as to the proper procedure for recording the bank's lien, even though a statute was on the books clearly stating that a division form was required to record a liquor license lien.

26. Had the bank's lawyer done a legal analysis, the law would have counseled him to request the appropriate form from the division rather than send off an incomplete submission, likely avoiding the ambiguity and confusion which resulted from the August 27 letter.

27. Nonetheless, reading the August 27 letter in conjunction with the enclosures, the letter constituted either: a request to record *both* the bank's new lien and a satisfaction of the Durens' existing lien; or, in the alternative, a request for the necessary forms to accomplish the same should they be required.

28. In 1993, the division had in place two internal written policy memoranda instructing staff on the proper procedures to be used in connection with the recording of liens in liquor licenses and the completion of the lien recordation form (DBR 739L). The division policy and the instructions on the recordation form itself required the division to notify persons applying to record liens of the approval or disapproval of the application.

29. Representation was made by Wewahitchka's counsel at the hearing that the bank's lawyer (for the 1993 transaction) had not seen the division policy until just prior to the Special Masters' hearing on this matter, on or about October 26, 1998.

30. By letter dated September 24, 1993, Ms. Charlie McNeal, a division employee, advised the bank's lawyer that the division had received the August 27 letter "concerning the satisfaction of the lien" recorded in June, 1988 in favor of the Durens, and advised that the license file had been marked to reflect the satisfaction. The letter also invited the bank's lawyer to contact the office if it could be of further assistance.

31. No special forms were required to record the satisfaction of a lien in 1993; it could be accomplished with a letter from the lienholder.

32. The division's September 24 letter never mentions the lien in favor of the bank; it is completely silent on the issue of recordation.

33. Also, the subject heading of the division's September 24 letter is clearly directed *exclusively* to the Durens' prior lien:

    Re: Ball James L. & Blaho Richard R. Sr.
    DBA St. Joes Package Store
    License #33-00032 3 DPS

34. The *only* reasonable conclusion which can be drawn from the division's September 24 letter, *as the bank's lawyer correctly testified*, is that the division recorded a satisfaction of the Durens' lien.

35. Between September 24, 1993 and November 22, 1993, the statutory deadline for recording and perfecting the bank's lien in the liquor license (see §561.65(4), F.S.(1993)), the bank's lawyer took no action to contact the division and inquire as to the status of the recordation of the bank's lien; the bank's lawyer did not request an acknowledgment

from the division, in writing or otherwise, indicating that the bank's lien had been properly recorded. The bank's lawyer testified that he simply *assumed* that the bank's lien had been properly recorded.

36. The bank's lawyer did not employ a tracking, or "tickler," system to insure that there was a written acknowledgment of the recordation of the bank's lien from the division prior to the November 22, 1993 deadline. In fact, the bank's lawyer admitted on cross examination that there may not have even been a file set up on this matter in 1993.

37. The bank itself apparently never sought an acknowledgment from the bank's lawyer in 1993 evidencing the division's recordation of the lien. However, the bank's inaction is perhaps understandable in that it relied on the expertise of its lawyer to handle the transaction and recordation.

38. The bank did not deal with liens in liquor licenses often; in fact, this case may have been the only time the bank had dealt with recording a liquor license lien with the division.

39. However, the bank did have extensive practice with perfecting security interests to secure loans in other commercial contexts. The bank maintained a filing system for each loan which included an acknowledgment of the recordation and perfection of each lien. The bank's general practice was to review its files every year or two to insure that its paperwork was in order.

40. In 1996, some two or three years after the bank's lien was supposed to have been recorded, the bank, while performing some "routine housekeeping" on its files, determined that it did not have an acknowledgment evidencing the recordation of the 1993 liquor license lien with the division.

41. On November 26, 1996, the bank's President, William Sumner, drafted a letter to the division

requesting a database search of the liquor license to determine the status of its lien.

42. The division responded by letter dated December 10, 1996, indicating that there was no lien recorded on the liquor license.

43. On December 23, 1996, Motley Grocery again pledged the liquor license to the bank and executed a new security agreement and mortgage modification. (Although the record is not entirely clear on this point, it appears that this transaction constituted a second and separate loan to Motley Grocery. If so, the effect of pledging the liquor license a second time was to cross-collateralize it between the two loans, the one in 1993 and the new loan in 1996.)

44. *Some three weeks later*, by letter dated January 16, 1997, the bank asked the division to advise as to the proper procedure to record the newly-created lien.

45. The division responded by letter dated January 29, 1997, providing a copy of the form which needed to be filed (DBPR 42-029) and instructions as to what other documents would be necessary to file and perfect the lien.

46. On February 10, 1997, the division received the requisite form and supporting documentation. However, because of defects in some of the supporting documentation submitted by the bank, there was an additional series of correspondence.

47. Throughout this time, the bank was not aware that Motley Grocery was in financial trouble as it had continued to timely make its loan payments (until it filed for bankruptcy on April 11, 1997).

48. It was not until April 4, 1997, that the division acknowledged by letter that the lien created in 1996 had been filed and made a part of the license file, effective on that day.

49. On April 11, 1997, Motley Grocery, the holder of the liquor license, filed a petition in federal court for Chapter 7 bankruptcy protection (Case No. 97-02202 (U.S. Bankruptcy Court, N.D. Fla.)). Unfortunately for all involved in this case, the bank's perfection fell within the 90-day Preference Period immediately preceding the date on which Motley Grocery filed its petition for bankruptcy protection.

50. Accordingly, the Bankruptcy Trustee filed a Complaint to avoid the bank's perfected lien in the liquor license. The bank ultimately settled the dispute with the Trustee, accepting a payment of $10,000. The Bankruptcy Trustee sold the liquor license for $55,000.

51. Also material to the disposition of this matter are the facts and circumstances surrounding the recordation and perfection of the Durens' lien in the liquor license in 1988.

52. *The bank's lawyer also handled that transaction*, and managed to successfully record the lien with the division on the appropriate form and with the appropriate recording fee.

53. On May 18, 1988, the bank's lawyer submitted a letter with enclosures to the division requesting that the division record the Durens' lien on the liquor license. The submission did not include the required division form nor the proper recording fee.

54. The May 18, 1988 letter, which constituted an improper request to record the Durens' lien, is materially different from the bank's lawyer's August 27, 1993 letter on behalf of the bank for two important reasons:

    a. The May 18, 1988 letter addressed only a *single subject*, *recording* a lien in favor of the Durens; the August 27, 1993 letter addresses *two subjects*, *satisfaction* of the Durens' prior lien and conditional *recordation* of the bank's lien.

Thus, the 1988 situation did not pose the same danger of error and confusion.

b. The May 18, 1988 letter *unequivocally directs* the division to file the lien on the license; the August 27, 1993 letter does not.

55. By letter dated May 25, 1988, the division advised the bank's lawyer that it would not file the lien until it received: a copy of the promissory note; the $5 recording fee; and, "form DBR 739L which is used to record a lien with the division . . .," which the division enclosed.

56. The bank's lawyer subsequently submitted the missing documentation, and the Durens' lien was officially recorded with the division in June, 1988.

57. *By letter to the bank's lawyer dated June 20, 1988,* the division *acknowledged in writing* that the Durens' lien had been filed and made part of the license file. As discussed previously, no such letter was ever sent by the division or received by the bank's lawyer in connection with the bank's 1993 lien.

58. The 1988 series of events demonstrates that: the bank's lawyer had *actual prior experience* as to the proper procedure for recording a liquor license lien with the division; and, *actual prior knowledge* that the division issued a written acknowledgment of the official filing of liquor license liens. Presumably, the bank's lawyer's own files contained the 1988 documentation with the proper procedure for recording a lien with the division. (There was no substantial change in the procedure for recording a lien with the division between 1988 and 1993.) Unfortunately, the bank's lawyer did not review these documents in preparing the August 27, 1993 submission or reviewing the division's September 24, 1993 response.

CLAIMANT'S ARGUMENTS: Wewahitchka State Bank believes it is entitled to recover because:

59. The division's staff actually guided the bank's lawyer through the filing process. Under such facts, in which there was complete good faith by the bank, and a technical miscue by the division, helpful guidance for addressing this claim bill may be found in the line of Florida court cases which speak to the effect of a technical miscue by the staff of other governmental agencies, such as the staff of a County Clerk's property records staff. In Beach Place Joint Venture v. Beach Place Condominium Ass'n, 458 So.2d 439 (Fla. 2nd DCA 1984), a condominium developer attempted to comply with all the recording requirements in the Florida Condominium Act, Chapter 718, F.S., for recording condominium documents at the Clerk's Office.

60. In spite of the developer's good faith attempt to comply with Chapter 718 in Beach Place, for reasons unknown, the Clerk's Office recorded only the first page of the condominium survey. The technical miscue became the subject of a lawsuit against the developer, and the District Court of Appeal ruled that a technical miscue at the Clerk's Office would not undo the developer's substantial compliance with the recording requirements of Chapter 718, to-wit:

> Appellant urges that a good faith effort was made to comply with the Condominium Act, (citation omitted) and that the recording error should not be used to provide a windfall to the condominium owners. We agree.

Beach Place, 458 So.2d at 441.

61. The factual parallel between Beach Place and the case *sub judice* is uncanny, and, accordingly, the applicable legal principal to be applied would be the same. The bank adequately or substantially complied with the recording requirement in §561.65(4), F.S., and did so in good faith. Therefore, the technical recording miscue by the division's staff should not undo the bank's substantial compliance.

RESPONDENT'S ARGUMENTS:

The Department asserts that recovery should be denied because:

62. The actions and inactions of the bank's lawyer, who was responsible to record and perfect the bank's security interest in the liquor license in 1993, was the cause of the injuries sustained by the bank. To the extent that any recovery is due the bank, it should come from the bank's lawyer.

63. The bank's lawyer had recorded a lien with the division on the same liquor license in 1988 on behalf of the Durens, and thus knew or should have known that the August 27, 1993, submission to the division would not constitute a proper request to record the bank's lien in accordance with the requirements of §561.65, F.S. The bank's lawyer also knew or should have known that there was a fee for recording the lien, which had to be paid as a precursor to the filing of the bank's lien. There was no change to the recording statute between 1988 and 1993.

64. The division was under no legal or equitable duty to inform the claimant that its lien would not be recorded in the form it was submitted on August 27, 1993 by letter of the bank's lawyer, because:

    a. The letter was vague, and could reasonably be read as a request only to record a satisfaction of the former lien in favor of the Durens;
    b. The letter was in the nature of providing information and did not constitute a request to record the lien, to wit: the letter failed to specifically direct or request that the agency permanently record the bank's lien;
    c. The August 27 submission did not include the statutorily-required form for filing a liquor license lien; and
    d. The August 27 submission did not include the $5 recording fee.

65. The bank, through its lawyer, failed to comply with the requirements in §561.65(4), F.S., for recording

and perfecting a lien. The use of a form to file a lien is not a matter of policy, it is mandated by statute.

CONCLUSIONS OF LAW: *Ripeness*

66. The equitable claim presented in this bill is not ripe for review by the Florida Senate.

67. A claimant should exhaust all judicial remedies before the Senate will consider a claim bill. Senate Rule 4.81(f) (November 19, 1996, amended March 4, 1997); D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA. BAR J. 23, 25 (April, 1988). Historically, the principle of exhaustion of remedies lies at the heart of the claim bill process. In general, the Legislature views claim bills, particularly equitable claims where there is no underlying record or decision, as a claimant's "last resort." Kahn, *supra*.

68. The bank and its lawyer established an attorney-client relationship with regard to recording and perfecting the bank's lien in the liquor license.

69. The bank's lawyer owed the bank a duty to exercise such skill, prudence, and diligence as similarly-situated attorneys of ordinary skill and knowledge commonly possess and exercise in the performance of the tasks they undertake. Dillard Smith Const. Co. v Greene, 337 So.2d 841, 843 (Fla. 1st DCA 1976).

70. The division asserts that the bank's lawyer is the proximate cause of the injuries sustained by the bank.

71. Florida law provides that an action for professional negligence (other than an action for medical malpractice) must be brought within 2 years from time the *cause of action* is discovered or, in the exercise of due diligence, should have been discovered. §95.11(4)(a), F.S. (1997).

72. The time within which an action must be instituted to comply with the 2-year statute of limitations runs from

the time the cause of action *accrues*. §95.031, F.S. (1997). A cause of action accrues when the *last element* constituting the cause of action occurs. §95.031(1), F.S. (1997).

73. For purposes of professional negligence, a cause of action does not accrue until a plaintiff has sustained *legally cognizable damage*. Pioneer Nat'l Title Ins. Co. v. Andrews, 652 F.2d 439 (5th Cir. 1981)(Unit B); Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990); Penthouse North Ass'n, Inc. v. Lombardi, 461 So.2d 1350 (Fla. 1985); Zuckerman v. Ruden, Barnett, McCloskey, Smith, Shuster & Russell, P.A., 670 So.2d 1050 (Fla. 3rd DCA 1996); Haghayegh v. Clark, 520 So.2d 58 (Fla. 3rd DCA 1988); see also, McGrath & Artigliere, *Liability of Attorneys*, in FLORIDA TORTS, Vol. 2, at §§ 62.30[2], p. 62-44 to 62-44.1 (Matthew Bender & Co. 1998).

74. In the case at hand, the *earliest possible date* on which it can be argued that the bank suffered redressable harm or injury is April 11, 1997, the date on which Motley Grocery, the debtor and holder of the liquor license, filed for federal bankruptcy protection. This is the initial act which led to the nullification of the bank's perfected lien in the liquor license. Prior to this date, the bank incurred no legally cognizable damages arising from the unsuccessful attempt in 1993 to perfect the lien in the liquor license. Thus, the *earliest possible date* on which the statute of limitations will run is April 11, 1999.

75. Because a claim by the bank against the bank's lawyer is not time-barred by the 2-year statute of limitations and is presently cognizable in circuit court, the bank has failed to exhaust its available judicial remedies and third-party sources of recovery.

COLLATERAL SOURCES: The liquor license was ultimately sold by the U.S. Bankruptcy Trustee for the amount of $55,000; the bank settled its disputed interest in the liquor license with the Trustee for $10,000, making the actual loss to the bank $45,000.

In addition, as a result of Motley Grocery's default on its loans to the bank (for which the liquor license was cross-collateralized), the bank has acquired title to real estate which it has been trying to sell for about the last year. The property is currently listed for sale at $148,000. The property is located in an economically-depressed area of Port St. Joe and there are numerous environmental factors which may discourage its sale. As of September 11, 1997, Motley Grocery owed the bank $170,242.97.

ATTORNEYS FEES: Claimant's counsel has filed a fee affidavit limiting recovery to a maximum of 25 percent, pursuant to §768.28, F.S.

RECOMMENDATIONS: For the foregoing reasons, this bill is not yet ripe for legislative consideration and, accordingly, I recommend that SB 44 be reported UNFAVORABLY.

Respectfully submitted,

Jonathan Fox
Senate Special Master

cc: Senator Pat Thomas
Faye Blanton, Secretary of the Senate
Sheri Holtz, House Special Master