

# ATTORNEY FEES UNDER THE PROMPT PAYMENT ACT AND A GROWING UNCERTAINTY

Construction Law Section

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On October 1, 2010, important changes to Florida's Local Government Prompt Payment Act, §§ 218.70-80, Fla. Stat., will take effect. Last session, Florida's Legislature tweaked the Local Government Prompt Payment Act (the "Act"); Governor Charlie Crist signed the amending legislation on May 26 to take effect next month.

Among its most important changes to the Act, the Legislature removed the requirement that the non-prevailing party have acted in bad faith as a pre-requisite to awarding attorney fees to the prevailing party. To illustrate the change, the following is the current text of the attorney fee rule, with the soon-to-be-removed language in bold:

In an action to recover amounts due under **ss. 218.70-218.80** [now: "this part"], the court shall award court costs and reasonable attorney's fees, including fees incurred through any appeal, to the prevailing party, **if the court finds that the nonprevailing party withheld any portion of the payment that is the subject of the action without any reasonable basis in law or fact to dispute the prevailing party's claim to those amounts.**

Section 218.76(3), Fla. Stat. (2009) (emphasis added). Other than replacing the section citation with the more scalable "this part" to avoid future ambiguity, the Legislature only removed the bad faith language from the Act's attorney fee provision.

Based on the revision, it is obvious that the Legislature intended to make the award of attorney fees mandatory in all claims under the Act. The change brings the attorney fee right under the Local Government Prompt Payment



**The Legislature's revision to bring the Act in line with other mandatory statutory fee provisions should add predictability... however, it has not been a particularly good year for the predictability of attorney fee awards in construction cases.**

Act more closely into accord with other statutory rights to attorney fees in construction cases. See §§ 255.05 and 713.29, Fla. Stat., and the more difficult § 627.428. The Legislature's revision to bring the Act in line with other mandatory statutory fee provisions should add predictability to construction litigation.

However, it has not been a particularly good year for the predictability of attorney fee awards in

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construction cases. In a February 26, 2009 decision,<sup>1</sup> the Florida Supreme Court determined that the significant issues test, as established in *Prosperi*,<sup>2</sup> applies to fee awards in all construction lien cases. Before *Trytek*, many construction attorneys would have advised their clients that courts would enter an attorney fee award in favor of a lienor who recovered any amount on a construction lien.<sup>3</sup> After *Trytek*, the outcome is less certain and the advice must be qualified.

Some will certainly argue that *Trytek* requires a *Prosperi* significant issues test in other construction cases with statutorily mandated attorney fee awards, such as the Local Government Prompt Payment Act. Others may argue that *Trytek* is by its own language strictly limited to claims under Chapter 713, as was *Prosperi*. It remains to be seen how Florida courts will respond to the arguments and how litigants and lawyers will deal with the growing uncertainty.

<sup>1</sup> *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1202 (Fla. 2009).

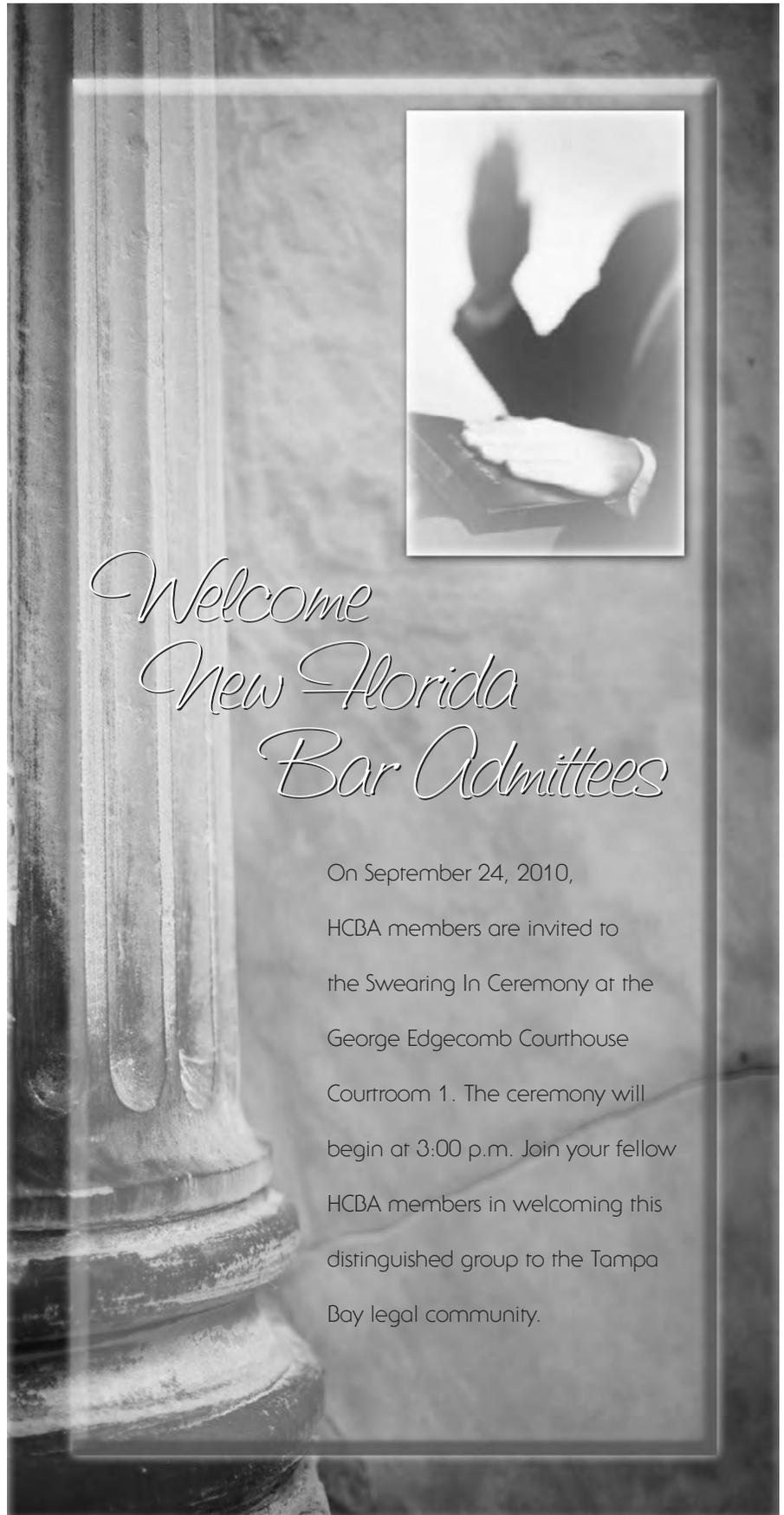
<sup>2</sup> *Prosperi v. Code, Inc.*, 626 So. 2d 1360, 1363 (Fla. 1993).

<sup>3</sup> Interestingly, the Court seems to suggest that using the "flexible" approach of *Prosperi* will "be consistent with encouraging settlement of disputes." *Trytek* at 1202. Certainty of outcome also encourages settlement,

but it remains to be seen which is more effective.



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## Welcome New Florida Bar Admittees

On September 24, 2010, HCBA members are invited to the Swearing In Ceremony at the George Edgecomb Courthouse Courtroom 1. The ceremony will begin at 3:00 p.m. Join your fellow HCBA members in welcoming this distinguished group to the Tampa Bay legal community.