



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

[www.palmbeachbar.org](http://www.palmbeachbar.org)

May 2012



## Installation Banquet

Please join us for our Annual Installation Banquet on **Saturday, June 2** at the Breakers Hotel in Palm Beach. A cocktail reception will be held from 7:00 - 8:00 p.m. with dinner and dancing immediately following.

## YLS to Host Fishing Tournament June 30

The Young Lawyers Section will be hosting its Third Annual Fishing Tournament on **Saturday, June 30** to benefit the Palm Beach Marine Institute. Entry fee is \$250 per boat and all activities will be held at the Palm Beach Yacht Club. For more information, go to the Bar's website at [palmbeachbar.org](http://palmbeachbar.org). Sponsorship opportunities are still available, if interested contact Evan Frederick at 561-659-7878.

## Mark your calendar for upcoming Membership Events

### Annual Judicial Reception

May 1  
The Harriet at City Place

### Law Day Luncheon

May 4  
Marriott West Palm Beach  
Speaker: Elizabeth Smart

### Annual Installation Banquet

June 2  
The Breakers Hotel, Palm Beach

### Diversity Luncheon

October 19  
Marriott West Palm Beach  
Speaker: FL Bar President-elect Gwynne Young



Retired Judges Karen Martin and Elizabeth Maass were honored during the luncheon at the Bench Bar Conference. Pictured from left to right Judge Timothy McCarthy, Ret. Judge Karen Martin, FL Supreme Court Justice Barbara Pariente, President John Howe, Ret. Judge Elizabeth Maass and 4th DCA Judge Robert Gross

## North County Section presents its 10th Annual Jurist of the Year

Thursday, May 24

5:30 pm to 8:00 pm

Ruth's Chris Steak House, North Palm Beach

RSVP online at [www.palmbeachbar.org](http://www.palmbeachbar.org)

Sponsored by: Debra Duran & Associates; Frank, White-Boyd; Karen Holloway/  
Northwestern Mutual; PNC Bank; Sabadell United Bank and Visual Evidence.

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## Rule 1.120(c): Conditions Precedent

By Matt Triggs and Jonathan Galler

### Admit. Deny. Without knowledge.

Those are your typical options when answering a complaint. Simple enough, right? You can save your real energy for those clever affirmative defenses and that killer counterclaim. There is just one problem. When answering some allegations, you need to do more. Maybe a lot more.

Rule 1.120(c) establishes the parties' respective burdens for purposes of alleging or denying the performance of conditions precedent. Reading the rule can have a dizzying effect on practitioners who are used to standard pleading practice.

**(c) Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

In other words, the rule imposes upon the defendant a heightened burden for pleading a denial of an allegation that all conditions precedent have been satisfied. The plaintiff may allege generally that all conditions precedent have been met; but, if the defendant wishes to deny that allegation, the denial must – at a minimum – identify “specifically and with particularity” the condition or conditions precedent that have not been satisfied.

A recent Fifth District Court of Appeal opinion highlights the significance of this pleadings standard. In *Godshalk v. Countrywide Home Loans, Servicing, L.P.*,<sup>1</sup> a foreclosure case, the plaintiff generally alleged that all conditions precedent had been satisfied. The defendant denied the allegation as follows: “Denied. Neither the Plaintiff nor any other person has provided any of the notices required by the document that the Plaintiff purports to be the applicable mortgage in this matter.”

The Fifth District held that the defendant’s denial failed to meet his heightened burden under Rule 1.120(c) because it did not specifically identify which of the thirteen required notices he allegedly did not receive. The consequences for the defendant were dire. The plaintiff was granted summary judgment on the ground that the defendant was deemed not to have denied the allegation concerning conditions precedent. The Court wrote:

The purpose of Florida Rule of Civil Procedure 1.120(c) is to put the burden on the defendant to identify the specific condition that the plaintiff failed to perform – so that the plaintiff may be prepared to produce or cure the omission, if it can be cured. The rule is intended to force a defendant to show his hand in advance to avoid surprise.<sup>2</sup>

In construing the majority opinion, the rather spirited dissent concluded that “[s]ince the denial seems pretty particular & the problem must be a lack of specificity” and noted that “[e]vidently, it is not enough to allege that *none* [of the notices] was complied with, each one must be separately identified.”<sup>3</sup>

The *Godshalk* opinion is not an outlier. The Florida Supreme Court has held that a mere general denial of the performance

of conditions precedent constitutes a waiver of the argument.<sup>4</sup> So have the other appellate courts, including the Fourth District.<sup>5</sup>

Thus, if the defendant does not satisfy its burden to make a particular and specific denial, the plaintiff will not be required to prove its allegation concerning the satisfaction of conditions precedent.<sup>6</sup> However, if the defendant does properly deny the allegation, the plaintiff will have the usual burden of proof at trial.<sup>7</sup> Rule 1.120(c) shifts the burdens only at the *pleading* stage; it does not shift the burden of proof if the defendant’s denial is sufficiently specific and particular.<sup>8</sup>

The language of Federal Rule of Civil Procedure 9(c) is very similar to Rule 1.120(c).<sup>9</sup> There is some authority, though, suggesting that the federal rule may be applied less strictly than the state rule. For example, in *Associated Mechanical Contractors, Inc. v. Martin K. Eby Const. Co.*, the Eleventh Circuit held that “the specific denial of performance of conditions precedent may be raised by motion as well as by answer.”<sup>10</sup> Indeed, in that case, the defendant was granted summary judgment by providing *in his motion* the specifics of his affirmative defense generally denying that all conditions precedent had been performed. It is possible, therefore, that if the *Godshalk* case had played out in federal court, the result might not have been quite as severe for the defendant.

*Matt Triggs is the head of the litigation department of Proskauer Rose LLP in Boca Raton. Jonathan Galler is a senior associate in the department. Both concentrate their practices in commercial and probate litigation.*

<sup>4</sup>*Ingersoll v. Hoffman*, 589 So. 2d 223, 225 (Fla. 1991).

<sup>5</sup>*See, e.g., Davie Westview Developers, Inc. v. Bob-Lin, Inc.*, 533 So. 2d 879, 880 (Fla. 4th DCA 1988).

<sup>6</sup>*W. J. Kiely & Co. v. Bituminous Cas. Corp.*, 145 So. 2d 762, 762 (Fla. 3d DCA 1962) (under predecessor rule).

<sup>7</sup>*Berg v. Bridle Path Homeowners Ass’n, Inc.*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002).

<sup>8</sup>*Id.*

<sup>9</sup>“In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.” Fed. R. Civ. P. 9(c).

<sup>10</sup>271 F.3d 1309, 1317 (11th Cir. 2001). *See also Schindler Architects, Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 2007 WL 781918, 2 (S.D. Fla. 2007); 2-9 Moore’s Federal Practice-Civil § 9.01(3) (“Denial of performance or occurrence of a condition precedent can also be made in a motion for summary judgment ...”).



## Justice Teaching

For information about Justice Teaching please contact Judge Jonathan Gerber at **561-242-2053**, [gerberj@flcourts.org](mailto:gerberj@flcourts.org) or visit the website at <http://www.justiceteaching.org>.

<sup>1</sup>2012 WL 751549 (Fla. 5th DCA Mar. 9, 2012) (not final as of this publication’s submission deadline).

<sup>2</sup>2012 WL 751549 at \*1.

<sup>3</sup>2012 WL 751549 at \*2.