Blue Sky Law

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Blue Sky Law: 1993 Survey of Florida Law

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I. LEGISLATIVE INITIATIVES

Securities regulation in Florida is governed by chapter 517 of the Florida Statutes and the Rules and Regulations promulgated thereunder by the Florida Department of Banking and Finance Division of Securities. In 1992-93, three bills were adopted which amended or added to chapter 517. These are chapters 92-9, 92-45 and 92-198.

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1. See generally FLA. STAT. ch. 517 (1991) and FLA. ADMIN. CODE ANN. r. 3E-300 to r. 3E-900.001 (1993).

Chapter 92-9 entitled, "Banking and Finance Department—Investigations—Confidentiality of Information," amends chapter 517 to provide exceptions to the state disclosure laws for certain information provided to the Department of Banking and Finance ("Department"), and a privilege against civil liability for persons who provide information to the Department for the furnishing of such information.

This relatively small amendment may have significant impact. First, it enacts an investigative privilege from state disclosure laws similar to that long enjoyed by federal agencies under the Freedom of Information Act ("FOIA"). Second, it exceeds the privilege granted federal investigative agencies by making consumer complaints or other information relevant to investigations by the Department, confidential even after the close of an investigation where the disclosure of such information might reveal identifying information of any complainant, customer or account holder.

517.301(1)(a) (Supp. 1992)); id. § 9, 1992 Fla. Laws at 421; ch. 92-198, § 1, 1992 Fla. Laws 1837 (codified at FLA. STAT. § 517.075 (Supp. 1992)). Incidental to the changes to chapter 517 promulgated by the Legislature, the rules of the Florida Administrative Code were revised for the purpose of implementing the amendments of chapter 517. The following regulations were adopted in 1993: FLA. ADMIN. CODE ANN. r. 3E-200.001, r. 3E-301.002, r. 3E-400.003, r. 3E-600.001, r. 3E-600.002, r. 3E-600.004, r. 3E-600.005, r. 3E-600.007, r. 3E-600.008, r. 3E-600.0012-.014, and r. 3E-600.019.

3. FLA. STAT. §§ 119.01-119.16 (1991). These sections state that, generally, information obtained by state officials must be made available to the public and contains exemptions thereto, for various circumstances. See generally id. § 119.07.


5. 5 U.S.C. § 552 (1988). The new section appears to be modeled upon FOIA, but contains some important differences as discussed infra.

6. FLA. STAT. § 517.2015(1)(b)2 (Supp. 1992); cf. 5 U.S.C. § 552(b)(7) (1988) which only allows protection of information gathered for law enforcement purposes and only to the extent that such information:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably
This section also makes provision for non-disclosure of information relating to department personnel and their families. It also makes provisions for the continuing confidentiality of the information even if it is offered in evidence in an administrative, civil or criminal proceeding at the discretion of the presiding officer. Furthermore, the Department is permitted to share information with any law enforcement, administrative agency, or regulatory organization, provided such agency or organization maintains the confidentiality of the information, so long as it would otherwise be confidential.

This section also extends exemption from disclosure laws to information made available to the Department on a "confidential or similarly restricted basis;" however, the subparagraph contains limiting language specifying that the exemptions are not to be construed to prohibit disclosure of information required by law to be filed with the Department or otherwise subject to disclosure laws. Presumably, this is intended to be a coordinate provision to the one allowing the Department to give information to other law enforcement agencies so that it could receive confidential information from those agencies without the necessity of making such information subject to disclosure laws.

Undoubtedly, securities counsel will attempt to use this provision to exempt from disclosure laws any information provided to the Department by securities broker/dealers during the course of an investigation or examination, which include, for example, witness statements and the like. How much the Department will cooperate with these efforts, and how much the protections offered by this section will be challenged, remains an open question at this juncture. Likewise, the question of who has standing to claim or defend the exemption offered by this section, and whether it will be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . .

5 U.S.C. § 552(b)(7) (1988) (emphasis added). Furthermore, the new section also allows the Department to keep information confidential and exempt from disclosure under the disclosure laws in four situations also covered by the FOIA exemptions: 1) where disclosure would jeopardize the integrity of another active investigation or examination; 2) where disclosure would reveal the identity of a confidential source; 3) where disclosure would reveal investigative techniques or procedures; and 4) where disclosure would reveal a trade secret. Fla. Stat. § 517.2015(1)(b)1, 3-5 (Supp. 1992). The FOIA does provide a privilege similar to that granted in section 517.2015 of the Florida Statutes for information gathered in examination of financial institutions. 5 U.S.C. § 552(b)(8)(1988).

8. Id. § 517.2015(2).
9. Id. § 517.2015(1)(d).
10. Id. § 517.2015(1)(e).
11. Id.
give rise to a flurry of litigation similar to that found under FOIA remains uncertain.\(^{12}\)

Chapter 92-9, section 4, grants a privilege against civil liability to persons who furnish information or evidence to the Department.\(^{13}\) This subsection may have the greatest impact in the area of securities broker/dealer employment cases. There has been a significant amount of litigation concerning questions of defamation over statements made on Form U-5, regarding terminations of registered persons from broker/dealers.\(^{14}\)

Presumably, although it was clearly not the intended purpose of the section, brokerage firms will attempt to use the privilege against civil liability, provided by section 517.2015(3), to defend actions for defamation brought by terminated employees.\(^{15}\)

The new section may, however, be a double edged sword in that it provides an exemption or an exception to the privilege if the person furnishing information to the Department, acted either in bad faith or with malice in providing such information or evidence.\(^{16}\) This appears to be a more difficult standard for the employer to meet than was previously

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\(^{13}\) Ch. 92-9, § 4, Fla. Laws 156, 159 (codified at FLA. STAT. § 517.2015(3) (Supp. 1992)).

\(^{14}\) A broker/dealer is required to file Form U-4 with the National Association of Securities Dealers, Inc., as well as with the State of Florida, upon the hiring of a person to be employed as a registered person, and upon the registered person’s termination, a Form U-5 must be filed. Broker/dealers are also required to submit additional information to the Department on Disclosure Reporting Pages (“DRP”) concerning the background of the registered person. This includes any complaints filed by customers, any administrative or civil actions brought by a regulatory authority, and of course, any criminal actions brought against the registered person. In addition, Form U-5 requires the broker/dealer to state the basis for the termination of employment. See FLA. STAT. § 517.12 (Supp. 1992); FLA. ADMIN. CODE ANN. r. 3E-600.002, r. 3E-600.008 (1992).

\(^{15}\) FLA. STAT. § 517.2015(3) (Supp. 1992).

\(^{16}\) Id.
available at common law where a terminated employee would have to prove both bad faith and malice, not either. Thus, while the section codifies the common law privilege for communications required to be made by law, it broadens the exemption to that privilege by allowing one who maintains an action in defamation to prove either bad faith or malice to avoid the statutory privilege. What the effect of this provision will be in defamation cases is, of course, an open question as is the interpretation of this section by Florida courts. It is possible that the courts may rule that the privilege, being part of a section relating to investigations or examinations by the Department of Banking and Finance, extends only to information transmitted in that context and not in the context of regular Form U-5 disclosures made by a brokerage firm. In that case, brokerage firms would be left to rely on common law privileges and exceptions to the laws of defamation.

It is equally conceivable that the courts would construe the disjunctive “or” to be read conjunctively as “and” and thus, to bring in line the exemption to the privilege with the exception currently available at common law. This would have the effect of making a person who attempts to rely on the exception to the privilege, prove that a brokerage firm acted not only in bad faith, but also with malice in providing information or evidence to the Department before the exemption to the privilege granted by this section is overcome.

Finally chapter 92-9, section 3 amends Florida Statutes section 517.12 to make exempt from disclosure currency reports. According to this section, registered persons are required to file currency reports with the Department.

The second major piece of legislation amending chapter 517 is chapter 92-45, sections 1-9, which made far more changes to the law than chapter

17. See 19 FLA. JUR. 2D Defamation and Privacy § 112 (1980).
19. See id.
20. Cf Form U-4 contains language granting a similar privilege from employee to employer which authorizes the employer to release information to the Department and releases the employer from any liability whatsoever for doing so. This authorization and release is, of course, contractual and not statutory. The provision states: "I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5) ...." Rev. Form U-4 (11/91) 2, at ¶ 8.
22. Id.
92-9, but whose impact may, except in one or two areas, be less significant. This act makes several technical and clarifying amendments, including amendments to section 517.051 (relating to securities exempt from registration under the blue sky laws) specifying that the exemptions granted by that section are self-executing, and that the person claiming any entitlement to the exemption bears the burden of proving such entitlement. This amendment to the introductory paragraph of Florida Statutes section 517.051 does nothing more than codify the existing status of the law. This section is also amended to provide an exemption for securities issued or guaranteed by the National Credit Union Association where formerly, the law provided the same exemption for the Federal Savings and Loan Insurance Corporation. The amendment also added credit unions to the list of institutions specifically named as exempt under that section.

Chapter 92-45, section 2 also amended Florida Statutes section 517.061 (relating to exempt transactions in securities) to codify existing law that the exemptions, provided by the act, are self-executing, and that the burden of proving such exemption is on the persons claiming same. The chapter made certain amendments to existing subsections (6) and (7) of Florida Statutes section 517.061, which are designated clarifying amendments by the preamble to the session law. Subsection (6) of Florida Statutes section 517.061, which previously granted an exemption for transactions involving the distribution of securities of an issuer exclusively among its own securities, in a circumstance where no commission or other remuneration is paid in connection with the distribution was, in fact, clarified to specify securities holders as any person holding convertible securities, non-transferable warrants, or warrants exercisable within not more than ninety days of issuance.

Subsection (7) of Florida Statutes section 517.061 is amended to include transactions with qualified institutional buyers, essentially as that term is defined by the United States Securities and Exchange Commission.
It also deletes the requirement that transactions with pension or profit sharing plans are exempt where such plans have assets not less than $500,000 and instead refers the exemption to rules also promulgated by the Department in accordance with SEC Rules. Potentially the most interesting amendment to the section is the deletion of the word "regulated" before the words "investment company," and the insertion thereafter of the words "as defined by the Investment Company Act of 1940." Thus, the exemption, previously only for regulated investment companies is now extended to any investment company, as that term is defined under the federal law.

Chapter 92-45, section 3 amended Florida Statutes section 517.111 (relating to revocation or denial of registration of securities) by extending the grounds for revocation or denial of registration of securities. Subparagraphs (b) and (c) of subsection (1) have been clarified by the addition of the terms "officer" and "director." These amendments are primarily clarifying since officers and directors are generally defined as control persons of the issuer.


The practical effect of this amendment is questionable. It is rare that circumstances could exist where an officer or director could sustain the argument that he or she was not a control person.
addition to (1)(b) and (1)(c), this chapter similarly adds the terms "officer" and "director" to subparagraph (1)(g) (formerly (d)) as persons whose dishonesty can lead to suspension, revocation or denial of the issuer’s registration.39

Chapter 92-45 adds new subparagraphs (d), (e), (f), (h) and (j) to subsection (1) of Florida Statutes section 517.111 which provide additional grounds for the revocation or denial of registration of securities.40 Subparagraph (1)(d) extends the revocation, suspension or denial powers to a case where an issuer, officer, director or control person has been found guilty of a fraudulent act in connection with the sale of securities, or is engaged or is about to engage in making a fictitious sale or purchase of securities, or in any practice or sale of any security which is fraudulent or in violation of any law.41 Subparagraph (e) extends the revocation, suspension or denial powers to cases where the issuer, officer, director or control person of the issuer had a final judgment entered against him in a civil action on grounds of fraud, embezzlement, misrepresentation or deceit.42 Subparagraph (f) extends the power to instances in which the issuer, officers, directors, or control persons of the issuer have “demonstrated any evidence of unworthiness.”43 Subparagraph (h) extends the power to circumstances where the security in question is the subject of an injunction or an administrative stop order or similar order prohibiting the offer or sale of a security.44 Subparagraph (j) extends the power to circumstances where the issuer or any person acting on its behalf has failed


39. Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at FLA. STAT. § 517.111(1)(g) (Supp. 1992)).
40. Id. (codified at FLA. STAT. § 517.111(1)(d)-(j) (Supp. 1992)).
41. Id. (codified at FLA. STAT. § 517.111(1)(d) (Supp. 1992)).
42. Id. (codified at FLA. STAT. § 517.111(1)(e) (Supp. 1992)).
43. Id. (codified at FLA. STAT. § 517.111(1)(f) (Supp. 1992)).
44. Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at FLA. STAT. § 517.111(1)(h) (Supp. 1992)).
timely to complete any application for registration filed with the Depart-
ment.\footnote{Id. (codified at FLA. STAT. § 517.111(1)(j) (Supp. 1992)).}

These provisions significantly broaden the Department's ability to deny,
suspend or revoke securities registrations.\footnote{See FLA. STAT. § 517.111 (Supp. 1992).}
Their scope, and no doubt, their intended scope, is extremely broad. For example, subparagraph (d) of
subsection (1) allows the Department to revoke or suspend registration
where a determination is made that an issuer or a related party is about to
engage in any securities transaction which is fictitious or fraudulent or in
violation of any law.\footnote{Id. § 517.111(1)(d). This authority is akin to that granted to the SEC under Section
8(e) of the Securities Act of 1933. 15 U.S.C. § 77h(e) (1991). However, the power of the
SEC, absent a stop order proceeding to suspend or delay a registration, has been rarely used. \textit{But cf.} Jones v. SEC, 298 U.S. 1 (1936); Las Vegas Hawaiian Dev. Co. v. SEC, 466 F. Supp. 928, 932 (D. Hawaii 1979).}
Under subsection (1)(e), the Department has the
right to suspend, revoke or cancel any registration if any officer, director or
control person of the issuer or the issuer itself has a judgment entered
against it in a civil action on grounds of fraud, embezzlement, misrepresen-
tation or deceit.\footnote{Id. § 517.111(1)(e) (Supp. 1992).}
The section is not in any way limited by time, and
presumably, the Legislature determined that rather than impose a limitation
similar to the ten year limitation of disclosure of such items on Form U-4,
it would leave it to the discretion of the Department to utilize its authority
under this section regardless of the timing of the civil determination. Sub-
paragraph (f) is by far the broadest grant of powers to the Department which
allows it to suspend, revoke or cancel the registration of any security where
the issuer or any officer, director or control person of the issuer has demon-
strated "any evidence of unworthiness."\footnote{Id. § 517.111(1)(f).}
This section neither defines "evidence of unworthiness," nor explains what demonstration of such
unworthiness need be made. This subparagraph has no coordinate provision
in the federal law and may well be challenged on constitutional vagueness
standards. It is clearly a reaffirmation of the qualitative review standard
found in the blue sky laws of Florida and other states, and is a coordinate
provision of new subparagraph (i), formerly subsection (e), which denies
registration or grants authority to the Department to suspend or revoke registra-
tion of securities where the offer or sale of such securities would not be
"fair, just or equitable."\footnote{Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at FLA. STAT. § 517.111(1)(i)
(Supp. 1992)).}
Section 517.12(11) is amended to change the dates for re-registration of branch offices. Presumably, this administrative change will help in the processing of paperwork. This section is also amended to require the payment of any amounts lawfully due and owing to the Department as a precondition of re-registration. Presumably, this would require the payment of any fines levied by the Department as a precondition of re-registration for any dealer, associated person, investment advisor or branch office of a broker/dealer.

Section 517.131(3), relating to persons eligible to seek recovery from the Securities Guaranty Fund, has also been amended. That section, and the ensuing sections, provide for a fund against which persons damaged by entities regulated by the Department can seek reimbursement up to a statutory limit of $10,000 if that person has been unsuccessful in collecting a judgment against the judgment debtor. Subsection (3)(b), which had previously required the issuance of a writ of execution and a return showing that no personal or real property of the debtor was available to be levied upon in satisfaction of the judgment or that such property was insufficient to satisfy the judgment, has now been deleted. Instead, the new law makes such a showing to be a condition within the Department’s discretion. This amendment is an addition to the old subsection (3)(c) now denominated (3)(b). The new law also adds subsection (3)(e), which allows the Department to waive compliance with paragraphs (a) and (b), which require the person to receive a final judgment and make reasonable inquiries to ascertain whether there are sufficient assets to satisfy it if the regulated person against whom the claim is filed is the subject of a proceeding in which a receiver has been appointed. While subsection (3)(e) grants the Department the authority to make such a waiver in the event of the appointment of a “receiver,” the next sentence makes clear that the term receiver is meant to encompass the “court appointed trustee or examiner” as well as a receiver. Therefore, upon petition by the debtor or the court

52. Id.
53. Id.
54. Id. § 5, 1992 Fla. Laws at 417 (codified at Fla. Stat. § 517.131(3) (Supp. 1992)).
57. Id.
59. Id. §§ 517.131(3)(c), 517.131(3)(a), (b).
60. Id. § 517.131(3)(e).
appointed trustee, examiner or receiver, any waiver granted by the Department will be considered a judgment for purposes of satisfying the requirements of Florida Statutes sections 517.131 and 517.141.61 This relaxation of the requirements is welcome and long overdue for individuals defrauded of their funds by members of the brokerage industry.

What the government giveth, the government taketh away. The amendments to subsection (1) of Florida Statutes section 517.141 exclude from payment to a claimant any award for costs and attorney fees.62 In addition, if the Department honors a claim by a trustee or a receiver, the claimant must assign all his rights against the debtor to the Department.63 The 1992 amendments to Florida Statutes section 517.141 (4), clarify that a claimant is entitled to no more than ten thousand ($10,000) dollars from the fund, regardless of how many accounts the claimant may have had with a regulated entity or how many judgments the claimant attains against same.64 Subsections (5), (6) and (7) of Florida Statutes section 517.141 clarify the obligation of a claimant to reimburse all amounts received in excess of what is permitted by law, or if the judgment is overturned on appeal or in a collateral proceeding, also authorizes the Department to enforce compliance with this section by instituting legal actions to recover such monies.65 Curiously, the amendments entitle the Department to obtain interest, costs and attorney fees if the Department is the prevailing party in an action to recover same, despite the fact that a claimant may not recover for same, either in an action brought against him or her by the State to recover excess funds paid, or as part of the judgment upon which the original claim is based.66

Perhaps the most significant changes made by the 1992 amendments are to be found in Florida Statutes sections 517.16167 and 517.301,68 the former regarding revocation, denial or suspension of registration of a dealer, investment advisor, associated person or branch office, and the latter

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61. *Id.* § 517.131(3)(e). 517.141.
64. Ch. 92-45, § 6. 1992 Fla. Laws 413, 418 (codified at FLA. STAT. § 517.141(4) (Supp. 1992)).
67. *Id.* § 7, 1992 Fla. Laws at 420 (codified at FLA. STAT. § 517.161 (Supp. 1992)).
68. *Id.* § 8, 1992 Fla. Laws at 421 (codified at FLA. STAT. § 517.301 (Supp. 1992)).
involving fraudulent transactions, falsification or concealments of facts. The sections have been amended to specifically include for the first time the power to regulate the rendering of investment advice. Subparagraphs (c), (d), (g) and (j) of subsection (1) of Florida Statutes section 517.161 have been amended to add, specifically, fraudulent conduct in connection with rendering investment advice as well as in the sale or purchase of any securities as a ground for revocation, suspension or denial of registration. In addition, misrepresentations, concealing material facts or false statements made in connection with the rendering of investment advice is similarly made a grounds for administrative action. Finally, rendering investment advice through any associated person not registered in compliance with the provisions of chapter 517 is also made a ground for revocation, denial or suspension of registration.

Similarly, Florida Statutes section 517.301 has been broadened to make unlawful, not only fraud in connection with the offer, sale or purchase of any investment or security, but also in connection with the rendering of any investment advice.

These changes clearly reflect the national concern for the growing number of people defrauded by individuals or entities labeling themselves "investment advisors." The federal government has focused on strengthening federal regulation of investment advisors. The Florida amendments

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70. Id. § 7, 1992 Fla. Laws at 420 (codified at Fla. Stat. § 517.161 (Supp. 1992)).
74. Id. § 8, 1992 Fla. Laws at 421 (codified at Fla. Stat. § 517.301 (Supp. 1992)).
seem an aggressive and positive step in closing the loopholes concerning the regulation of those who offer financial services to the public. 76 Definiti-

The change in the Florida law may present certain regulatory problems. Previously, fraud was only actionable in the offer, purchase or sale of securities. 77 That is, an offer, or the purchasing or selling of securities, was required before an unlawful act could be deemed to have occurred. By making unlawful the fraudulent rendering of investment advice absent the offer, purchase or sale of securities, an argument could be raised that the unlawful act is totally inchoate until acted upon by the potential victim. In response, no doubt, the Department and plaintiff’s counsel will argue that the rendering of fraudulent investment advice is akin to the offer of a security, the alleged perpetrator having committed all the acts necessary for a violation of the law. In private actions, presumably, absent a showing of detrimental reliance, damages, if available, would be nominal. The Department on the other hand, would presumably not need a showing of damages to institute injunctive proceedings against an investment advisor for rendering fraudulent investment advice. 78

Moreover, the 1992 amendments add new subparagraph (m) to Florida Statutes section 517.161(1) which enables the Department to suspend, revoke, restrict or deny the registration of any investment advisor or other regulated person having been civilly adjudicated to have committed fraud in connection with the rendering of investment advice or any violation of federal or state securities or commodities laws or any rule or regulation promulgated thereunder or any injunction or adverse administrative order by

The proposed legislation would require investment advisors, under certain circum-
stances, to pay, upon registration, and annually thereafter, a fee based on assets under management. One of the most important provisions of this proposed legislation is that it would add to the Investment Advisor’s Act a section specifically prohibiting advisors from making unsuitable recommendations and require that the advisor make a reasonable inquiry into the client’s financial circumstances.

76. See Ch. 92-45, §§ 7-8, 1992 Fla. Laws 413, 420-21 (codified at FLA. STAT. §§ 517.161-517.301 (Supp. 1992)).


78. Id. § 517.191. The Department is granted the right to seek injunctive relief for any violation of chapter 517. Id. This section makes clear that no damage need already to have occurred, granting the Department authority to seek injunction against one who “is about to engage in any act or practice constituting a violation of this chapter.” Id.
a state or federal agency regulating banking, insurance, finance or small loan companies, real estate, mortgage brokerage or other related or similar industries. The subparagraph does limit the right and power of the Department to bring such a proceeding if the registered entity has been continuously registered with the Department for five years after the entry of the decision, provided of course, that the decision has been timely reported to the Department pursuant to its rules. Presumably, the threat of a coattail action by the Department to revoke or suspend the registration of a regulated entity because of the entry of a civil or regulatory judgment of fraud will encourage additional lawsuits against regulated persons as well as settlements prior to determination of those actions. More liberal settlement policies on the part of regulated entities can be expected to generate even further litigation.

The language of subsection (1)(m) of Florida Statutes section 517.161 is exceedingly broad. This is no doubt intentional. It allows the Department to deny, revoke or suspend registration when any regulated person "[h]as been the subject of any decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order by any court of competent jurisdiction, administrative law judge, or by any state or federal agency, national securities, commodities, or option exchange, or national securities, commodities, or option association . . . ." It is an open question whether this includes a decision by an arbitrator or arbitration panel of the National Association of Securities Dealers, Inc., or New York Stock Exchange, Inc., or arguably, even of the American Arbitration Association. While the language, though broad, does not include the terms arbitrators or arbitration panel, it is conceivable that the Department could deem an arbitrator's decision to be a "decision" or "finding" of a national securities, commodities, or option exchange or national securities or option association. Further credence to this argument is lent by the fact that the subparagraph refers to reported or reportable determinations, and arbitration decisions have been deemed to be such according to the rules governing reports on Forms U-4 and U-5. If this was in fact the intention of the legislature, arbitral decisions should be one of the specified grounds for

81. Id.
82. See id.
83. Id.
84. Rev. Form U-4 (11/91) and Rev. Form U-5 (11/91).
revocation or suspension spelled out in the statute and further legislation is needed for its inclusion. In the absence of such legislation and the otherwise expansive of reach of subparagraph (m), a compelling argument can be made that it was not the intent of the legislature to include such decisions. The final legislative amendment to chapter 517, made in the 1992-1993 legislative sessions, was added by chapter 92-198. This amendment added Florida Statutes section 517.075 to the securities laws requiring disclosure in any prospectus for the issuance of securities in this state, if the issuer or any affiliate of the issuer does business with the government of Cuba or with any person or affiliate located in Cuba. The section further provides that after a registration is in effect, if a company later engages in business with the government or any person or affiliate located in Cuba, the issuer must file with the Department a statement to that effect within 90 days. Additionally, the section provides penalties for non-compliance, including a civil remedy to any purchaser of securities sold in violation of the section. This section also provides for public disclosure, upon request, of any statements or forms filed with the Department by an issuer doing business with the government of Cuba or its citizens or affiliates. The authors believe this provision to be unique to the laws of the State of Florida.

In addition to the enacted legislation, five bills affecting or seeking to regulate or amend the securities laws were introduced in the last two legislative sessions. Senate Bill 1058 and its coordinate House Bill 0241 sought to reduce statutory interest rates from twelve to nine percent in the absence of a written contract. The bills died in the Senate and House. House bill 1893 also introduced in the 1993 session, had as its primary purpose to clarify the provisions related to selling and registering

85. Ch. 92-198, § 1, 1992 Fla. Laws 1837 (codified at FLA. STAT. § 517.075 (Supp. 1992)).
86. FLA. STAT. § 517.075 (Supp. 1992).
87. Id. § 517.075(3).
88. Id. § 517.075(6).
89. Id. § 517.075(2)(c).
90. S. 1058, FLA. S. JOUR 117 (Reg. Sess. 1993) (died in Senate Commerce Committee 3/24/93); see FLA. LEGIS., PROVISIONAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF SENATE BILLS at 109, S. 1058.
92. Id.
93. See supra notes 90-91.
small corporate securities offerings and to simplify registration for such offerings, i.e. offerings under one million dollars. This bill also died in committee. Senate Bill 354 would have provided a rate of interest for certain judgments equal to the prime rate plus two percent and would also have provided for the imposition of prejudgment interest. It too died in committee. Finally, Senate Bill 1252 sought to incorporate some of the amendments of the prior unsuccessful bills and would have included a prohibition on the sale of securities into, from or within the state without registration. It also would have deleted an exception to the definition of "associated person" for the registration of small corporate offerings and would have authorized the Department to adopt rules to facilitate these registrations. This bill also died in committee and no securities legislation was enacted in the 1993 session.

In 1992, the Legislature amended one section of the Florida Statutes, which though not specifically relating to securities regulation, may have a significant impact in the area. Chapter 768.73, regarding punitive damages, previously provided that sixty percent of all judgments awarding punitive damages in the areas of "negligence, strict liability, products liability, misconduct in commercial transactions, professional liability or breach of warranty that involves willful, wanton or gross misconduct"

95. See supra note 94.
97. See supra note 96.
99. See supra note 98.
100. See supra note 98.
101. During 1992-93, the SEC enacted several new rules and regulations affecting, inter alia, proxy solicitations, small business capital formation and reporting requirements, and, most notably, penny stock regulation. The details of these initiatives are beyond the scope of this paper, but should be of interest to Florida Securities practitioners, the SEC's activities are the subject of a well written article entitled "Significant 1992 Regulatory Developments," 48/3 The Business Lawyer 977 (May 1993).
102. Ch. 92-85, § 2, 1992 Fla. Laws 821 (codified at FLA. STAT. § 768.73 (Supp. 1992)).
103. FLA. STAT. § 768.73(1)(a) (1988).
was payable either to the Public Medical Assistance Trust Fund in the case of personal injury or wrongful death, or to the General Revenue Fund in the case of other punitive damages awards. Chapter 92-85, effective April 8, 1992, reduced the percentage of punitive damages awards payable to the state from sixty to thirty-five percent. Thus, a successful plaintiff in an action covered by Florida Statutes section 758.73 will now recover sixty-five percent rather than forty percent of any punitive damage award. The provision of subsection 1(a) of Florida Statutes section 768.73 relating to “misconduct in commercial transactions” certainly appears broad enough to cover securities cases. Moreover, since securities related causes of action are often founded in fraud, which has traditionally been a subject of punitive damage awards, it appears likely that courts confronting the issue will apply Florida Statutes section 768.73 to securities cases. Recently, the Court of Appeals for the Eleventh Circuit certified to the Florida Supreme Court the question of whether Florida Statutes section 768.73 applied to arbitration awards in a securities case. This issue was previously raised in the case of Peabody v. Rotan Mosle, Inc., where the court refused to apply section 768.73 to an award of punitive damages made by an arbitration panel because the cause of action arose prior to the then operative date of the statute even though the award was made after that date. Section 4 of chapter 92-85 amends Florida Statute section 763.73 to clarify that subsections (2) and (3) of Florida Statutes section 768.73 shall apply to pending cases and causes of action in which a judgment has not yet been entered, in effect putting to rest the issue

104. Id. § 768.73(2)(b).
105. Id.
108. See id. § 768.73(1)(a). But see infra notes 111-14 and accompanying text.
109. But cf. Alamo Rent-A-Car v. Mancusi, 599 So. 2d 1010, 1013 (Fla. 4th Dist. Ct. App. 1992). The Fourth District Court of Appeal held that the intentional tort of malicious prosecution was not intended to be included among those civil actions for which punitive damages are limited by section 768.73(1)(a) of the Florida Statutes. Id.; see also infra notes 378-386 and accompanying text for a discussion of Florida’s economic loss rule limiting securities actions to breach of contract causes. Presumably, this would also limit the application of punitive damages in securities cases.
110. Miele v. Prudential-Bache Sec., 986 F.2d 459 (11th Cir. 1993).
112. Id. at 1139.
II. LITIGATION

A review of securities litigation requires inquiry on both the state and federal level since regulation of securities is concurrent. Moreover, since the United States Supreme Court decisions in *Dean Witter Reynolds, Inc. v. Byrd*, and *Shearson/American Express, Inc. v. McMahon*, endorsing arbitration as a means for resolution of disputes between broker/dealers and their customers and employees, the great majority of these disputes have been brought either in the first instance or ultimately in arbitration. Finally, a substantial portion of the judicially created law regarding securities regulation in Florida is made on the circuit court level which is reported, unfortunately, sporadically, if at all. Any review therefore, of securities litigation in Florida, cannot purport to be complete and the practitioner is cautioned to recognize the externally imposed limitations of any such undertaking.


117. The National Association of Securities Dealers, Inc., reports that the Fort Lauderdale office handled 657 cases in 1992 and another 701 have been filed to date in 1993. Additionally, cases are arbitrated before the American Arbitration Association, the New York Stock Exchange, Inc., and other arbitral fora in Florida.

Arbitrators are not required by arbitration rules to write opinions but merely state the ultimate resolution of the arbitration matter. See, e.g., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD") CODE OF ARBITRATION PROCEDURE § 41 (1992). These decisions are not widely reported, and as stated, only infrequently contain any rationale. Section 41(f) of the NASD Code has been amended to make arbitration awards, their contents, and the names of the arbitrators publicly available. “The NASD will implement this rule change October 1, 1993. For public customer cases, the rule change will apply to awards rendered on or after May 10, 1989. For industry cases, including employment disputes, the rule change will apply to awards rendered on or after October 1, 1993.” Self-Regulatory Organization; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Public Availability of Arbitration Awards, SEC Release No. 34-32740 (August 12, 1993). Any interested practitioner should also consult the Securities Arbitration Commentator, an invaluable source of information concerning securities arbitration. The New York Stock Exchange ("NYSE") makes all of its awards publicly available, and the AAA is reportedly considering doing the same in securities cases.

118. This paper also is intended as a survey only and not as an in depth analysis or discussion of each and every decision reported in the field during the period.
A review of federal and state court cases for the period 1992-1993 reveals that the court decisions have been concentrated primarily in arbitration related cases. Most of these cases can be loosely divided into two areas relating to arbitration disputes: The first, involves the extent of judicial intervention in determining under what circumstances and in what manner aggrieved parties must submit their disputes to arbitration. These cases generally arise on motions or petitions either to compel or stay arbitration. The second, involves the extent, manner and grounds for judicial review of arbitration decisions.

On the federal level, judicial inquiry into compelling or staying arbitration has been delimited by the mandates of the Federal Arbitration Act ("FAA"). Under the FAA, the court’s authority is confined to determining whether there is an agreement to arbitrate. If the parties have validly agreed to arbitrate their dispute, under the FAA, the district court must compel arbitration. The federal courts have made clear, however, that while the scope of their inquiry may be limited, they must and will inquire into the issue of the making of an agreement to arbitrate where the validity of the agreement to arbitrate is in issue. In such circumstances, a district court will decide if the arbitration agreement is enforceable against the parties and will not allow the question to be addressed by the arbitrators. In Chastain v. Robinson-Humphrey, the Eleventh Circuit affirmed a denial of a motion to compel arbitration where the customer denied signing the arbitration agreement. Stating the general rule that a mere denial without more is

119. The authors have attempted to review the decisions published between January 1, 1992 and August 31, 1993.
121. Id. § 4. This section further provides that the court make this determination in a summary proceeding.
122. Id. §§ 2, 3. Section two of the FAA mandates that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable . . . ." Id. § 2, and section three of the FAA requires courts to stay trial of any action in which it finds any issue contained therein to be referable to arbitration pursuant to an agreement of the parties. Id. § 3. See, e.g., Chastain v. Robinson-Humphrey Co., Inc., 957 F.2d 851 (11th Cir. 1992).
123. See Chastain, 957 F.2d at 854; see also Volt Information Sciences, Inc. v. Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989). In Volt, the Supreme Court instructed: "[w]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . . ." Id. at 478 (citations omitted).
124. 957 F.2d at 851.
125. Id. at 854.
normally insufficient to deny compelling arbitration, the Chastain court nevertheless affirmed the lower court ruling. The court recognized that in the rare instance, where, as here, a customer makes a substantial showing that she had not, in fact, signed the arbitration agreement, the court, not the arbitrators, must determine the validity of the agreement. The Chastain court expressed the general rule as follows: "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."

In Shearson Lehman, Hutton, Inc. v. Lifshutz, the Fourth District Court of Appeal construed the state court’s duty under the Florida Arbitration Code ("FAC") to be identical, that is, the court must make the determination whether an enforceable written agreement to arbitrate exists between the parties. Unlike its federal counterpart, however, the state court construed the burden to be on the party seeking arbitration to establish the existence of an enforceable agreement to arbitrate. Finding that despite submitting the arbitration agreements, appellant Shearson Lehman had failed to produce handwriting experts or make any other attempt to authenticate the signature on the brokerage agreement. The appellate court affirmed the lower court’s denial of the motion to compel, holding that "[t]he record does not show any evidence that the appellees signed or

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126. See id.
127. Id. at 855.
128. Id. at 854.
129. Chastain, 957 F.2d at 854 (citation omitted). Where, however, it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring same, as the court stated, "the calculus changes." Id. “Under these circumstances, there is no presumptively valid general contract which would trigger the district court’s duty to compel arbitration pursuant to the Act.” Id. “Therefore, before sending any such grievances to arbitration, the district court itself must first decide whether or not the non-signing party can nonetheless be bound by the contractual language.” Id.; see also Cancanon v. Smith Barney Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam). Stating that in such circumstances “[t]o make a genuine issue entitling the [party seeking to avoid arbitration] to a trial by jury [on the arbitrability question], an unequivocal denial that the agreement has been made [is] needed, and some evidence should [be] produced to substantiate the denial.” Chastain, 957 F.2d at 854. In the instant matter, the court agreed that appellant Chastain had, in fact, made such showing and was therefore entitled to a trial on the issue of the validity of the arbitration agreement. Id.
130. 595 So. 2d 996 (Fla. 4th Dist. Ct. App. 1992).
131. FLA. STAT. §§ 682.01-682.22 (1991).
132. Lifshutz, 595 So. 2d at 997.
133. Id.
134. Id.
assented to the brokerage agreement submitted by the appellants."

One year later, in Wheat, First Securities, Inc. v. Green, the Eleventh Circuit reiterated the proposition that it is the task of the court asked to compel arbitration to determine whether the parties agreed to arbitrate that dispute. In Wheat, while recognizing that Congress in enacting the Federal Arbitration Act declared a national policy favoring arbitration, the court reiterated its position in Chastain stating that "[s]imply put, parties cannot be forced to submit to arbitration if they have not agreed to do so."

The Wheat court was asked to review a judgment of the district court that a securities broker/dealer had no obligation to arbitrate claims by investors arising from transactions with the broker/dealer's predecessor in interest. Appellants, customers of another brokerage firm, signed arbitration agreements with that broker. Thereafter, Wheat purchased the assets of the original broker, and in its agreement expressly denied assuming any liabilities of its predecessor. Notwithstanding, appellants, whose accounts were transferred to Wheat after the asset purchase, sought to hold Wheat liable on the questioned transactions conducted by the predecessor. The Eleventh Circuit, echoing its prior ruling in Chastain, held that the parties had not agreed to arbitrate the matters before it.

In affirming the lower court's determination that Wheat was not bound by the arbitration agreement of its predecessor, the Eleventh Circuit also stated that since contract interpretation is generally a question of law, the burden then shifts to the party challenging that agreement to present evidence rebutting same. See Chastain, 957 F.2d at 854.

135. Id. In his dissent, Judge Anstead noted that appellants had in fact successfully introduced the arbitration agreements into evidence and that since no other evidence to the contrary existed in the record, a motion to compel arbitration should have been granted. Id. at 998. Presumably, Judge Anstead was recognizing that the burden of disputing the making of the arbitration agreement shifted to the appellee after the agreement itself was submitted in evidence. It is arguable that the dissent's position in Lifshutz is closer to that espoused by the Eleventh Circuit in Chastain, since the Chastain court, at least impliedly recognized that the party seeking to compel arbitration is required to make a prima facie showing of the existence of an arbitration agreement, the burden then shifts to the party challenging that agreement to present evidence rebutting same. See Chastain, 957 F.2d at 854.

136. 993 F.2d 814 (11th Cir. 1993).
137. Id. at 817.
138. Id.
139. Id. (citing Chastain, 957 F.2d at 854).
140. Id. at 815.
141. Wheat, 993 F.2d at 816.
142. Id.
143. Id.
144. Id. at 818.
"[d]eterminations of arbitrability, like the interpretation of any contractual provision, are subject to de novo review." Thus, while the de novo review standard announced in Wheat was applied therein to facts that were not in dispute, the court's previous review in Chastain involved a case where the facts were very much in question: whether or not appellant Chastain was bound by an arbitration agreement, despite her vehement assertion that she had never signed same. In Chastain, however, the Eleventh Circuit was careful to note that "the district court did not decide that Chastain could not in fact be bound by the arbitration clauses of the customer agreements. The district court only determined that Chastain's duty to arbitrate would be decided by the district court, rather than being decided by an arbitration panel." The court carefully noted that this was the only determination that it reviewed upon appeal. Left open by its two rulings, Chastain and Wheat, is the question of what standard the court would apply to any subsequent determination of the district court in Chastain. In other words, whether the appellate court would review the district court's determination on the issue of arbitrability de novo, or under the more common abuse of discretion standard normally applied in cases where a district court makes factual determinations.

The Eleventh Circuit may have indicated its view on this question earlier in the year in its decision in Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc. In Kelly, plaintiffs filed a complaint alleging two causes of action under Section 10(b) of the Securities Exchange Act of 1934. After two years, the plaintiffs dismissed one of their claims and the trial court granted summary judgment in favor of the defendant on the remaining claim. Thereafter, the plaintiffs commenced arbitration of four state common law claims alleging essentially the same conduct as the earlier litigation, based on a clause in the arbitration agreement which required arbitration of all claims with the exception of federal securities laws claims. On motion of the defendant, the district court enjoined the

145. Id. (citations omitted).
146. Wheat, 993 F.2d at 815.
147. Chastain, 957 F.2d at 854.
148. Id. at 853.
149. Id.
150. PHILIP J. PADAVANO, FLORIDA APPELLATE PRACTICE § 5.5 (1988).
151. 985 F.2d 1067 (11th Cir. 1993).
152. Id. at 1068; see also 15 U.S.C. § 78j(b) (1983).
153. Kelly, 985 F.2d at 1068.
154. Id.
arbitration proceeding and Kelly appealed.\textsuperscript{155} In affirming the lower court’s order, the Eleventh Circuit stated, “[w]e review the district court’s injunction for abuse of discretion.”\textsuperscript{156} Thus, it appears that despite its enunciation in Wheat of the \textit{de novo} review standard in questions of arbitrability, whereas in Kelly, the district court has been required to review evidence in making its determination on whether or not to compel arbitration, the court will apply an abuse of discretion standard not \textit{de novo} review of the lower court’s determination. As the Eleventh Circuit explained in Kelly, “the district court . . . [is] in the best position to decide whether . . . an injunction was necessary.”\textsuperscript{157}

In Kelly, appellants sought to enjoin the subsequent arbitration proceeding on grounds of \textit{res judicata}.\textsuperscript{158} In upholding the district court’s power to grant an injunction to protect its own rulings,\textsuperscript{159} the court rejected an argument that the issue of \textit{res judicata} should be left to the arbitrators “because it is an affirmative defense that goes to the merits of . . . [the] claims.”\textsuperscript{160} The court stated “[w]e think the better rule is that courts can decide \textit{res judicata}.”\textsuperscript{161}

The Eleventh Circuit’s willingness to have courts, rather than the arbitrators, consider the issue of \textit{res judicata} is interesting in that it appears to be contrary to and a departure from the general rule that courts faced with a request to compel arbitration will limit their review to the issue of the making of the agreement to arbitrate and the failure or refusal of one of the parties to agree to arbitration.\textsuperscript{162} The Kelly court’s departure from the general rule resurrects questions that had previously been thought, at least on the federal level, to have been settled. By deciding the \textit{res judicata} issue, the court clearly did not limit the scope of its inquiry to the valid making of an agreement to arbitrate. Whether and under what circumstances federal courts will expand their scope of inquiry when asked to compel or stay arbitration are again open questions. As we shall see, on the state level, the question of the scope of judicial review of motions to compel or stay arbitration is not at all well settled and is, in fact, the subject of a rather

\textsuperscript{155} Id.
\textsuperscript{156} Id. at 1070.
\textsuperscript{157} Id.
\textsuperscript{158} Kelly, 985 F.2d at 1069.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} See Chastain, 957 F.2d at 817; see also Wheat, 993 F.2d at 817.
During the period 1992-93, the Eleventh Circuit, following the dictates of the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, joined the Fifth, Sixth, and Ninth Circuits in determining that claims of sex discrimination under Title VII, the Equal Employment Opportunity Act of 1972, were subject to arbitration. In *Gilmer*, the United States Supreme Court held that a former stockbroker, dismissed from his employment, who sought recovery under the Age Discrimination in Employment Act of 1967, was required, by having signed a U-4 registration form which provided for arbitration of all disputes between him and his employer, to arbitrate his age discrimination claims. The Supreme Court rejected the employee’s contentions that Congress had intended to exclude age discrimination claims from the purview of the FAA. In *Bender v. A.G. Edwards & Sons, Inc.*, the plaintiff filed a complaint in federal court alleging sexual harassment and seeking relief under Title VII and pendent state law claims. The defendants sought a stay of the Title VII claims pending arbitration under the FAA. The Eleventh Circuit, noting that in her application for registration as a stockbroker plaintiff had agreed to arbitrate all her disputes with her employer, compelled arbitration of all claims including the Title VII claims.

The expansion of the scope of causes of action which have been held to be arbitrable in cases like *Bender* undoubtedly come as a result of what the courts see as a clear mandate from the Supreme Court: They are to effectuate the intention of parties signing arbitration agreements and order

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163. See infra notes 211-46 and accompanying text.
165. Alford v. Dean Witter Reynolds, Inc. 939 F.2d 229 (5th Cir. 1991), appeal after remand, 975 F.2d 1161 (5th Cir. 1992). Originally, the Fifth Circuit had determined Title VII cases were not subject to arbitration, but its decision was vacated by the United States Supreme Court for reconsideration in light of the Supreme Court’s opinion in *Gilmer*. Id.; see also *Gilmer*, 111 S. Ct. at 1647.
171. Id. at 1657.
172. 971 F.2d 698 (11th Cir. 1992).
173. Id. at 699.
174. Id.
175. Id. at 700.
all claims not specifically required to be determined by a court to arbitration.176 Perhaps the attitude was best described by the Fourth District Court of Appeal in Pierce v. J.W. Charles-Bush Securities, Inc.177 The Pierce court in determining that parties could agree to grant arbitrators authority to award attorneys’ fees, reviewed the various decisions of the United States Supreme Court expanding the scope of arbitration in Moses H. Cone,178 Southland Corp. v. Keating,179 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.180 Shearson/American Express, Inc. v. McMahon,181 and Gilmer v. Interstate/Johnson Lane Corp.182. The Pierce court then stated: “[i]f civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced.”183 In general, this is probably a fair statement of the law.184

Perhaps the most highly debated issue regarding judicial intervention to compel or stay arbitrations before Florida courts during 1992-1993, involves what has come to be known as the “AMEX Window.” 185 The matter was ultimately resolved, at least in part, by the Eleventh Circuit’s recent opinion in Luckie v. Smith Barney, Harris, Upham & Co.186 The

176. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (the FAA is a “congressional declaration of the liberal federal policy favoring arbitration . . . [requiring that] as a matter of federal law, any doubts concerning the scope of arbitrable issues, should be resolved in favor of arbitration . . . ”).
177. 603 So. 2d 625 (Fla. 4th Dist. Ct. App. 1992).
178. 460 U.S. 1 (1983); see also supra note 176 and accompanying text.
179. 465 U.S. 1 (1984) (holding that the Federal Arbitration Act prohibited the states from requiring a judicial forum for the resolution of claims that the contracting parties had agreed to resolve by arbitration).
180. 473 U.S. 614 (1985) (holding that certain antitrust and RICO claims were arbitrable).
183. Pierce, 603 So. 2d at 628.
185. See, e.g., Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509 (11th Cir. 1993). In essence, the AMEX Window cases do not involve the courts in making a determination of whether or not parties agreed to arbitrate, but rather whether specific fora for those arbitrations are permitted or specified in the contracts. Id.
186. Id.
controversy surrounding the AMEX Window involves whether or not an involved customer of a broker/dealer may seek resolution of disputes by arbitration before the American Arbitration Association ("AAA"). In *Luckie*, the Eleventh Circuit decided that, where there was a valid arbitration agreement between the parties which contained a provision denominating fora for arbitration (a "forum selection provision") which did not include AAA, the answer was no.\(^{187}\) In *Luckie*, the plaintiffs, who were customers of the broker/dealer and its registered representatives, alleged that the defendant mismanaged and misused their investment accounts.\(^{188}\) In April 1989, the plaintiffs filed a complaint with the AAA to resolve the dispute.\(^{189}\) The case was filed pursuant to article VIII, sections 1 and 2(c) of the AMEX Constitution which allow a customer of any member organization to demand arbitration before the AAA.\(^{190}\) Thereafter, plaintiffs commenced suit in the Sixth Circuit Court of Florida seeking a declaratory judgment, affirming AAA jurisdiction and compelling arbitration before the AAA.\(^{191}\) The case was subsequently removed to the federal district court on diversity jurisdiction.\(^{192}\) The day before removal, however, the defendant filed suit in New York City attacking the jurisdiction of the AAA and seeking to compel arbitration before the New York Stock Exchange ("NYSE"), National Association of Securities Dealers, Inc., ("NASD"), or AMEX.\(^{193}\) The New York court then enjoined the plaintiffs from proceed-

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187. *Id.* at 514. ("[T]he New York Stock Exchange, Inc. ("NYSE"), the American Stock Exchange, Inc. ("AMEX"), and the National Association of Securities Dealers, Inc. ("NASD") are all self-regulatory organizations, overseen and regulated by the Securities and Exchange Commission. The AAA is an independent arbitral forum.") *Id.* at 511.

188. *Luckie*, 999 F.2d at 510.

189. *Id.*

190. *Id.* Section 1 of article VIII of the AMEX Constitution provides that members of the exchange "shall arbitrate all controversies arising in connection with their business . . . between them and their customers as required by any customer's agreement or, in the absence of a written agreement, if the customer chooses to arbitrate." *Id.* Section 2(c), the so-called "AMEX Window" provision, states that "[a]rbitration shall be conducted under the arbitration procedures of this Exchange, except as follows: . . . (c) if any of the parties to the controversy is a customer, the customer may elect to arbitrate before the American Arbitration Association in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange." *Id.*


192. *Id.*

193. *Id.* The defendants actions were based upon a "choice of law" provision of the arbitration agreement which specified that New York law was to apply to any disputes between the parties.
ing in any manner with their claim before the AAA and the plaintiffs filed a motion challenging the jurisdiction of that court to hear the case. The federal district court in Florida then stayed further action in the Florida matter pending the New York court's resolution of the jurisdictional issue. The New York court then issued an internal order affirming its jurisdiction to which plaintiffs filed objection on September 18, 1989. The Florida federal court continued its stay pending a final decision of the jurisdictional question in New York until that court had failed to act for almost two years. In June 1991, the district court lifted its stay. The court then ruled on the plaintiff's motion to compel arbitration and determined that the customer's agreement in the instant case, which provided in relevant part for "arbitration in accordance with the rules, regulations and procedures then in effect of the New York Stock Exchange, Inc., the AMEX or the National Association of Securities Dealers, Inc..." barred arbitration before the AAA. The district court, adopting the defendant's position that the AMEX window operates only as a default provision in the absence of a specific agreement between the parties, refused to compel AAA arbitration. The case made its tortuous way to the

194. Id.
195. Id.
197. Id.
198. Id.
199. Id. at 1119.
200. Id. at 1120.
201. Luckie, 766 F. Supp. at 1120. Ultimately, the New York court decided to rule on the matter before it. In Smith Barney Harris Upham & Co., Inc. v. Charles Luckie, Index No.: 9909/89 (Supreme Court, New York October 14, 1992), the New York court, noting the actions of the Middle District of Florida, finally determined the only issue remaining before it, Smith Barney's motion to dismiss one of the plaintiff's claims as time-barred under the Supreme Court decision in Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson, 111 S. Ct. 2773 (1991) (adopting the one/three year statute of limitations applicable to other sections of the Securities Exchange Act of 1934 to actions under section 10(b) thereof). The New York court denied petitioner's motion to dismiss the claims as time-barred on the grounds that the claim was not time-barred under New York or federal statutes of limitation. Id. at 5. The court based its reasoning on the fact that Congress had amended the Securities Exchange Act of 1934 by enacting Section 27A "to modify the retroactive effect of the Lampf ruling." Id. at 4. "Section 27A provides for re-instatement of certain actions time-barred and dismissed under Lampf, if timely commenced prior to June 19, 1991, [date of the Lampf decision], under applicable federal or state limitations as herein." Id. Accordingly, the court found that respondent's claim was not time-barred under the New York (CPLR 213[9]) or federal law. Id.
Eleventh Circuit Court of Appeals. On August 26, 1993, the Eleventh Circuit affirmed the District Court’s holding closing the AMEX Window in cases where the contract between the parties specifically designates other fora for arbitration.\textsuperscript{203} Relying on Second Circuit decisions in \textit{Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis},\textsuperscript{204} and \textit{PaineWebber, Inc. v. Rutherford},\textsuperscript{205} as well as the Sixth Circuit decision in \textit{Roney & Co. v. Goren},\textsuperscript{206} the court held that a forum selection provision of a customer arbitration agreement can supersede the arbitration provisions of the AMEX Constitution, namely the AMEX Window.\textsuperscript{207}

Prior to the Eleventh Circuit’s pronouncement in \textit{Luckie}, the District Court for the Middle District of Florida was again required to consider the viability of the AMEX Window. In \textit{Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King},\textsuperscript{208} Judge Elizabeth A. Kovachevich was confronted with an arbitration agreement containing a forum selection clause providing for specific fora which, while specifically including the AMEX, did not provide for arbitration before the AAA.\textsuperscript{209} Relying on her previous ruling in \textit{Luckie}, the Judge preliminarily enjoined an AAA arbitration based on the fact that the AMEX Window was superseded or closed by the specific provisions in the arbitration agreement.\textsuperscript{210}

On the state level, a rather heated debate is raging about the proper scope of inquiry for a court when faced with a motion to compel or stay arbitration. In 1989, the Fourth District Court of Appeal, in \textit{Anstis Ornstein}...
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Associates v. Palm Beach County, a non-securities case, held that issues of statutes of limitation when raised as objections to submitting matters to arbitration, are to be determined by the courts and not by arbitrators. Two years later, the Fourth District Court of Appeal, relying on its previous holding in Anstis Ornstein, refused to allow an arbitration panel to determine whether or not a claim under the Florida probate code was time-barred. The court, in a rather pugnacious opinion in Estate of Vernon v. Shearson, Lehman Bros., Inc., stated:

We hold that just because parties agree to the arbitration of disputes in the execution of a contract, this does not mean that statutes of limitation are without effect. It certainly does not mean that the arbitrators should interpret the applicable statute of limitation to decide whether it applies or not.

In 1992, in a per curiam decision in Lange v. Dean Witter Reynolds, Inc., the Fourth District Court of Appeal again refused to allow arbitrators to consider the issue of statutes of limitation, relying on its opinions in Anstis Ornstein and Vernon. In Anstis Ornstein, the Fourth District Court of Appeal was not required to consider the applicability and effect of the FAA because it was a non-securities case. Nor was it required to consider that most federal courts, in construing their role under the FAA, have usually refused to determine issues of statutes of limitation, and referred such issues to arbitration.

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211. 554 So. 2d 18 (Fla. 4th Dist. Ct. App. 1989).
212. Id. at 19.
213. Id.
215. Id. at 1170.
217. Id.
218. See, e.g., Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2nd Cir. 1991); Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976); Titan Group, Inc. v. Anne Arundel County, 588 F. Supp. 938 (D. Md. 1984), aff'd, 749 F.2d 32 (4th Cir. 1984). The Eleventh Circuit has adopted the rationale of the Second Circuit's Wagoner opinion. See Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982). Generally, the rationale is that statutes of limitation are affirmative defenses and do not go to the issue of whether or not the parties agreed to arbitrate. See generally Wagoner, 944 F.2d at 121 (where the rule is that “it is up to the arbitrators, not the court, to decide the validity of time-bar defenses.”). But cf. Lawler v. Dean Witter Reynolds, Inc., Case No.: 91-136-CIV-FTM-17D (M.D. Fla. 1992):
In *Vernon* (and presumably *Lange*), however, the Fourth District Court of Appeal directly confronted the dictates of the FAA, as well as the decisions of the federal courts construing same. Not only did the *Vernon* court find exception to the general application of the FAA in cases of statutes of limitation arising under state probate law, its strong dicta indicated a disinclination to apply the majority approach to statutes of limitation issues in general. The *Vernon* court, referring to its opinion in *Anstis Ornstein*, stated: “this court [has previously] held that it is the court’s responsibility, and not that of the arbitrators, to decide whether arbitration has been time barred by statute.” The court’s 1992 *per curiam* decision in *Lange*, derived from a circuit court injunction of an AAA arbitration concerning “standard” securities law claims of fraud, breach of fiduciary duty, negligence and breach of contract. In *Lange*, the Fourth District affirmed the circuit court ruling without deeming the subject worthy of comment.

The position of the Fourth District has, however, by September 1993, become a rather solitary one. The Fifth District in *Victor v. Dean Witter Reynolds*, Inc.*

In an action to compel arbitration under [sic] Federal Arbitration Act, [a court] generally considers no issues other than the making of the agreement to arbitrate and the failure or refusal of the other party to arbitrate, and apart from equity doctrines such as laches, which on a motion to compel arbitration the court sitting as a court of equity must take into account, all other issues of law and fact are for determination by the arbitrators.

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220. *Id.*
Reynolds, Inc., \(^{223}\) considered and expressly rejected the Fourth District’s approach to the extent that it extended past the probate code. \(^{224}\) In the securities context, the Victor court refused to follow Vernon, noting that cases construing the court’s powers of review under the FAA require it to leave issues of statutes of limitation to the arbitrators. \(^{225}\) The Victor court also rejected an argument based on Volt, \(^{226}\) that since the arbitration agreement contained a choice of law provision specifying the application of New York law, the FAA was inapplicable. \(^{227}\) The Victor court reasoned that the application of New York law was precluded on preemption grounds since the application of New York law would have resulted in barring arbitration. \(^{228}\) Finally, while feeling constrained by the FAA and the federal cases construing it, the Victor court curiously—and in the authors’ view, correctly—expressed sympathy with Dean Witter’s argument that since “arbitrators are not frequently steeped in the law and cannot always be expected to follow its precepts. . . . [They] are wont to ignore valid statute of limitations defenses.” \(^{229}\)

The rationale of the Fifth District was quickly followed by the District Court of Appeal for the Second District in Marschel v. Dean Witter Reynolds, Inc. \(^{230}\) The Marschel court refused to allow the courts to consider the issue of statutes of limitation, stating:

> [T]he Fifth District recently decided the exact issue presented in this case regarding whether the arbitrators or the court should decide time bar defenses . . . . The Fifth District concluded that the arbitrators should decide the statute of limitations issue . . . . We agree with the conclusion reached in Victor . . . . \(^{231}\)

\(^{223}\) 606 So. 2d 681 (Fla. 5th Dist. Ct. App. 1992), review denied, 614 So. 2d 502 (Fla. 1993).

\(^{224}\) \textit{Id.}\n
\(^{225}\) \textit{Id.} at 683.

\(^{226}\) \textit{Volt Info. Servs., Inc.}, 489 U.S. at 468.

\(^{227}\) Victor, 606 So. 2d at 685.

\(^{228}\) \textit{Id.}

\(^{229}\) \textit{Id.}

\(^{230}\) 609 So. 2d 718 (Fla. 2d Dist. Ct. App. 1992), review denied, 617 So. 2d 318 (Fla. 1993).

\(^{231}\) \textit{Id.} at 720; see also Daugherty v. Dean Witter Reynolds, Inc., 618 So. 2d 802 (Fla. 2d Dist. Ct. App. 1993) (Second District Court of Appeal, relying on its holding in Marschel, summarily reversed a circuit court’s refusal to compel arbitration on statute of limitations grounds).
In April of this year, the Third District Court of Appeal joined the debate, siding with the Second and Fifth District Courts of Appeal in a succinct opinion in *Dean Witter Reynolds, Inc. v. Clarke.* The Clarke court stated: "The decision below that the dispute must be arbitrated is affirmed on the authority of . . . [Victor and Marschel], with which we are in complete agreement."  

Despite the Third District's agreement with the *Victor* and *Marschel* decisions, one important issue raised in both cases was resolved in opposite manners by those two courts. Both cases construed the same arbitration clause, containing a New York choice of law provision. The *Victor* court found that the choice of law provision was preempted by the FAA, while the *Marschel* court found the contract did not show an intent to apply state law and, therefore, decided that it need not determine whether New York law would conflict with the goals and policies of the FAA and, therefore, be preempted. 

Most recently, in a rather unusual written (and reported) opinion of a circuit court in *Paine Webber, Inc. v. Hall,* Judge Leroy H. Moe, of the Seventeenth Judicial Circuit in and for Broward County, a court within the jurisdiction of the Fourth District Court of Appeal, openly rejected the holdings of the Fourth District in *Anstis Ornstein, Vernon and Lange* and sided with the Second, Third and Fifth District Courts of Appeal holding that the question of statutes of limitation are for the arbitrators and not for the court under the Federal Arbitration Act. This case has apparently been appealed to the Fourth District Court of Appeal. Thus, the issue

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232. The Third District's position was predictable. In *Miami Dolphins, Ltd. v. Cowan,* 601 So. 2d 301 (Fla. 3d Dist. Ct. App. 1992), the Third District disposed of an argument in a federal labor law case seeking to preclude arbitration as time barred by the terms of a collective bargaining agreement. The *Cowan* court stated: "[t]hat contention is a matter to be presented to the arbitrators and is not for us to determine." Id. at 302 n.2. See also infra note 255 and accompanying text.


234. *Id.* But see *Seaboard Surety Co. v. Cates,* 604 So. 2d 570 (Fla. 3d Dist. Ct. App. 1992) (citing *Anstis Ornstein Assoc. v. Palm Beach County,* 554 So. 2d 18 (Fla. 4th Dist Ct. App. 1989) for the proposition that timeliness of a claim for arbitration is for the courts not the arbitrators). It is important to note, however, that this is a non-securities case to which the FAC, and not the FAA, probably applied.

235. *Victor,* 606 So. 2d at 682.

236. *Id.* at 683.

237. *Marschel,* 609 So. 2d at 721.


239. *Id.* at 97,239.

240. 5 Securities Arbitration Commentator 9, at 11 (August 1993).
has been squarely joined; the ball so to speak is in the court of the Fourth District Court of Appeal. Should the Fourth District continue in its position taken in Anstis Ornstein, Vernon and Lange, the issue, no doubt, will ultimately be decided in the Florida Supreme Court.

Ironically, the issue of court inquiry into statutes of limitation which the Second, Third and Fifth District courts determined to be resolved by the dictates of the federal courts in construing the FAA, may not be so clear-cut on the federal level. In Lawler v. Dean Witter Reynolds, Inc., the court specifically included among the duties of a court faced with a motion to stay or compel arbitration, determination of issues of equitable defenses. Presumably, this would include laches. If courts have jurisdiction to construe laches, why not statutes of limitation? Similarly, the Eleventh Circuit has, at least nominally, widened the scope of inquiry in its recent decision in Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc. in holding that issues of res judicata are properly for the court and not the arbitrators. Other federal courts have, at least in part, left the door open to judicial review of statute of limitation issues and it is difficult to say that the issue is fully resolved at either level.

241. The Fourth District Court of Appeal has had ample opportunity to reverse its position. To date it has chosen not to do so. See, e.g., Investment Management & Research, Inc. v. Wylie, Appeal No.: 92-3256, pending since November 6, 1992, before the Fourth District. In Wylie, Judge Edward Fine of the Fifteen Judicial Circuit in and for Palm Beach County, Florida enjoined an arbitration proceeding on statute of limitations grounds. Investment Management & Research, Inc. v. Wylie, No. CL-92-6169-AN (Fla. 15th Cir. Ct. Oct. 20, 1992) (order on Defendant's Motion to Dismiss). In at least two other cases, circuit courts in the Fourth District have enjoined arbitrations based on Vernon, see Dean Witter Reynolds, Inc. v. Banks, Case No.: 92-8685 AC (Fla. 15th Cir. Ct. 1992); Dean Witter Reynolds, Inc. v. DeGroff, Case No.: 92-00638 (Fla. 17th Cir. Ct. 1992).
243. Id. at 3.
244. 985 F.2d 1067 (11th Cir. 1993).
245. Id. at 1069; see also supra notes 157-61 and accompanying text.
246. See, e.g., Smith Barney, Harris Upsham & Co. v. Escobar, Case No.: 91-1078-CIV-T-15A (M.D. Fla. 1991). In Escobar, the district court found certain claims to be time barred and enjoined defendants therein from prosecuting those claims in a pending NASD arbitration. Id.; see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gimenez (N.Y. Sup. Ct.) N.Y.L.J., Sept. 24, 1992. In Gimenez, a New York court was asked to consider, inter alia, whether or not arbitration between a broker and its disgruntled customer was barred by the statute of limitations. The New York court, finding that the matter was governed by the FAA, specifically referred the issue of statutes of limitation to the arbitrators. Interestingly, the New York court refused to decide that the FAA and federal law applied since securities transactions, including the mailing of monthly account statements and confirmations, involve interstate commerce. Rather, the court found federal law applicable on the grounds of
Another major issue confronting state courts in considering motions to compel or stay arbitration during 1992-1993, is the issue of waiver. The courts have ruled that, while parties may agree to arbitrate, a party seeking to compel arbitration may waive the right by taking actions inconsistent with the right to arbitrate.247 The general rule was clearly enunciated in Mike Bradford & Co. v. Gulf States Steel Co.: "[where] a party to a contract, containing a provision for arbitration . . . commences suit, or takes other inconsistent action therewith, he will be held to have waived his rights to arbitration."248 This rule has been consistently followed by the Florida courts249 and has been specifically adopted by the Florida Supreme Court.

diversity. The court found that the broker/dealer was a Delaware corporation and Gimenez, the customer, a Florida resident. The court also rejected the customer’s challenge to its jurisdiction, noting that in its forum selection clause, the customer agreed to arbitration and later chose the NASD for resolution of the dispute. Reasoning that the NASD had its principal place of business in New York, and the customer chose a New York based entity for his forum, the court found sufficient basis for obtaining jurisdiction over him.

The importance of Gimenez to Florida practitioners, even though the case was decided by a New York court, is the fact that it applied federal law in refusing to determine statute of limitations issues despite the fact that the contract contained a choice of law provision stating that New York law would apply. Under New York law the court could dismiss arbitration claims as time-barred. It is also important for Florida practitioners to note that at least one court has construed a common forum selection provision to confer jurisdiction on the courts of the state where the fora are located or have their principal place of business to determine motions to stay or compel arbitration. The authors would note that many, if not most, arbitration disputes arising in Florida contain similar choice of law and forum selection provisions. In this regard, the authors direct practitioners’ attention to the special concurrence of Judge Anstead in Terminal Construction Co. v. DeSantis, 614 So. 2d 7 (Fla. 4th Dist. Ct. App. 1993). In DeSantis, Judge Anstead questioned the continuing viability of the Florida Supreme Court decision in Damora v. Stresscon International, Inc., 324 So. 2d 80 (Fla. 1975), which held that an agreement to arbitrate in another state will not be enforced in Florida upon the authority of section 682.02 of the Florida Statutes. In DeSantis, Judge Anstead stated:

I do not believe the policy reasons underlying the Damora decision remain valid, and hope both the legislature and the Florida Supreme Court would revisit the issue. When parties agree to arbitrate their disputes, even in another state, there is no valid reason why Florida courts, if properly called upon to do so, should not enforce the parties’ agreement to the extent that the courts have jurisdiction over the parties.

DeSantis, 614 So.2d at 8.


248. Id. at 913.

249. See, e.g., Finn v. Prudential-Bache Sec., Inc., 523 So. 2d 617, 618 (Fla. 4th Dist. Ct. App.), review denied, 531 So. 2d 1354 (Fla. 1988); R.W. Roberts Constr. Co. v. Masters
In Bradford, and its progeny, the courts have made clear that a party claiming waiver of arbitration must demonstrate: (1) knowledge of an existing right to arbitrate; and (2) commencement of suit or other acts inconsistent with the right. In *Finn v. Prudential-Bache Securities, Inc.*, the Fourth District Court rejected a claim that in order to find a waiver of arbitration, a court must not only find knowledge and inconsistent acts, but also prejudice to the party opposing arbitration. The *Finn* court stated: "prejudice must be shown only where there is a finding of waiver based upon delay in assertion of one's right. A showing of prejudice is not required if waiver is based on inconsistent acts." The *Finn* rule seems to be one of lack of ambiguity; that is, the actions of one claimed to have waived arbitration are not ambiguous but are clearly inconsistent with that right and clearly reflect knowing waiver.

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251. *Bradford*, 184 So. 2d at 915; *Klosters*, 280 So. 2d at 681.
253. *Id.* at 619.
254. *Id.* at 619-20.
255. *See, e.g.*, *Rosen v. Shearson, Lehman Bros., Inc.*, 534 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1988), *review denied*, 514 So. 2d 200 (Fla. 1989) (affirmative selection of a course of action-litigation in the court-runs counter to the very purpose of arbitration); *Lapidus v. Arlen Beach Condominium Ass'n, Inc.*, 394 So. 2d 1102, 1103 (Fla. 3d Dist. Ct. App. 1981) (manifest acceptance of the judicial forum). Several cases have held that commencing suit or answering a complaint is sufficient to waive arbitration. *Ojus Indus.*, 221 So. 2d at 782; *Gettles*, 276 So. 2d at 840; *King*, 352 So. 2d at 1235; *Hardin Int'l, Inc. v. Firepak, Inc.*, 567 So. 2d 1019 (Fla. 3d Dist. Ct. App. 1990); *see also Handmacher v. Campagna*, 621 So. 2d 445 (Fla. 4th Dist. Ct. App. 1993). The Fourth District Court of Appeal affirmed *per curiam* an order from the Fifteenth Judicial Circuit denying appellant's motion to stay the lower court proceedings and compel the matter to arbitration. In *Handmacher*, the plaintiff filed a complaint alleging wrongdoing against her former investment adviser, its two principals and the broker dealer through whom her trades were placed by the advisory company. The plaintiff and three of the defendants agreed to arbitration of their dispute. The fourth defendant objected claiming that by filing her complaint in circuit court, the plaintiff had waived her right to arbitrate. The circuit court agreed, and the Fourth District affirmed this ruling on appeal. *Handmacher*, 621 So. 2d at 445.
The issue of the necessity of showing prejudice, where waiver of arbitration is based merely on delay in asserting the right to arbitrate, apparently left open in Finn, has been the subject of debate among the district courts of appeal during the period 1992-1993. In a case involving federal labor law, Miami Dolphins, Ltd. v. Cowan, the Third District held that in cases of delay, a party opposing arbitration must additionally demonstrate that he was prejudiced by the inconsistent acts (delay). The Cowan court, recognizing that the case involved federal labor law, applied federal substantive law to the issue of waiver of arbitration. Relying on decisions of various federal circuit courts, and the now familiar litany that doubts concerning arbitration are to be resolved in favor of arbitrability, the court, found no showing of prejudice caused by the delay in asserting a right to arbitration, and referred the matter to arbitration.

In 1993, the Second District Court of Appeal apparently threw down the gauntlet, challenging the Third District’s Cowan decision. In Donald & Co. Securities, Inc. v. Mid-Florida Community Services, Inc., the Second District refused to require a showing of prejudice in order to conclude that arbitration had been waived by inconsistent acts. The Donald & Co., court recognized the applicability of the FAA. Nevertheless, the court reasoned that since the United States Supreme Court had not ruled on the necessity of showing prejudice, and since Florida courts are bound only by the United States Supreme Court in interpreting acts of Congress, it was free to ignore lower federal court precedent and apply the law of Florida. The Second District then ruled that following Florida law: “a party may waive arbitration by actively participating in a law suit or by taking action inconsistent with that right. . . . [I]t is not necessary to show prejudice to establish waiver . . . .”

257. Id. at 302.
258. Id.
259. Id.
260. Id. (citing Dryer v. Los Angeles Rams, 709 P.2d 826 (1985)).
262. Id. at 194.
263. Id. at 193.
264. Id. The Second District did note that at least one federal court had held that waiver may be found absent a showing of prejudice. See National Found. for Cancer Research v. A.G. Edwards & Sons, 821 F.2d 772, 775 (D.C. Cir. 1987).
265. Donald & Co., 620 So. 2d at 194.
In so holding, the court specifically noted that the Third District had ruled to the contrary in Cowan.266 The court did conclude, however, that while the facts in Cowan demonstrated no prejudice, the court could infer prejudice from the facts of Donald & Co. sub judice.267 It was careful to point out, however, that it was following the rule that a showing of prejudice was not necessary.268 Curiously, the Second District's decision in Donald & Co. makes almost no reference to its decision of the prior year in Bared & Co. v. Specialty Maintenance & Construction, Inc.,269 a non-securities case that apparently did not involve construction of the FAA or a review of the federal law on waiver of arbitration. In Bared, the Second District succinctly found waiver of arbitration by the filing of an answer.270 The Bared court held that the fact that appellees had both raised the arbitration agreement as an affirmative defense in their answer and specifically claimed the right to arbitrate in their amended answer did not negate their initial waiver of arbitration.271

The Florida courts in 1992-1993 have considered several other issues in the context of motions to compel or stay arbitration. These include determinations of what issues are properly the subject of arbitration, who may demand arbitration, and whether disputes arising prior to the making of the arbitration agreement or subsequent to the conclusion of that agreement are properly arbitrable. In Stratton Oakmont, Inc. v. Goldstein,272 the court confronted the issue of whether an introducing broker may validly enforce an arbitration agreement entered into between a customer and a clearing broker.273 In Stratton, the customer had entered into a customer account agreement with the clearing broker, Bear Stearns & Co., which provided that disputes between them were to be resolved in

266. ld.
267. ld.
268. ld.
270. ld. at 3.
271. ld.
272. 615 So. 2d 183 (Fla. 3d Dist. Ct. App. 1993).
273. ld. The court explained: "The 'introducing broker' deals directly with the customer and relays orders to the 'clearing broker,' who has access to the relevant stock exchanges." ld. Introducing brokers use the services of clearing brokers in order to gain access to exchanges in which they may not be members. Frequently, in such arrangements, the customers are required to contract directly with and be financially responsible to the clearing broker. Typically, introducing brokers guarantee the accounts of their customers to the clearing broker.
Another part of the agreement provided that "[y]ou agree that your broker (including Bear Stearns & Co., Inc.) is a third party beneficiary of this agreement, and that the terms and conditions hereof, including the arbitration provision, shall be applicable to all matters between or among any of you . . . ." Finding that the introducing broker, Stratton, was a third party beneficiary of the contract, and that the contract clearly covered the controversy between the parties, the Third District reversed the trial court decision refusing to compel arbitration and remanded with directions to refer the matter to arbitration.

Florida courts were also asked to construe what claims were properly determined in arbitration. In Pierce v. J.W. Charles-Bush Securities, Inc., the court readily determined that parties could agree to grant arbitrators authority to award attorney fees stating: "If civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced." Perhaps mindful of the Fourth District's admonitions in Pierce, the circuit court for Indian River County, in an action brought before it, issued an order compelling arbitration. In Noe v. Dean Witter Reynolds, Inc., the Fourth District Court of Appeal reversed the trial court's order compelling arbitration. The court stated in a succinct per curiam opinion: "We reject appellees' argument that subsequent federal cases require us to depart from the holding expressed in Montgomery Distributors." In Montgomery Distributors, Inc. v. G. Heileman Brewing Co., Inc., the Fourth District Court of Appeal held that: (1) antitrust claims were not a proper subject for arbitration; and (2) the doctrine of permeation did not require a stay of arbitration of breach of contract claims pending a trial on antitrust issues. The doctrine of permeation has subsequently been rejected on the federal level. To the extent that the

274. Id.
275. Id.
276. Stratton, 615 So. 2d at 184.
278. Id. at 628; see supra notes 176-82 and accompanying text.
281. Id. (citing Montgomery Distrib., Inc. v. G. Heileman Brewing Co., Inc., 505 So. 2d 443 (Fla. 4th Dist. Ct. App. 1986)).
282. 505 So. 2d 443 (Fla. 4th Dist. Ct. App. 1986).
283. Id. at 445.
284. See, e.g., Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985). If arbitrable claims were so intertwined with nonarbitrable claims that the arbitrators could not reasonably
Fourth District's decision in Noe reflects a conflict with its own decision in Pierce, it is an anomaly.\(^{285}\)

In Bachus & Stratton, Inc. v. Mann,\(^{286}\) the Fourth District compelled arbitration of Title VII sex discrimination and various common law claims against a broker/dealer and its registered representatives.\(^{287}\) The court also compelled arbitration of the claims against the broker/dealer's parent company, holding that the issue of whether it was vicariously liable for the acts of its agents is properly referable to arbitration.\(^{288}\)

In Bachus & Stratton, the Fourth District was also required to consider the issue of the arbitrability of claims which arose after the termination of appellee's employment by the appellants, and thus, arguably after the extinction of the agreement between them to arbitrate.\(^{289}\) The Fourth District upheld the trial court's ruling that the arbitration agreement did not apply to claims which arose after the termination of appellee's employment.\(^{290}\)

The Fourth District, without reference to same, apparently followed its holding in Bachus & Stratton in its decision in Chelsea Street Securities, Inc. v. Cawthon,\(^{291}\) issued on the same day. In Chelsea, the Fourth District in a *per curiam* opinion affirmed, without opinion, a lower court's refusal to compel arbitration of a suit by a former employee of a securities brokerage firm alleging slander and infliction of emotional distress.\(^{292}\) The alleged conduct giving rise to the suit apparently occurred some ten days after the employee resigned.\(^{293}\)

\(^{285}\) Since the circuit court ruling in Noe is unreported, and the Fourth District opinion sheds no light on the issues considered by the circuit court, it is arguable that the decision is unique to its facts and does not reflect a retreat from the court's position in Pierce. It is important to note, however, that the court's broad statement in Pierce may not have been entirely accurate. In its decision in Mitsubishi, 473 U.S. 614 (1985), the Supreme Court noted that its ruling that antitrust claims were arbitrable was limited to cases involving international arbitrations. *See supra* note 184.

\(^{286}\) 18 Fla. L. Weekly D1275 (Fla. 4th Dist. Ct. App. May 19, 1993).

\(^{287}\) Id.

\(^{288}\) *Id.; see also* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (compelling arbitration of Title VII claims); *supra* notes 163-74 and accompanying text.

\(^{289}\) Bachus, 18 Fla. L. Weekly at D1275.

\(^{290}\) Id.

\(^{291}\) 18 Fla. L. Weekly D1272 (Fla. 4th Dist. Ct. App. May 19, 1993).

\(^{292}\) Id.

\(^{293}\) Id.
Notwithstanding his concurrence in *Bachus & Stratton*, which held that claims arising after termination of employment were not subject to arbitration, Judge Farmer of the Fourth District Court of Appeal, inexplicably wrote a scathing dissent in *Chelsea*. Judge Farmer reasoned that the arbitration clause at issue in *Chelsea*, even though it was identical to the arbitration clause in *Bachus*, was in fact broad enough to encompass post employment disputes, so long as they arose “out of, or in connection with, the business of the firm.” Judge Farmer noted the liberal federal policy favoring arbitration set forth in the FAA and the case law requiring that all doubts be resolved in favor of arbitration rather than against it.

Relying on the court’s previous holding in *Pierce*, Judge Farmer stated: “Manifestly, there is nothing inherent in slander or infliction of emotional distress claims that precludes arbitration. Or, to put it another way, there is nothing about such claims that requires a court in preference to an arbitration forum.”

In summary, Judge Farmer stated:

I do note that the employee’s causes of action all arose after his employment relationship with the firm had already terminated. I do not understand why the date of the employee’s termination of employment might be thought to determine whether the claims are arbitrable.

In light of his same day concurrence in the *Bachus* decision, which held directly to the contrary, Judge Farmer’s *Chelsea* dissent is an apparent anomaly.

In *Prudential-Bache Securities, Inc. v. Segal*, the Fourth District was confronted with a similar issue to that raised in *Bachus & Stratton* and *Chelsea*. In *Segal*, the brokerage firm sought retroactive application of an agreement to arbitrate. The Fourth District Court of Appeal affirmed...
the lower court ruling refusing to apply the subsequent arbitration agreement to pre-employment disputes.\(^{302}\)

The second major focus of judicial review of arbitration decisions in the period 1992-1993 in Florida, has been the extent, manner and grounds for judicial review of arbitration decisions. This category can be loosely termed post-arbitration review. In this context, Florida courts on both the state and federal level have considered issues relating to the vacatur of arbitration awards as well as the grounds and standards of review to be applied in doing so. Three principal cases concerning this issue reached the Eleventh Circuit in 1992-1993. The first two were *Ainsworth v. Skurnick*,\(^{303}\) ("Ainsworth II") a case having its genesis in the Southern District of Florida,\(^ {304}\) and *Brown v. Rauscher Pierce Refsnes, Inc.*\(^ {305}\) *Brown* involved a review of a decision of the District Court for the Middle District of Florida.\(^ {306}\) Curiously, both *Ainsworth* and *Brown* involved the construction of Florida Statutes section 517.12 relating to the unregistered sale of securities in Florida.\(^ {307}\) The third case, *Robbins v. Day*,\(^ {308}\) arose out of the vacatur of an arbitration award by the United District Court for the Northern District of Alabama in a case primarily concerning Alabama blue sky violations.\(^ {309}\)

The FAA makes specific provision for vacatur of arbitration awards by

\(^{302}\) *Id.* The court held that the broker's subsequent agreement to arbitrate, which was executed incident to the broker's registration after his employment dispute with the brokerage firm, does not constitute an agreement to arbitrate disputes arising prior to registration. *Id.* The court found that "[t]he rules of the NASD and NYSE do not provide that a registrant's agreement to arbitrate disputes applies retroactively." *Segal*, 603 So. 2d at 689.

\(^{303}\) 960 F.2d 939 (11th Cir. 1992), cert. denied, 113 S. Ct. 1269 (1993).

\(^{304}\) *Id.*


\(^{306}\) *Id.; see Brown v. Rauscher Pierce Refsnes, Inc.*, [1992] Fed. Sec. L. Rep. (CCH) ¶ 96,935, at 93,956 (M.D. Fla. 1992), wherein Judge Elizabeth Kovachevich of the Middle District issued a typically well reasoned and well written opinion which thoroughly summarizes the law to that time of judicial review of arbitration decisions in the Eleventh Circuit.

\(^{307}\) *Brown*, 7 Fla. L. Weekly Fed. at C508; *Ainsworth*, 960 F.2d at 939.

\(^{308}\) 954 F.2d 679 (11th Cir.), cert denied, 113 S. Ct. 201 (1992).

\(^{309}\) *Id.* The district court vacated an arbitration award in the amount of $325,000 since the arbitrators' decision did not explain their rationale for determining liability or their methodology for imposing damages. *Id.* at 681. Claimants originally sought 4.2 million dollars in actual damages, 12 million in punitive damages and 12.6 million dollars in RICO damages, attorneys' fees, costs and expenses totalling over 26.8 million dollars in damages. *Id.* at 681 n.1.
the district courts in section 10 thereof. However, the grounds provided by section 10 are extremely limited. Specifically, section 10 enumerates four grounds for vacating an arbitration award:

(1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Given the limited grounds for vacatur of arbitration awards specified in United States Code Title 9, section 10, it is perhaps not surprising that several federal courts have fashioned other grounds to vacate awards. The first of these judicially crafted means allows vacatur if the arbitrators' award is "arbitrary or capricious." Another ground is when a court finds an award "violates public policy." Another ground cited by the courts is that the award is "irrational." The final method crafted by the courts to vacate arbitration awards is upon a finding that the award was rendered in "manifest disregard of the law.

The Eleventh Circuit has been considering the manifest disregard standard without specifically adopting same since its decision in O.R. Securities, Inc. v. Professional Planning Associates, in 1988. Given the Eleventh Circuit's relatively long term flirtation with the manifest disregard standard, it was inevitable that a district court below would vacate an arbitration award on the grounds of manifest disregard of the law, and

311. Id.
312. Id.
314. See Delta Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665 (11th Cir. 1988).
316. O.R. Sec., Inc. v. Professional Planning Assoc. Inc., 857 F.2d 742 (11th Cir. 1988). In O.R. Sec., the Eleventh Circuit discussed the manifest disregard standard noting that it had never adopted same. Id. at 747.
317. 857 F.2d 742 (11th Cir. 1988).
318. Id.; see Raiford, 903 F.2d at 1412-16.
that the decision would be appealed to the Eleventh Circuit. In *Ainsworth v. Skurnick* ("Ainsworth I"), the District Court for the Southern District of Florida did just that and the case was appealed to the Eleventh Circuit. 319 In *Ainsworth I*, the Eleventh Circuit reviewed an order of the Southern District vacating an arbitration award in which a customer sued a broker alleging *inter alia* that the broker was not registered to sell securities in Florida, and that, despite the fact that his office was in New York, his effectuation of the Florida customer’s orders constituted the sale of securities in Florida by an unregistered person, in violation of Florida Statutes section 517.12. 320 The arbitration panel refused to award damages. On appeal, the district court specified the elements of a section 517.12 violation, including an instruction that a finding of scienter was unnecessary and remanded to the arbitrators for a clarification of their decision. 321 The panel responded that although the broker had acted negligently, the claimant had suffered no damages, and no violation of section 517.12 had been proven. 322 The district court, reviewing the transcript of the arbitration proceeding *de novo*, determined that there had clearly been a violation of Florida Statutes section 517.12, and vacated the arbitration award as being in manifest disregard of the law. 323 On appeal, the Eleventh Circuit, was unable to ascertain the status of the law concerning this statute from Florida court decisions, and therefore certified, in *Ainsworth I*, the question of whether the broker’s conduct constituted a violation of section 517.12 to the Florida Supreme Court. 324 The Florida Supreme Court held that the District Court had been correct. 325 The case again went to the Eleventh Circuit. 326

In *Ainsworth II*, the Eleventh Circuit, armed with the opinion of the Florida Supreme Court, affirmed the district court’s vacatur, 327 but rejected the court’s use of the manifest disregard standard, again noting that it had never adopted that standard as a ground for vacating arbitration awards. 328 The *Ainsworth II* court did adopt the arbitrary or capricious standard as a non-statutory ground upon which courts could, under proper circumstances,
vacate an arbitration award.\textsuperscript{329} Defining the arbitrary or capricious standard as one in which "a ground for the arbitrator's decision cannot be inferred from the facts of the case,"\textsuperscript{330} the court explained that, since the district court correctly instructed the arbitrators on the law, and they nevertheless refused to apply it properly, the refusal to grant damages was arbitrary and capricious.\textsuperscript{331} The \textit{Ainsworth II} court stated: "In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis."\textsuperscript{332}

Prior to \textit{Ainsworth II}, the Eleventh Circuit reviewed the district court's decision in \textit{Robbins}, which held the actions of an arbitration panel to be in manifest disregard of the law since a review of the record supported a finding of fraud, and yet the arbitrators refused to apply a mandatory damages provisions of the Alabama Securities Act.\textsuperscript{333} The Eleventh Circuit, however, reversed.\textsuperscript{334} The court stated: "[F]ollowing Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standard."\textsuperscript{335} The \textit{Robbins} court did not completely reject the idea of judicial grounds for vacatur; instead, it declared that the court could look beyond the statutory grounds of the FAA "[o]nly after it is determined that there could be no proper basis for the award . . . ."\textsuperscript{336}

Relying on the Eleventh Circuit's pronouncement in \textit{Robbins}, the district court in \textit{Brown v. Rauscher Pierce Refsnes, Inc.},\textsuperscript{337} found that the arbitrators below had a "proper basis" for their award since the issue of what constituted a violation of Florida Statutes section 517.12 was not clear at the time of the \textit{Brown} arbitration, and the arbitrators' interpretation of the law was reasonable.\textsuperscript{338} Although the Eleventh Circuit affirmed the district court finding, it noted that by inquiring into whether the arbitrators had a

\begin{itemize}
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} \textit{Id.} at 941 (quoting \textit{Raiford}, 903 F.2d at 1413).
\item \textsuperscript{331} \textit{Ainsworth II}, 960 F.2d at 941.
\item \textsuperscript{332} \textit{Id.}
\item \textsuperscript{334} Robbins v. Day, 954 F.2d 679 (11th Cir.), \textit{cert. denied}, 113 S. Ct. 201 (1992).
\item \textsuperscript{335} \textit{Id.} at 684. As discussed above, it is not at all clear to the authors and, presumably to the district court in \textit{Robbins}, that this was the case. \textit{See O.R. Sec.}, 857 F.2d at 42; \textit{Raiford}, 903 F.2d at 1410.
\item \textsuperscript{336} Robbins, 954 F.2d at 684.
\item \textsuperscript{338} \textit{Id.} at 93,962.
\end{itemize}
proper basis, the district court abused its discretion. The Eleventh Circuit instructed that, since the arbitrators stated the rationale for their decision, the district court should have confined its consideration to appellant’s contentions that the award was arbitrary, capricious and contrary to public policy.

If any bright line can be determined from these cases, it is that the Eleventh Circuit has nominally rejected the manifest disregard standard for judicial review of arbitrations and directed the district courts to be extremely circumspect in vacating arbitration awards. To this end, the court in Robbins directed the district courts to review arbitration decisions under the abuse of discretion standard; that is, to uphold arbitration decisions if any basis can be inferred for the arbitrators’ decision, while warning that it would review any vacatur of an arbitration award de novo. While the dictates of the Eleventh Circuit are far from clear, by its failure to reject all judicially crafted grounds for review of arbitration decisions, and to allow vacatur solely on the grounds provided in 9 U.S.C., section 10, the court arguably encouraged the district courts to continue vacating arbitration awards under proper circumstances.

One other decision of the federal courts concerning post-arbitration review is of note. Again, the opinion was written by Judge Elizabeth A. Kovachevich of the Middle District of Florida. In *In re Arbitration between Prudential-Bache Securities, Inc. & Depew*, the court vacated an arbitration award of attorney fees awarded by an AAA panel. In *Depew*, claimants alleged their investment accounts had been mishandled in violation of various statutes, including section 517.211(6) of the Florida Statutes and Securities and Exchange Commission Rule 10b-5, and alleged various common law causes of action. In their statement of claim, the Depews requested attorneys fees for the 10b-5 allegations and for violation of chapter 517, but did not request attorney fees for the common law causes. Notwithstanding, the arbitrators awarded damages and attorney fees despite finding the broker had committed no statutory viola-

340. Id.
341. Robbins, 954 F.2d at 681.
343. Id.
346. Id.
The court, noting that under the American Rule, attorneys fees awards are improper unless provided by statute or contract, also recognized that even if an arbitration clause in a contract is ambiguous, but can be read to include an award of attorney fees, the court will not vacate an arbitration award of attorney fees made under the contract. The court determined that the Depew panel found no statutory violations and, therefore, it could not have awarded attorney fees pursuant to the statute. It also found that the contract did not provide for attorneys fees and held that even though the contract incorporated AAA rules, and that Rule 43 of the AAA arguably provides for the award of attorneys fees, the Rule failed to grant the arbitrators the power to award attorneys' fees. Presumably the court found that such a tortured construction of the contract failed to demonstrate a clear intent of the parties to empower the arbitrators to award attorneys fees.

The state courts have also reviewed arbitration decisions and awards during the period 1992-1993 and have focused on many of the same issues as the federal courts. For example, several cases have addressed the issue of the propriety of arbitrators awarding attorneys fees. In Pierce v. J.W. Charles-Bush Securities, Inc., the Fourth District Court of Appeal concluded that there was no reason not to allow parties to submit attorneys' fees claims to arbitration if they so desired since applicable statutes do not evidence a legislative intent to require that all attorneys fees be determined by a judge. In a well reasoned opinion, Judge Farmer explained that the court's decision in Pierce, allowing for an award of attorneys fees, was a retreat from the court's prior opinion in Loxahatchee River Environmental Control District v. Guy Villa & Sons, Inc. In Loxahatchee River, the court construed the plain language of section 682.02 of the Florida Statutes, and deemed that arbitrators could not award attorneys fees. In Pierce, Judge Farmer noted the change at both the federal and state level in the judicial view of arbitration since the time of the Loxahatchee decision.

347. Id.
348. Id.
349. Id.
350. Depew, 814 F. Supp. at 1083-84 (stating, "Rule 43 does not grant unlimited power to the arbitrators. The rule allows arbitrators to grant only those awards which are 'within the scope of the agreement between the parties'.").
352. Id. at 630-31.
354. FLA. STAT. § 682.02 (1975).
355. Loxahatchee River Env'l. Control Dist., 371 So. 2d at 1113.

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and determined that if ambiguous, statutes should be construed to favor arbitration. The court instructed, "[a]ny legislative mandate to force contracting parties to a courtroom for legal fees should thus be stated in language far more clearly requiring that result than the current text of FAC Section 682.18(1)." Based on this reasoning, the Pierce court concluded that appropriately read, the Florida Arbitration Code ("FAC") precludes the arbitrators from awarding attorney fees "but not when the parties have specifically agreed to submit the fee issue to arbitration." The court questioned whether, in light of the clear federal mandate favoring arbitration, any civil claim could not be subject to arbitration upon the agreement of the parties. It is significant to note that despite the fact that Pierce involved a typical securities related arbitration between a customer and a broker, neither party argued the applicability of the FAA. Because the record was silent, the court, although itself remarking upon the likely applicability of the FAA, considered the question solely under Florida law.

Florida courts, during 1992-93 entertained several issues concern-
ing vacatur and the standards to be applied. In *Lee v. Dean Witter Reynolds, Inc.*, the Second District Court of Appeal refused to conclude that an AAA arbitration panel’s denial of a continuance constituted arbitrator misconduct such that under section 10(c) of the FAA, its decision should be reversed by the court. The first question confronted by the *Lee* court was whether on issues of vacatur, the FAA preempted or superseded the FAC. The court quickly resolved this issue stating, “[a]s this court has previously determined, the Federal Arbitration Act supersedes the Florida Arbitration Code when interstate commerce is involved.” The *Lee* court then determined that the trial court exceeded its authority, in taking evidence which went beyond that presented to the arbitrators, in its inquiry into the reasons for a requested continuance. The court stated: “[t]he trial court was not authorized to delve beyond [the] . . . record and second guess the AAA on evidence which the AAA did not have the benefit of when it made its ruling.” Instead, the Second District Court of Appeal determined that the AAA’s refusal to grant a continuance was not, based on the limited information presented to it, an “abuse of discretion, i.e. ‘misconduct,’ on the part of the AAA.” Thus, the Second District made clear that the trial court’s proper role in reviewing arbitrations is not *de novo* review but rather a summary review of the record to determine whether or not there had been an abuse of discretion.

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1028. The court instructed that the trial court must consider each claim separately and account for time spent by the opposing party on the claim on which it prevailed as well. *Id.* at 1028-29.

362. *Id.* at 784-85.
363. *Id.* at 785.
364. *Id.; see also supra* notes 230-31 and accompanying text; Marschel v. Dean Witter Reynolds, Inc., 17 Fla. L. Weekly D2722; Daugherty v. Dean Witter Reynolds, Inc., (Fla. 2d Dist. Ct. App. Dec. 2, 1992); 18 Fla. L. Weekly D1385 (Fla. 2d Dist Ct. App. June 4, 1993). Thus, it appears that in the Second District Court of Appeal, at least, securities cases will be solely governed by the FAA. *See id.* The court’s summary determination of this issue perhaps ignores the instruction of the United States Supreme Court in Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1988), to the effect that the FAA is only intended to preempt state law when that state law offends the congressional purposes behind the FAA. *Id.* at 477.
365. *Lee*, 594 So. 2d at 785.
366. *Id.* The state court’s decision clearly reflects the limited scope of review available to trial courts on issues of vacatur. *See id.*
367. *Id.*
368. *Id.*
The scope of review of arbitration decisions by the circuit courts was also the subject of the Third District Court's opinion in *Okun v. Litwin Securities, Inc.* In *Okun*, the court enunciated perhaps the most stringent standard found in any of the decisions on the state or federal level construing the scope of review of arbitration awards. Recognizing that the FAC provided five grounds for vacating an arbitration award, the court pronounced: "[i]n the absence of one of those five grounds, the trial court does not have the authority to vacate the arbitration award." Thus, the Third District Court of Appeal appears to have eliminated judicially crafted grounds for vacatur entirely. While the authors are unaware of any other court applying quite such a stringent standard, and it is important to note that the *Okun* court was not faced with a judicially created basis for vacatur, the concept of narrow review of arbitration awards prevails both on the federal and state level.

370. Id.
371. Section 682.13(1) of the Florida Statutes provides in pertinent part:
   (1) Upon application of a party, the court shall vacate an award when: (a) The award was procured by corruption, fraud or other undue means. (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party. (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers. (d) The arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s.682.06, as to prejudice substantially the rights of a party. (e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s.682.03 and unless the party participated in the arbitration hearing without raising the objection.

FLA. STAT. ANN. § 682.13(1) (1991). The grounds for vacatur under section 682.13 Florida Statutes are similar to those under 9 U.S.C. § 10 of the FAA. The most notable difference is subsection (e) of section 682.13(1) allowing the court on motion to vacate to again determine the validity of the making of an agreement to arbitrate.

372. *Okun*, 619 So. 2d at 995.
373. *Id.* But compare the trial court's determination in Raymond James & Assoc., Inc. v. Deutsch, Case No. 92-08793 (Fla. 17th Cir. Ct. April 28, 1993), in which the court conducted a full evidentiary hearing (and allowed depositions) in vacating an arbitral decision on grounds of arbitral bias or "evident partiality." It is logical that a more in depth court inquiry is appropriate where the issue is bias.

374. See, e.g., *Applewhite v. Sheen Fin. Resources, Inc.*, 608 So. 2d 80 (Fla. 4th Dist. Ct. App. 1992). In *Applewhite*, the circuit court upheld an injunction granted by an arbitration panel enforcing a non-competition agreement and employment contract between a broker and its registered representatives. *Id.* While the trial court did modify the
Finally, state courts have been asked during 1992-1993 to consider and determine the timing of review of an order vacating arbitration. In *Raymond James & Associates, Inc. v. Deutsch*, 375 the Fourth District dismissed the appeal of a lower court's vacatur of an arbitration award, on grounds of evident partiality or bias of the arbitrator, holding that the vacatur order was non-final and therefore not appealable on an interlocutory basis. 376 The Fifth District Court of Appeal, in a non-securities case, also considered the issue of whether a trial court order vacating an arbitration award and ordering a re-hearing is a final appealable order. 377 In *Central Florida Police Benevolent Ass'n v. City of Orlando*, 378 the court, following the Fourth District Court of Appeal, ruled that it was not a final appealable order. 379

An emerging area of judicial concern in Florida involves what has come to be known as the "economic loss rule." The economic loss rule had its genesis in Florida in a case certified to the Supreme Court by the Eleventh Circuit entitled *AFM Corp. v. Southern Bell Telephone & Telegraph Co.* 380 and the Supreme Court's previous decision in *Florida Power & Light Co. v. Westinghouse Electric Corp.* 381 In those cases, the Florida Supreme Court enunciated the rule that parties could not recover in tort for damages arising solely out of a contractual relationship between the

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376. Id.; accord *City of Fort Lauderdale v. Fraternal Order of Police, Lodge No. 31*, 582 So. 2d 162 (Fla. 4th Dist. Ct. App. 1991).
378. Id.
379. Id. at 1204.
380. 515 So. 2d 180 (Fla. 1987).
381. 510 So. 2d 899 (Fla. 1987).
Thus, the rule has developed that where a plaintiff fails to allege and prove the existence of a tort independent of the contractual breach, it cannot recover economic damages under a tort theory. The economic loss rule was soon applied in the securities context. The courts, recognizing that the essential relationship between customer and broker is contractual, have continued to limit non-contractual grounds for suits between broker/dealers and their customers.

During 1992-1993 at least two federal courts have considered the application of the economic loss rule in the context of securities claims and curiously, at least one state court which might have, has not been required to do so. In *City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco MIM, Inc.*, the trial court was requested to consider the application on a motion to dismiss of plaintiff's claim of tort damages resulting from defendants alleged wanton, willful and reckless conduct in speculative investments in plaintiff's account. The Southern District court, reviewing the case law concerning the economic loss rule, construed the law, stating:

no independent tort can exist solely for contractually based economic damages, absent personal injury or damage to property other than that which was subject to the contract. . . . If a claimant, however, does not have a contractual remedy because no contract exists, then this lack of alternate means of recovery provides claimant with an exception to the economic loss rule.

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382. See AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987).
383. See e.g., Interstate Sec. Corp. v. Hayes Corp., 920 F.2d 769, 774 (11th Cir. 1991).
384. See e.g., id. (refusing to allow claims of breach of fiduciary duty and negligence in light of the contractual relationship between the parties); see also Zitrin v. Raymond James & Assoc., Inc., Case No.: CL-91-13284-AF (Fla. 15th Cir. Ct. Nov. 9, 1992) (unpublished order striking civil theft, breach of fiduciary duty and negligence claims); Tietig v. E.F. Hutton & Co., Case No.: 89-1572-CIV-MARCUS (S.D. Fla. Oct. 15, 1991) (barring negligence, fraud and breach of fiduciary duty claims); Dziabis v. Gandolfo, Case No.: 90-402-CIV-T-10 (C) (M.D. Fla. Nov. 27, 1991) (holding that allegations in complaint that defendant was a paid professional investment advisor created a contractual relationship as a matter of law and then applying the economic loss rule to bar claims of common law fraud, negligence, and breach of fiduciary duty).
386. Id. at 393.
387. Id. at 393-94 (citation omitted). But see Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1248 (Fla. 1993) (overturning Latite Roofing Co. v. Urbanek, 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988) wherein the exception to the economic loss rule relied upon by the Southern District of Florida in *Invesco* was enunciated). In *Casa Clara*, the Florida Supreme Court denied a tort remedy to a homeowner against a
Relying on the economic loss rule the Southern District court dismissed the trust’s tort allegations stating that the plaintiffs could seek recovery through a claim for breach of contract.  

In *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, the Eleventh Circuit had occasion to consider the scope of the Florida economic loss rule. In *BankAtlantic*, the bank sued Paine Webber who had served as its investment advisor and had also served as a broker for BankAtlantic in certain securities transactions. BankAtlantic sued Paine Webber over the securities transactions alleging breach of fiduciary duty, negligence and fraud. A jury returned a verdict in favor of the broker and an appeal was taken. The broker claimed that the bank’s appeal was moot since the underlying claims were barred by Florida’s economic loss rule. The Eleventh Circuit disagreed, in *dicta* noting that the broker had argued until its brief on appeal that the brokerage transactions were outside of the contract for investment advisory services. Accordingly, the Eleventh Circuit decided the claims were not barred by the economic loss rule.

The final case regarding economic loss is interesting primarily for the fact that the defense was apparently not raised. In *Csordas v. Smith Barney, Harris Upham & Co., Inc.*, the customer sued a brokerage firm and its account executive trainee for losses suffered on a bond purchase recom-

supplier of concrete used by the developer to build the homeowner’s residence. *Id.* at 1246-67. The court did so even though by limiting the action to contract, the homeowner arguably was denied relief since he was not in privity with the supplier and even though, as the dissent correctly points out, in supplying defective concrete the supplier could reasonably have foreseen that the homebuyer would have been the party likely to have been injured. *Id.* at 1249 (Shaw, J., concurring and dissenting).

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390. *Id.* at 1469-70.
391. *Id.*
392. *Id.* at 1470.
393. *Id.* at 1476.
394. *BankAtlantic*, 955 F.2d at 1476.
395. *Id.* It is interesting to note that the court apparently did not consider whether the brokerage relationship between Paine Webber and BankAtlantic, which resulted in the disputed securities transactions, was itself contractual in nature albeit under a separate contract from the investment advisory contract. *See id.* Arguably, the brokerage contract would have served to deny BankAtlantic its tort claims against Paine Webber. It is unclear from the opinion whether or not Paine Webber raised this argument.
mended to the customer by the trainee. The customer sued the broker/dealer and the trainee alleging violation of chapter 517, breach of contract, breach of fiduciary duty, negligence and common law fraud. The trial court sitting without a jury, found for the plaintiff on breach of fiduciary duty and negligence and for the defendants on the other counts. The opinion contains no reference whatsoever to the economic loss doctrine and one can only conjecture whether it was raised in preliminary matters or at the trial by either the defendants or the court. It is possible that in finding for the defendants on breach of contract, the court determined that there was no contract between the parties which would preclude the tort claims. However, such a ruling would ignore written documents and the essential nature of the relationship between broker and customer recognized by so many of the Florida courts. The case does contain a good explanation of the nature and scope of the fiduciary duty owed by broker to customer as that law has developed in Florida and elsewhere. This case demonstrates the continuing, if improper, viability of actions based on such duties. Notwithstanding the Csordas decision, the practitioner should not underestimate the effect of the economic loss rule on securities litigation in Florida.

397. Id.
398. Id.
399. Id.
400. See Central Florida Police Benevolent Ass’n, Inc. v. City of Orlando, 614 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1993); see also Okun v. Litwin Sec. Inc., 619 So. 2d 995 (Fla. 3d Dist. Ct. App. 1993).
402. Id. The case indicates that the trainee had not studied the bonds he recommended and only knew what his computer displayed. He did not obtain a pricing history, which was available in the computer. Apparently, he did not consult Moody’s Bonds Ratings, which indicated that the bonds had speculative elements. The court also faulted the trainee for not consulting Standard and Poor’s Corporation Records available in his office, which would have indicated that the corporation, whose bonds were recommended by him, had substantial holdings in real-estate and savings and loan institutions which the court found were in financial trouble at the time. Id. at 95,000. The opinion is silent on whether the trainee found the bonds on the employer’s recommended list or whether simply recommending a security found on such a list would have satisfied his duty to the customer. It is interesting to note that the broker, itself was only found vicariously liable for the negligence and breach of fiduciary duty of its trainee. From this, one can infer that the security was not on its recommended list and that the court did not have before it or consider the issue of negligent supervision. Id. at 94,999-95,000.
403. Inter alia, by limiting securities controversies to actions in contract, litigation will be streamlined. Presumably, such a limitation will also eliminate or virtually eliminate awards of punitive damages in securities cases. It is even questionable whether parties could
The third major focus of Florida courts in securities cases decided in 1992-1993 may generally be classified as non-arbitration cases. They cover numerous subjects under the state and federal securities laws. In 1992, the Eleventh Circuit joined the growing number of courts which have upheld the constitutionality of Section 27A of the Securities Exchange Act of 1934,\(^4\) in its decision in *Henderson v. Scientific-Atlanta, Inc.*\(^5\) In *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*,\(^6\) the Supreme Court rejected the practice of borrowing state statutes of limitation for private causes of action under Section 10(b) of the 1934 Act.\(^7\) Instead the Court held that the one year/three year statute of limitations applicable to express private rights of action under other sections of the 1934 Act governed 10(b) actions and that the *Lampf* rule should be retroactively applied in that case.\(^8\) In *James B. Beam Distilling Co. v. Georgia*,\(^9\) announced the same day as *Lampf*, the Supreme Court held that when the Court applies a new rule to litigants in a particular case, that rule must be retroactively applied to all other similarly situated litigants.\(^10\) In 1992, in *Lufkin v. McCallum*,\(^11\) the Eleventh Circuit ruled that *Beam* required retroactive application of the new statute of limitations rule announced in *Lampf*.\(^12\) Thereafter, Congress amended the 1934 Act by specifically providing in Section 27A that private civil actions implied under Section 10(b) begun before June 19, 1991 were to be governed by the limitations period provided by the laws applicable to the jurisdiction as such laws existed on June 19, 1991.\(^13\) Section 27A also provided that cases dismissed as time-barred subsequent to June 19, 1991, which would have been timely filed under the limitation provision provided by laws applicable in the jurisdiction as such laws

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\(^5\) 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993).
\(^7\) *Id.* at 2781-82.
\(^8\) *Id.*
\(^10\) *Id.* at 2441.
\(^11\) 956 F.2d 1104 (11th Cir. 1992) (superseded by statute as recognized in, Henderson v. Scientific-Atlanta, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993)).
\(^12\) *Id.* at 1108.
existed on that date, must be reinstated on motion. Thus Section 27A amounted to a Congressional reversal of the retroactivity rulings of the Supreme Court in Lampf and Beam, at least as to 10(b) actions.

In Henderson v. Scientific-Atlanta,\textsuperscript{415} the Eleventh Circuit considered a case in which the plaintiff had filed a class action securities claim against the defendant in September, 1988 alleging violations of Section 10(b) of the 1934 Act. After the action was filed, the Supreme Court issued its decision in Lampf and Scientific-Atlanta moved for summary judgment on time-bar grounds.\textsuperscript{417} The district court granted summary judgment in favor of defendant on the federal securities laws claims and dismissed the pendent state law claims without prejudice.\textsuperscript{418} The plaintiffs then appealed to the Eleventh Circuit.\textsuperscript{419} While the appeal was pending, Congress enacted Section 27A.\textsuperscript{420} Scientific-Atlanta argued that Section 27A violated the separation of powers doctrine because Congress sought to render Lampf a nullity.\textsuperscript{421} Appellee also contended that Section 27A was unconstitutional because it operated to deny it due process since Congress intended in enacting Section 27A to direct the outcome of pending litigation.\textsuperscript{422} The court rejected both constitutional challenges, finding first that Congress has the right under our federal system to amend a statute as it sees fit if it disagrees with a court’s interpretation of that statute,\textsuperscript{423} and second that the fact that the statute had an effect upon pending litigation does not constitute a due process violation.\textsuperscript{424} Appellees made two other attacks upon the constitutionality of the statute, the first, also on due process grounds, alleging that the statute made no attempt to define what would be an appropriate limitations period.\textsuperscript{425} The court summarily disagreed, stating that under the statute, the limitations period is clear.\textsuperscript{426} The court, in similar summary fashion, disposed of an argument claiming the statute

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{414} Id. § 78aa-1 (not later than 60 days after the date of enactment of § 78aa-1 [enacted Dec. 19, 1991]).
\item\textsuperscript{415} 971 F.2d 1567 (11th Cir. 1992), cert denied, 114 S. Ct. 95 (1993).
\item\textsuperscript{416} Id. at 1568.
\item\textsuperscript{417} Id. at 1569.
\item\textsuperscript{418} Id.
\item\textsuperscript{419} Id.
\item\textsuperscript{420} Henderson, 971 F.2d at 1570.
\item\textsuperscript{421} Id.
\item\textsuperscript{422} Id.
\item\textsuperscript{423} Id. at 1573.
\item\textsuperscript{424} Id. at 1574.
\item\textsuperscript{425} Henderson, 971 F.2d at 1574.
\item\textsuperscript{426} Id.
\end{enumerate}
\end{footnotesize}
violated appellee's right to equal protection noting that the statute must be upheld as long as it is rationally related to a legitimate governmental interest. The court found protecting litigants from an unexpected change in the law to be a legitimate governmental interest and that Section 27A is rationally related to that end. The court also found that the equal protection clause was not offended by the fact that plaintiffs in different areas would, under Section 27A, have different statutes of limitation. The court concluded that there is nothing irrational about borrowing statutes of limitation in cases where Congress has failed to provide one. The court also found it rational for Congress to conclude that litigants not already in court on June 19, 1991 were not in need of the protection offered by the statute. Thus, the Eleventh Circuit became the first court of appeal to address the constitutionality of Section 27A.

*Henderson v. Scientific-Atlanta* arose in the context of a securities class-action suit. During the period 1992-1993, the Eleventh Circuit had occasion to consider one other securities class-action suit of note and one district court has written two cogent opinions in the area. In *In re U.S. Oil & Gas Litigation v. Wolfson*, the court upheld a determination by Judge William H. Hoeveler of the United States District Court for the Southern District of Florida enforcing a bar order against a settling defendant on a cross-claim. In *In re U.S. Oil & Gas Litigation*, the lower court was faced with an incredibly complex case. One defendant settled, carefully preserving its rights to cross-claim against another of the defendants. Notwithstanding, when the second defendant settled it asked the court to bar the cross-claim. The district court granted the settlement bar and the first defendant appealed but did not withdraw its settlement offer despite being offered the opportunity to do so by the court. The Eleventh Circuit affirmed the lower court's right to enforce the settlement bar holding that a court is so empowered where it makes a reasonable determination that

427. *Id.*
428. *Id.*
429. *Id.*
430. *Henderson*, 971 F.2d at 1574.
431. 967 F.2d 489 (11th Cir. 1992).
432. *Id.* at 491.
433. *Id.* The case included 96 defendants, requiring 50 hearings between the period 1984-1990 and 260 depositions. *Id.* at 491. On the eve of trial, plaintiffs stipulated that more than 700 issues of fact remained unresolved in the matter. *Id.*
435. *Id.*
436. *Id.* at 492.
to do so is fair and equitable. The Eleventh Circuit, noting that the appellants' cross-claims were not independent claims but rather claims for indemnity, found that the lower court could appropriately bar the same as part of its settlement approval duties in class-action cases.

The decision in *In re U.S. Oil & Gas Litigation* assumes, but does not discuss, the obligation courts have under the federal rules of civil procedure to approve proposed class action settlements. In *Ressler v. Jacobson*, the Middle District of Florida was requested to consider the propriety of a proposed settlement in a securities class-action. Concluding that the settlement was fair, reasonable and adequate, the court explicated the elements a court must consider in making such a determination, setting forth a six-factor test. The court then applied those factors to the proposed settlement at bar and approved it. The practitioner considering a securities class action matter is recommended to the court’s well written opinion. In a second reported opinion in *Ressler v. Jacobson*, the same court was asked to award attorneys fees. Again, the court set forth the factors involved in granting such an award.

Applying the standard to the facts, the court, in another opinion recommended to the practitioner, approved the award of attorneys fees.

437. *Id.*

438. *Id.; see Fed. R. Civ. P. 23(3) (requiring that courts approve class action settlements).* Curiously, the court noted that indemnification claims are not cognizable under the 1933 and 1934 Acts and concluded that they would have been unlikely to survive a cursory adjudication on the merits in any event. *U.S. Oil & Gas Litigation*, 967 F.2d at 495. The Supreme Court, however, in *Musick, Peeler & Garrett v. Employee’s Ins. of Wausau*, 113 S. Ct. 2085 (1993), held that parties have a right to seek contribution as a matter of federal law and courts have a right to imply such a private right of action under Section 10(b) of the 1934 Act. *Id.* Accordingly, the Eleventh Circuit’s assertion in *In re U.S. Oil & Gas* may not be a fair statement of the law.


440. The court’s six factors were:

- (1) The existence of fraud or collusion behind the settlement;
- (2) the complexity, expense and likely duration of the litigation;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the probability of plaintiff’s success on the merits;
- (5) the range of possible recovery; and
- (6) the opinions of class counsel and absent class members.

441. *Id.* at 1553.


443. *Id.* These factors included, *inter alia*, benefits conferred upon the class as a result of counsel’s work, the complex nature of the litigation, the risks faced, the quality of the work performed, and the promptness and efficiency in which the litigation was resolved.

444. *Id.*
In *Budget Rent A Car Systems, Inc. v. Hirsch*, the Southern District of Florida confronted the issue of whether section 12(2) of the 1933 Act applies to secondary market transactions. *Section 12(2) provides an express remedy for material omissions or misrepresentations made in connection with the offer or sale of a security.* As noted by the district court, the majority of courts considering the issue have held that "[s]ection 12(2) applies only to initial offerings [of securities and] not to secondary market transactions." The court recognized that the majority of courts based their decision on three factors. First, the legislative history supports the conclusion that the 1933 Act was enacted in order to regulate initial offerings of securities and the 1934 Act was enacted in order to regulate secondary transactions. Second, the section makes reference to statements made in a prospectus, and prospectuses normally accompany only initial offerings not secondary market transactions. Finally, the United States Supreme Court's holding in *United States v. Naftalin*, making section 17(a) of the 1933 Act applicable to secondary transactions, distinguishes that section from "much of the rest of the [1933] Act," in that regard.

The *Budget Rent A Car Systems* court also noted that one federal court had carved an exception to the majority rule and extended coverage of

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446. *Id.* at 1255.
447. 15 U.S.C.S. § 77i(2) (1991). In relevant part, section 12(2) of the 1933 Act provides:

> any person who . . . (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such truth or omission shall be liable to the person purchasing such security from him ....

*Id.*
449. *Id.*
450. *Id.*
451. *Id.*
452. 441 U.S. 768 (1979).
453. *Id.* at 777-78.
section 12(2) to a sale of stock that, while not an actual initial offering, is similar to an initial offering because it is the sale of a large block of stock by a corporate insider. Therefore, an exception was made where "a corporate insider sells his own stock in such a manner that it takes on the characteristics of a new offering." The district court explicated the requirements of the exception: that is, all the outstanding stock of the corporation, is distributed through a controlling distributor, and the stock must be offered to the public. Without deciding the validity of the exception, however, the district court held that the criteria were not present in the case sub judice. Accordingly, the court adopted the majority rule finding that section 12(2) did not apply to secondary offerings and refused to find an exception to that rule for the transaction at issue.

One year later, the issue of the applicability of section 12(2) was presented to the Eleventh Circuit in the case of First Union Discount Brokerage Services, Inc. v. Milos. In First Union Discount Brokerage Services, a customer of a discount broker/dealer had maintained large positions at the broker on margin. With the stock market crash of October 1987, the customer lost not only the equity in his account but also owed the broker substantial funds for the margined positions. The broker sued the customer for the margin debits. The customer filed counterclaims on various state law grounds. Additionally, the customer alleged that the broker violated section 12(2) by making materially false representations in connection with the sale of securities. These alleged false representations consisted of oral representations that the broker would forebear enforcement of margin calls on the customer's account. The trial

455. Id. at 1257.
456. Id. (citing Hedden v. Marinelli, 796 F. Supp. 432 (N.D. Cal 1992)).
457. Id.
458. Id. at 1258.
460. 997 F.2d 835 (11th Cir. 1993).
461. A discount broker, unlike its full service counterparts, does not provide research and investment advice. It handles all transactions on a non-discretionary basis. That is, it acts primarily as an order taker and not as a provider of securities trading advice. See, e.g., id.
462. Id. at 837.
463. A margin account is one in which the broker extends credit to the customer which credit extension is normally secured by the securities portfolio of the customer and cash deposits in to his account. See, e.g., id.
464. Id. at 840.
465. Margin calls are demands for the deposit of additional securities or cash to collateralize the credit extensions made by the brokerage firm and normally occur when the
court determined that the customer was liable for the debt and granted summary judgment to the broker on its complaint for account stated. The Eleventh Circuit affirmed the holding, recognizing that the broker had established the account stated and that the customer had failed to object to the statements presented to him in the manner provided on the statements. The court then considered the section 12(2) issue, that is whether section 12(2) applies to aftermarket or secondary market transactions. Relying on the opinion of the Third Circuit Court of Appeals in Ballay v. Legg Mason Wood Walker, Inc., the court held that Section 12(2) does not apply to aftermarket transactions. The Third Circuit first noted in Ballay that the section’s language itself limited the section’s scope to initial distributions. Second, the court observed that section 12(2) is structurally positioned after sections 11 and 12(1) of the 1933 Act, which govern the registration of securities and liability for the sale of unregistered securities, and before section 13, which establishes limitation periods for sections 11 and 12. Noting that this position “sandwiched” section 12(2) between sections that dealt exclusively with initial distributions, the court reasoned that section 12(2) also must be so limited. Finally, the court rejected the suggestion that since section 17(a) of the 1933 Act applies to secondary market transactions, section 12(2) must, by analogy, as well. Noting the materially distinct language between sections 12(2) and 17(a), the former being restrictive while the latter is expansive, the court concluded that the broad reading appropriate for section 17(a) was not applicable to section 12(2).

the language and legislative history of section 12(2), as well as its relationships to sections 17(a) and 10(b) within the scheme of the 1933

value of the securities or cash in the account diminishes. See First Union Discount Brokerage Serv., 997 F.2d at 837-38.

466. Id. at 840.
467. Id.
468. Id. at 841.
469. Id. at 842-43.
471. First Union Discount Brokerage Serv., 997 F.2d at 843 (citing Ballay, 925 F.2d at 682).
472. Ballay, 925 F.2d at 688.
473. Id. at 691.
474. Id. at 691-92.
475. Id. at 693.
and 1934 Acts, compel our conclusion that section 12(2) applies only to initial offerings and not to aftermarket trading.\textsuperscript{476}

The Eleventh Circuit also refused to extend the reach of section 12(2) to secondary transactions.\textsuperscript{477}

The \textit{First Union Discount Brokerage Services} case is notable not only for its determination of the applicability of section 12(2), but also for the court’s interesting discussion on the element of causation in securities fraud allegations. First the court noted that in connection with a securities fraud claim under state law, a customer had to prove that its injuries were proximately caused by any alleged false representation or omission.\textsuperscript{478} The court went on to note that the Milos’ injury did not result from their reliance on the broker’s representations, but rather on the market crash.\textsuperscript{479} Thus, the court clearly reinforced the focus on an element of a securities fraud claim not infrequently overlooked by arbitrators and courts, to wit: the necessity of a direct causal relationship between the allegedly unlawful conduct and the injury to the claimants.

The duties of a broker/dealer to its clients were also considered during 1992-1993 on the state court level by the First District Court of Appeal in \textit{Palmer v. Shearson Lehman Hutton, Inc.}\textsuperscript{480} In \textit{Palmer}, the plaintiffs claimed that they were injured by the actions of a registered representative who had formerly worked for the defendant, Shearson, not while he was employed by Shearson, but several years after the representative left Shearson and had gained employment elsewhere.\textsuperscript{481} Since Shearson had not appropriately indicated on the representative’s termination documents the real reasons for his termination, the plaintiffs claimed the broker was liable to them for the injuries subsequently caused by their former employee.\textsuperscript{482} Noting that while the complaint was legally insufficient to show that the broker owed a common law duty to appellants, the district court found that

\begin{itemize}
\item \textsuperscript{476} \textit{Id.}
\item \textsuperscript{477} \textit{See First Union Discount Brokerage Serv., 997 F.2d at 844 (11th Cir. 1993).}
\item \textsuperscript{478} \textit{Id. at 843-44.}
\item \textsuperscript{479} \textit{Id. at 844-45.}
\item \textsuperscript{480} \textit{622 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1993).}
\item \textsuperscript{481} \textit{Id.}
\item \textsuperscript{482} \textit{Id. at 1086-88.} Plaintiffs alleged that had Shearson disclosed his prior bad conduct, plaintiffs never would have done business with him since he would not have been allowed to re-register with the Department. \textit{Id.} Whether this actually amounts to proximate causation is at least questionable since it assumes an intervening act by the Department. The opinion is silent about any allegation that the plaintiffs had obtained the representative’s employment history before doing business with him.
\end{itemize}
a broker can be held accountable in negligence for damages to a customer for breach of its statutory duty to report accurately the terms of an employee’s termination.\(^{483}\) The court stated that by falsely reporting in his termination documents that the broker had “no reason to believe that . . . [the registered representative] had violated any state or federal law or regulation or . . . had engaged in any conduct inconsistent with just and equitable principles of trade\(^{484}\) when in fact the broker had knowledge to the contrary, the broker was in violation of section 517.12 of the Florida Statutes requiring that accurate termination reports be filed with the Department of Banking.\(^{485}\) Further, the court determined that the statute “creates a duty of care upon one whose behavior is the subject of the statute to a person who is in the class designed to be protected” by same.\(^{486}\) Thus a finding of liability for negligence will be supported “when the injury suffered by a person in the protected class is that which the statute was designed to prevent.”\(^{487}\) The court continued its analysis stating that:

\[\text{Although the violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury or type of injury constitutes negligence per se, the fact of negligence per se resulting from a statutory violation does not necessarily mean that there is actionable negligence. It must also be shown that the plaintiff falls within the class of persons the statute was intended to protect, that the plaintiff suffered an injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of this injury.}\]\(^{488}\)

The court then concluded that the facts presented to it, if true, were legally sufficient to satisfy these elements.\(^{489}\) The court distinguished the pronouncements of the Florida Supreme Court in \textit{E. F. Hutton \\& Co. v. Rousseff},\(^{490}\) requiring privity to recover damages for violations of chapter

\(^{483}\) \textit{Id.} at 1087.
\(^{484}\) \textit{Palmer}, 622 So. 2d at 1088.
\(^{485}\) \textit{Id.}
\(^{486}\) \textit{Id.} at 1090 (citing \textit{deJesus v. Seaboard Coast Line Ry.}, 281 So. 2d 198 (Fla. 1973)).
\(^{487}\) \textit{Id.}
\(^{488}\) \textit{Palmer}, 622 So. 2d at 1090 (emphasis added) (footnotes omitted).
\(^{489}\) \textit{Id.} The case was before the First District on an appeal of a summary judgment. \textit{Id.} at 1086. It is important to note that this required the court to view the record before it in the context of determining whether the appellee was entitled to judgment as a matter of law. That is, as the court carefully noted in its conclusion, it was required to presume facts which may not be later proven. \textit{Id.} at 1093; see also FLA. CIV. P. 1.540.
\(^{490}\) 537 So. 2d 978 (Fla. 1989).
Noting that in *Rousseff*, a case involving securities transactions between buyers and sellers, the plaintiffs relied on section 517.301(1) relating to wrongs committed "in connection with the offer, sale or purchase of any security," the court distinguished the claims in the matter before it, finding that they were governed by subsection 517.301(3). That subsection makes it unlawful and a violation of chapter 517 for any person in any matter within the jurisdiction of the Department to knowingly make false and misleading statements or omissions. The *Palmer* court concluded that this section does not require privity like the section in issue in *Rousseff*.

The duty of brokers to subsequent customers of a former employee to report accurately the circumstances surrounding the termination of that employee, will undoubtedly be a fertile area for securities litigation in the future. Given the already thorny issue of defamation claims against brokers for reports of termination and the unsettled law in that area, these subjects will clearly occupy the securities bar in Florida in the future.

Another area in which the Florida courts in 1992-1993 have addressed duties of persons involved in securities transactions is in the area of the duties of corporate insiders. In *Tapken v. Brown*, the court found that allegations in a complaint concerning misrepresentations in a company’s reports and SEC filings were sufficient to state a fraud claim against individual directors even if their specific roles in the alleged fraud were not detailed in the complaint. The court also found that allegations that outside directors, because of their positions with the company, had knowledge of and assisted in the dissemination of false information stated an aider and abettor claim against the outside directors. The court also held that the accounting firm that audited the company’s allegedly false and misleading financial statements could be liable for aiding and abetting in the company’s claimed violation of section 10(b). The *Tapken* case is noted principally for its discussion of the pleading requirements for primary and secondary liability under section 10(b) of the 1934 Act, liability under

491. *Id.* at 979.
492. *Id.*
494. *Id.*
495. *See supra* notes 13-19 and accompanying text.
497. *Id.* at 93,169.
498. *Id.*
499. *Id.* at 93,170.
section 20 of the 1934 Act, liability for common law fraud, especially as compared to the federal fraud action and liability for negligent misrepresentation. It also discusses the elements necessary for class certification in a securities fraud class action.500

In Securities & Exchange Commission v. Tuchinsky,501 the court construed the elements of liability under section 5 of the 1933 Act and the exemptions thereto. The court first explained that to make a prima facie case for violation of section 5 of the 1933 Act, which makes unlawful the offer or sale of unregistered securities, the plaintiff must prove three elements:

First, it must show that no registration statement was in effect as to the securities. Second, it must establish that [the parties sought to be charged] sold or offered to sell . . . securities. Third, it must prove that . . . [the person sought to be charged] used interstate transportation or communication or the mails in connection with the sale, offer to sell, or delivery [of the securities].502

The court then noted that section 5 imposes strict liability in the civil context on offerors or sellers of unregistered securities. As the court noted, once the plaintiff has established a prima facie case of the sale of unregistered securities, the burden falls on the party to be charged to demonstrate that either the securities or transactions involved were exempt from the registration requirements.503 In Tuchinsky, the court noted that the SEC had demonstrated these elements.504 Despite recognizing that the defendant had failed to raise any exemption as a defense, the court refused to grant summary judgment sua sponte, noting that an issue of fact existed as to whether or not the defendant fell within the scope of certain of the exemptions provided by the 1934 Act.505

The Tuchinsky ruling is troubling since the court went beyond the record on a motion for summary judgment to consider defenses thereto not raised by the parties. The authors question the propriety of such a course of conduct. As the court itself noted, the burden of claiming and proving the exemption once the SEC had established its prima facie case falls on the

500. See id.
502. Id. at 93,803.
503. Id.
504. Id.
505. Id. at 93,804-05.
Having found that the defendant failed to do so in this case, it appears that the court abused its discretion in refusing to uphold the grant of summary judgment.

In *Marcus v. Shapiro, Abramson & Schwimmer, P.A.*, the Fourth District Court of Appeal was confronted with an allegation of violation of section 517.301 of the Florida Statutes by the failure to disclose material facts. The case involved an allegation that a passive investor was defrauded in connection with his investment in the stock of a proposed savings and loan association. The venture was unsuccessful. The investor sued the promoters of the venture alleging violation of the anti-fraud provisions of chapter 517. The trial court granted summary judgment in favor of the promoters on the basis that the investor was committed to the purchase of the stock prior to any alleged misconduct; therefore, the misconduct was not "in connection with" his purchase transaction. The Fourth District Court, for the purposes of summary judgment, disagreed with this pronouncement and reversed. The issue upon which the matter turned was the timing of the purchase by the investor. The trial court, in fixing the date of the sale, relied on what is known as the "commitment test." Under this test, the date of the sale is fixed at the date that the investor enters into a binding commitment to undertake a securities transaction. The trial court, noting that the investor had signed a stock purchase agreement, fixed the sale date as the date of signing. The investor argued instead that the agreement was not a binding commitment because it was revocable within six months. The promoters argued that even assuming *arguendo* that the stock purchase became revocable, the purchase date was fixed by the time the investor made his down payment and submitted his application for a loan for the balance due. The Fourth District, noting that the appellees might well be correct, concluded

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507. 620 So. 2d 1284 (Fla. 4th Dist. Ct. App. 1993).
509. *Marcus*, 620 So. 2d at 1285.
510. *Id*.
511. *Id.* at 1286.
512. *Id.* at 1288.
513. *Id.* at 1286. (the “commitment test” was set out in *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2d Cir. 1972)).
514. *Marcus*, 620 So. 2d at 1286.
515. *Id*.
516. *Id*.
517. *Id*.
that the date when the sale occurred was, in any event, a disputed issue of material fact which precluded summary judgment. Thus, while the Fourth District discussed the issue of the date upon which a purchase of securities is deemed to have occurred, it refused to supply a definitive answer to the question in light of the procedural context in which this matter was before the court. The court specifically noted that its opinion was "in no way intended as a definitive exposition of the law in this area. It is but a reversal of summary judgment with perceived reasons why such was inappropriate."

One cannot adequately review or understand securities regulation in Florida without reference to the activities of the federal and state agencies charged with the responsibility of regulating the entire scope of securities transactions, that is, the United States Securities and Exchange Commission and the Florida Department of Banking and Finance, Division of Securities and Investor Protection. Unfortunately, the activities of these agencies often go under-reported or unreported entirely. Certain cases reflecting the action of the administrative agencies during the period 1992-1993 have been reported and may be notable more for an analysis of the areas of activity of

518. Id. at 1287.
519. See Marcus, 620 So. 2d at 1285-88.
520. Id. at 1288.
521. A full cognizance of the regulation of securities in Florida also is impossible without reviewing the activities of the self-regulatory organizations, most notably the National Association of Securities Dealers, Inc. and the New York Stock Exchange, Inc. They regularly inquire into the conduct of stockbrokers and other regulated persons in Florida and throughout the country, make rules of conduct for regulated persons, and in fact, provide two of the primary arbitration fora for resolution of brokerage disputes. In fact, the United States Supreme Court in its decision in Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987) specifically recognized the integrity and abilities of these organizations as one of the grounds for reversing its long standing policy against the arbitration of securities disputes and indeed as a basis for mandating a change in the long standing judicial antipathy for alternative dispute resolution. Id. at 225-26. The third major arbitration forum, the American Arbitration Association, is, as noted above, specifically set forth as an arbitral forum in the constitution of the American Stock Exchange, Inc., the so-called AMEX Window (Article VIII of the American Stock Exchange Constitution Section 2(c)). Its attractiveness as a "non-industry" forum should not be underestimated. See id. at 226-27. Unfortunately, arbitration decisions too, are unreported and frequently contain no opinions or rationale upon which an interested practitioner can rely. Also it is important to recognize that arbitration decisions have no stare decisis effect. Whether such opinions have res judicata effect is an interesting and open question. Compare, Marilyn Blumberg Cane & Patricia A. Shub, SECURITIES ARBITRATION LAW AND PROCEDURE, 340-51 (1991) with Phillip J. Hoblin, Jr., SECURITIES ARBITRATION: PROCEDURES, STRATEGIES, CASES, §§ 13-2 to 13-5 (1988).
these agencies than necessarily for the opinions or rationale of the courts. For example, in *Securities & Exchange Commission v. Elliott*,\(^{522}\) the court considered various objections to a proposed plan of distribution of assets made by an SEC recommended and court appointed receiver. This matter arose out of an SEC investigation of a massive Ponzi-type scheme in which investors were paid paper profits from funds invested by subsequent investors.\(^{523}\) As the court points out, this massive scheme left the receiver and the court the mammoth task of sorting out the equities.\(^{524}\) The opinion is important for the court’s discussion of the receiver’s role, the legal and equitable basis for a receiver’s powers and the limits on same. Thus, it emphasizes the SEC’s essential role in uncovering and halting such illegal enterprises and its predilection for appointing a receiver to unwind the result of the fraud.

The SEC was involved in several other cases of note during the period which bear mention. These cases demonstrate areas of concern of the SEC in Florida as well as the remedies sought and obtained by it. In *Securities & Exchange Commission v. Walloga*,\(^{525}\) the court permanently enjoined Walloga, a principal of a broker/dealer, from violating the anti-fraud provisions of the 1933 Act and the anti-fraud and recordkeeping provisions of the 1934 Act. Additionally, it ordered Walloga to disgorge all ill-gotten gains. The SEC alleged that Walloga failed to disclose to investors purchasing securities in the secondary market that the broker/dealer was acting as a market maker with respect to those securities. It further alleged that Walloga charged customers excessive undisclosed mark-ups and inaccurately maintained his books in order to conceal his undercapitalization. In *Securities & Exchange Commission v. Rosemary Grady*,\(^{526}\) the SEC charged and the court found that Grady, the president and controlling stockholder of a broker/dealer, violated the registration and anti-fraud provisions of the securities laws and aided and abetted violations of the anti-fraud and recordkeeping provisions of the securities laws. The court found that Grady manipulated prices of securities of at least two issuers by fraudulent sales practices. The court ordered her to disgorge one million five hundred seventy thousand ($1,570,000) dollars of ill-gotten gain and to pay prejudgment interest of eight hundred thirty three thousand nine hundred

\(^{522}\) 953 F.2d 1560 (11th Cir. 1992), *rev’d in part*, 998 F.2d 922 (11th Cir. 1993).
\(^{523}\) *Id.* at 1565.
\(^{524}\) *Id.*
seventy-six ($833,976) dollars.\textsuperscript{527} In \textit{Securities \& Exchange Commission v. First Fidelity Financial Corp.},\textsuperscript{528} the SEC sought and the court granted an injunction against the defendants from further violations of the broker/dealer registration provisions and violations of the anti-fraud provisions of the federal securities laws. The defendants were ordered to disgorge five hundred sixty thousand ($560,000) dollars and pay civil penalties upon a determination by the court that they operated a boiler-room selling speculative over-the-counter securities to the public through high pressure sales tactics and misrepresentations.\textsuperscript{529} In \textit{Securities \& Exchange Commission v. Omni Capital Group, Ltd.},\textsuperscript{530} the court permanently enjoined Thomas R. Mullens, the president and sole shareholder of defendant Omni Capital Group, Ltd. from future violations of the registration and anti-fraud provisions of the 1933 Act and the anti-fraud provisions of the 1934 Act. The court ordered disgorgement, civil penalties and other relief against Mullens.\textsuperscript{531} The court found that Mullens had engaged in unregistered non-exempt offerings of securities and that through Omni had made material misrepresentations and omissions of material facts to investors and prospective investors concerning, among other things, Mullens’ personal criminal history, the use of the proceeds from the offerings, the risks associated with the investment and the existence of a guaranteed rate of return on the investments.\textsuperscript{532} The court appointed a receiver to unravel an approximately 25 million dollar Ponzi scheme in which, despite making various representations of the profits being made, Mullens, in fact, never made any investments on behalf of his clients.\textsuperscript{533} Mullens was recently sentenced to more than thirty years in prison on various criminal charges arising from his Omni activities. On June 14, 1993 the court entered a final judgment of permanent injunction against the defendants in \textit{Securities
Exchange & Commission v. Premium Sales Corp., enjoining the defendants from further violation of the anti-fraud provisions of the 1933 and 1934 Acts. The SEC alleged that the defendants falsely represented to investors that they had an extremely profitable grocery diversion business which could yield upwards of 60% return on investment. In fact, the SEC alleged, defendants had not made the represented returns and a material number of the diversion transactions reported were overstated or sham transactions. As a result of their activities, the defendants raised approximately five hundred fifteen million ($515,000,000) dollars from investors. At the time of the filing of the action, only eighty nine million ($89,000,000) dollars was accounted for, according to the SEC complaint. The SEC, in addition to the injunctions, sought and obtained the appointment of a receiver, and an order freezing assets of the defendants and prohibiting the destruction of records. The SEC is seeking disgorgement and civil penalties against the defendants.

Finally, in Securities & Exchange Commission v. Premier Benefit Capital Trust, the court preliminarily enjoined the defendants from further violations of the registration and anti-fraud provisions of the federal securities laws. It also entered orders freezing assets, prohibiting the destruction of records, expediting discovery and appointing a receiver. The SEC’s complaint alleged that the defendants had raised at least six million six hundred thousand ($6,600,000) dollars through the unlawful sale of unregistered securities to 180 investors. The SEC further alleged that these sales had been accomplished through materially false representations and omissions in offering documents, radio and newspaper advertisements and by oral communications which employed “boiler-room” techniques.

The SEC’s litigation release cited the substantial assistance of the Florida Department of Banking and Finance in its investigation. Such cooperative efforts among the regulatory agencies, appears to be an increasing trend in securities regulation in Florida.

Unfortunately, the activities of the Florida Office of the Comptroller, Department of Banking and Finance, Division of Securities and Investor Protection are even less well reported than those of the SEC. Two reported decisions concerning that agency demonstrate some of the matters within the purview and concern of the Department. In Giordano v. Department of

535. Id.
appellant sought review of an administrative order of the Department of Banking and Finance requiring him to cease and desist from the unauthorized sale of securities. The district court affirmed the administrative order in an opinion that gave some insight into the workings of the Department and its powers. The district court held that the Department did not have to hold an evidentiary hearing or to consider reasons why appellant had failed to respond to an administrative complaint prior to entry of a default order. The decision outlines the practice of the Department to conduct administrative hearings on complaints of securities laws violations and examines some of the procedures involved therewith. It also demonstrates the broad latitude given the Department by the state courts. In Santacroce v. Department of Banking & Finance, Division of Securities & Investor Protection, the Fourth District Court of Appeal held that the Department had properly found that a broker had violated a statute concerning receiving commissions on securities transactions before the broker was properly registered with the state, but suggested that the sanction imposed may have been excessive. Again, the Department was concerned with the sale of securities by unregistered persons in the state and the case gives additional insights into the Department’s workings and processes. As in Giordano, it demonstrates the latitude granted the Department by the courts. The court in Santacroce affirmed the right of the Director of the Department to act as a hearing officer in a revocation (of license) hearing against the securities broker. The court also held the constitutional guarantee of right to counsel not to be applicable to revocation hearings. It also upheld the hearing officer’s determination that the appellant had violated section 517.12, requiring registration of brokers before they may sell securities, regardless of the fact that the violation may have been inadvertent and that appellant had asserted a good faith belief that he was registered. The court held, “appellant’s argument regarding his good faith belief that he was registered at the time he

538. Id. at 715.
539. Id. at 713-15.
541. Id. at 136-37.
542. Id.
543. Id. at 136; cf. supra notes 319-39 and accompanying text.
conducted the subject transactions did not provide him with a defense to section 517.12.\textsuperscript{544}

One other decision of interest which was reported during the period involves the effect of SEC Rule 2(e)(1) of the SEC Rules of Practice.\textsuperscript{545} Under Rule 2(e), the SEC is empowered to discipline lawyers who practice before it, including the power to revoke that lawyer's right to practice before the SEC. In \textit{The Florida Bar v. Tepps},\textsuperscript{546} the Supreme Court held that The Florida Bar could not consider the entry of an SEC 2(e) revocation as "conclusive proof of misconduct" under the Bar's rules allowing the Bar to revoke the license of a lawyer solely on the basis of the entry of an order of another jurisdiction terminating the lawyer's right to practice there.\textsuperscript{547} The court concluded that "the SEC is not a 'court or other authorized disciplinary agency of another jurisdiction'" and refused to recognize its order as a basis for disciplinary action without a full evidentiary hearing.\textsuperscript{548}

\textsuperscript{544} \textit{Id.} Apparently, the Department takes a much dimmer view of alleged inadvertent violations of broker registration provisions than do arbitration panels. See, \textit{e.g.}, Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1269 (1993); Brown v. Rauscher Pierce Refsnes, Inc., 796 F. Supp. 496 (M.D. Fla. 1992), \textit{aff'd}, 994 F.2d 775 (11th Cir. 1993).

\textsuperscript{545} 17 C.F.R. § 201.2(e)(1)(1991).

\textsuperscript{546} 601 So. 2d 1174 (Fla. 1992).

\textsuperscript{547} \textit{Id.}

\textsuperscript{548} \textit{Id.} at 1175.