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Contracts

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Abstract

It was a relatively quiet year in Contracts.

KEYWORDS: freedom, contract, obligation

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I. Introduction

It was a relatively quiet year in Contracts. The Florida Supreme Court decided only five contract cases¹ of note during the 1986 Survey period, in contrast to the previous year's thirteen.² As in 1985, however, the cases included one major surprise³ and several classifications of leg-

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1. *Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986); *Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032 (Fla. 1986); *ITT Indus. Credit Co. v. Regan*, 487 So. 2d 1047 (Fla. 1986); *Fireman's Fund Ins. Co. v. Pohlman*, 485 So. 2d 418 (Fla. 1986); *Continental Assurance Co. v. Carroll*, 485 So. 2d 406 (Fla. 1986).

2. See O'Dempsey, *Contracts: Survey of Florida Law 1985*, 10 NOVA L.J. 953 (1986). Cases discussed in the present article were decided between December 1, 1985 and November 31, 1986.

3. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1032. See discussion *infra* notes 5 to 27 and accompanying text.

isolation affecting contracts.⁴ In almost equal measure, they continue to reflect two major themes: a careful protection of the freedom of contract and the reshaping by modern legislation of classic contract doctrines. These two can, of course, conflict in a given case, if legislation purports to restrict freedom of contract. Exactly that conflict arose in 1986; the result is instructive and interesting.

II. Freedom of Contract

A. *Department of Insurance v. Dade County Consumer Advocate's Office*

Despite the court's denial that new ground was broken, *Department of Insurance v. Dade County Consumer Advocate's Office*⁵ will strike most lawyers as a quite extraordinary case. Here the court struck down two Florida statutes on the ground that, by depriving consumers of freedom of contract, they violated the due process clause of the Florida Constitution.⁶

The action was brought by the Dade County Consumer Advocate's Office.⁷ The head of that office, Walter Dartland, alleged that he had tried and failed to persuade an insurance agent to "rebate" part of the commission that the agent would earn on Dartland's life insurance policy.⁸ The agent's refusal to grant the rebate was understandable, if frustrating to Dartland. Under Florida "anti-rebate" legislation, the agent stood to lose his license if he entered into the agreement Dartland sought.⁹

4. *ITT Indus. Credit*, 487 So. 2d at 1047; *Continental Assurance Co.*, 485 So. 2d at 406. See discussion *infra* notes 63 to 106 and accompanying text.

5. 492 So. 2d at 1032.

6. *Id.*; See FLA. CONST. art. I, § 9.

7. See *Dade County Consumer Advocate's Office v. Department of Ins.*, 457 So. 2d 495 (Fla. 1st Dist. Ct. App. 1984).

8. See *Dade County Consumer Advocate's Office*, 490 So. 2d at 1035 n. 1 (Boyd, C.J., dissenting).

9. FLA. STAT. § 626.611(11) (1983) provided in pertinent part that the Department of Insurance shall suspend or revoke the license of any agent who rebated his commission or offered to divide the commission with another. FLA. STAT. § 626.9541(1)(h)(1)(b) (1983) additionally provided that the offering of a rebate not set forth in a contract of insurance was an unfair method of competition or deceptive act or practice. An agent who engaged in price competition by offering a rebate therefore risked losing his livelihood.

The Consumer Advocate's Office then brought suit, alleging that the statutes prevent "price competition with respect to insurance agents' commissions."¹⁰ The absence of such price competition, according to the plaintiffs, deprived Florida consumers of their property without due process of law.¹¹ Plaintiffs' theory, at its most basic, was that Florida consumers have a property interest in freedom of contract and that this interest had been unjustifiably infringed by the Florida legislature.

The case turned on the legislature's freedom to use the police power in the area of insurance regulation. States are held to possess a "police power" — an incident of sovereignty — under which they may enact legislation to protect the general health, safety and welfare of the public.¹² Numerous legislative encroachments on "pure" or absolute freedom of contract have, of course, been sanctioned pursuant to the police power, despite challenges under the due process clauses of the federal and the state constitutions.¹³

As a rule, the due process clause can be successfully invoked to limit an exercise of the police power only if the legislation in question is shown to be absolutely arbitrary. In this context, arbitrariness is determined by application of the "reasonable relation" test.¹⁴ That is, legislation putatively enacted pursuant to the police power may be invalidated on due process grounds only if there is "no conceivable rational relation" between the enactment and the public welfare.¹⁵

In *Dade County Consumer Advocate's Office*, the state argued

10. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1033.

11. *Id.*

12. The police power has variously been defined as "the state's authority to safeguard the vital interests of its people," *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934); "[t]he sovereign right . . . to protect the . . . general welfare of the people," *Manigault v. Springs*, 199 U.S. 473, 480 (1905); and the power to legislate "in furtherance of broad social interests," in particular on "matters of health, safety, and the preservation of natural resources," *United States Trust Co. v. New Jersey*, 431 U.S. 1, 46 (1977) (Brennan, J., dissenting). See generally E. FREUND, *THE POLICE POWER* (1904).

13. Anti-usury statutes, which forbid the charging of excessive interest in connection with an agreement to lend money, are examples of a permitted encroachment on freedom of contract pursuant to the legislature's power to protect the public welfare.

14. *Atlantic Coastline R.R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914).

15. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1034-35. See, e.g., *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15-16 (Fla. 1974); see *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974). See also *Atlantic Coastline R.R. Co.*, 232 U.S. at 548.

that the challenged statutes served multiple legitimate purposes. It asserted, for example, that the statutes helped prevent economic discrimination among insureds in the same actuarial class.¹⁶ Various negative consequences would flow from their invalidation: premiums would increase due to pressure by agents for larger commissions so as to offer larger rebates, and administrative costs would rise because consumers would replace their policies each year.¹⁷

The court rejected these and other arguments, finding that "[i]nsurance agents' commissions do not affect the net insurance premiums."¹⁸ The court held that the state had failed to show a legitimate state purpose in safeguarding the general welfare, and that the statutes were therefore unconstitutional.¹⁹

The Court implied that its decision did not constitute any major, or even minor, departure from previously established law in the state of Florida.²⁰ Not surprisingly, however, the majority opinion elicited a sharp dissent in which three justices joined.²¹ Chief Justice Boyd, author of the dissent, saw the decision as effecting an alarming change in Florida law, and characterized it as an "aggrandizement of judicial

16. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1033-34. The district court had responded to this argument by stating that price differences of the type anticipated "have historically been considered fair in every other segment of our economy," and that such discrimination was therefore not undesirable "in a free market economy." *Dade County Consumer Advocate's Office v. Department of Ins.*, 457 So. 2d 495, 497 (Fla. 1st Dist. Ct. App. 1984), *aff'd*, 492 So. 2d 1032 (Fla. 1986).

17. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1034. Under the conventional commission structure, first-year commissions are highest. An agent selling a new policy would therefore be able to offer a higher rebate than an agent renewing an existing policy. *Id.*

18. *Id.* at 1035. The court did not discuss most of the state's arguments in support of the legislation, saying simply that "[t]he other arguments presented by the Department of Insurance . . . have been properly responded to by the district court in its opinion." *Id.* The district court's discussion is found at 457 So. 2d at 497-98.

19. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1035. The court analogized to earlier cases in which "minimum price" schedules set by law had been struck down. The court mentioned, for example, *Liquor Store v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949), in which the court held that legislation allowing a manufacturer-distributor to establish a minimum retail price was unconstitutional, and *Larson v. Lesser*, 106 So. 2d 188 (Fla. 1958), where the court declared unconstitutional a law prohibiting a certain kind of insurance adjuster from soliciting business. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1034.

20. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1034 (discussing other state and federal cases holding "minimum price" legislation unconstitutional).

21. *Id.* at 1035 (Boyd, C.J., Adkins, Shaw, JJ., dissenting).

power" because it permitted judicial interference with the legislature's sphere of power.²²

In the chief justice's view, the decision harks back to the heyday of substantive due process. That doctrine, as every law student knows, was broadly used by the U.S. Supreme Court to strangle federal economic legislation in the first third of this century.²³ Eventually it gave way to an almost passive judicial acceptance of the broad sweep of the police power. Courts now generally accept the legislature's enactments so long as they are not absolutely arbitrary or so long as the means/ends issue "may be regarded as fairly open to differences of opinion."²⁴

The majority in *Consumer Advocate's Office* almost blithely gave the back of its hand to the state's arguments in support of the legislation. But the Chief Justice appears correct in his observation that, at a minimum, "there is a fairly debatable question" whether the legislation bears a reasonable relation to a legitimate police power goal.²⁵ And, ordinarily, the existence of such a question should be "sufficient to put an end to all further judicial inquiry in this kind of case."²⁶

The dissent has probably captured the real significance of the majority's decision: substantive due process does have some degree of life in Florida. A generalized alarm, however, is not yet appropriate. The first paragraph of the court's opinion contains the sentence "We find these statutes unnecessarily limit the bargaining power of the *consuming* public and, in accordance with prior *consumer* decisions of this Court, we . . . hold that these statutes are unconstitutional . . ."²⁷ Taking the majority at its word, the rational relation test is still in

22. *Id.*

23. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 443-47 (2d ed. 1983).

24. See, e.g., *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 196 (1936).

25. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1037 (Boyd, C.J., dissenting).

26. *Id.* at 1037 (Boyd, C.J., dissenting). See, e.g., *Williams v. Hartford Accident and Indem. Co.*, 245 So. 2d 64, 67-68 (Fla. 1971) ("It is not the function of this Court to determine the wisdom of legislation or to pass on its efficacy as a solution to the problem sought to be remedied.").

27. *Dade County Consumer Advocate's Office*, 492 So. 2d at 1033 (emphasis added). The federal and state cases cited by the court as analogous or precedents all concern consumers' "economic bargaining power." See *id.* at 1034 (citing cases). The statutes were, moreover, declared unconstitutional only "to the extent they prohibit insurance agents from rebating any portion of their commissions to their customers." *Id.* at 1035.

effect for most purposes.

One may expect, however, that the close scrutiny given these statutes will be applied again in the future to other types of legislation affecting the consumer. To this extent, it is the Florida legislature and the Florida lawyer — not the buyer — who must beware.

B. Forum Selection Clauses

*Manrique v. Fabbri*²⁸ presented the sole case in which no statutory issue was presented. In *Manrique*, the court reinforced the freedom of parties to a contract to designate the forum in which disputes arising out of the contract would be determined.²⁹ More precisely, the court clarified Florida law by holding that a forum selection clause in a contract will be upheld except where unreasonable or unjust.³⁰

The parties in *Manrique* were a resident of Argentina and a Netherlands Antilles corporation. The two had entered into a contract for the purchase and sale of a Netherlands Antilles corporation, the sole asset of which was a parcel of land in Florida. The contract contained a "forum selection clause" through which the parties agreed that the laws of the Netherlands Antilles would govern any disputes and that the parties would "submit themselves to the venue and jurisdiction of the Courts of the Netherlands Antilles."³¹

When plaintiff Fabbri nonetheless brought suit for breach of contract in Florida, the district court refused to uphold the clause, and permitted a Florida court to take jurisdiction over the dispute.³² The supreme court reversed.³³

In its opinion, the court stated that Florida courts should in general uphold forum selection clauses because such clauses embody "the legitimate expectations" of the contracting parties³⁴ and their enforcement "enhances contractual predictability."³⁵ The court relied heavily upon the United States Supreme Court's opinion in *The Bremen v. Zapata Off-Shore, Co.*³⁶ and explicitly approved the fourth district's

28. 493 So. 2d 437 (Fla. 1986).

29. *Id.* at 439.

30. *Id.* at 440.

31. *Id.* at 438 (quoting English version of original contract).

32. *Manrique v. Fabbri*, 474 So. 2d 844 (Fla. 3d Dist. Ct. App. 1984).

33. *Manrique*, 493 So. 2d at 440.

34. *Id.*

35. *Id.* at 439.

36. *Id.* at 438-40 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1

decision in *Maritime Limited Partnership v. Greenman Advertising Associates*.³⁷

Under an older rule, courts routinely disregarded forum selection clauses on the theory that the parties had no right to "oust" a court of jurisdiction.³⁸ The *Manrique* court adhered to the view that parties may not deprive a court of its jurisdiction, but held that Florida courts should generally decline to exercise their jurisdiction when the parties had previously agreed to another forum.³⁹

The court acknowledged that this rule should not be absolute, and that Florida courts should disregard such clauses if they had been obtained by unequal bargaining power or enforcement would be otherwise unfair.⁴⁰ In enunciating its "unreasonable or unjust" exception, the court made clear that the exception should not be permitted to swallow the general rule of enforcement.⁴¹ The applicable definition of "unreasonableness," for example, will not be mere inconvenience or increased expense. Rather, a clause will be considered unreasonable only if its enforcement would create such difficulty as to effectively deprive a party of his day in court.⁴²

III. Impairment of the Obligation of Contracts: Part Two

Counsel for the plaintiff in *Fireman's Fund Insurance Co. v. Pohl-*

(1972)). In *Zapata*, the U.S. Supreme Court upheld a forum selection clause which lodged jurisdiction in a London court, and required that a suit brought in federal court be dismissed.

37. *Manrique*, 493 So. 2d at 440. Cf. *Maritime Ltd. Partnership v. Greenman Advertising Assoc.*, 455 So. 2d 1121 (Fla. 4th Dist. Ct. App. 1984).

Maritime possesses two points of special interest not mentioned by the supreme court in *Manrique*. First, it upheld a forum selection clause so as to acquire jurisdiction in Florida rather than require the parties to litigate in South Carolina. *Maritime Ltd. Partnership*, 455 So. 2d at 1122. It thus concerns choice of forum at the interstate level. In *Manrique* and *Zapata*, which both arose out of international contracts, the two American courts declined to exercise jurisdiction in favor of the courts of another country.

Second, the issue of the validity of the *Maritime* clause arose because the plaintiff apparently was unable to show that in personam jurisdiction over the defendant existed in Florida. *Maritime* thus stands, in part, for the proposition that personal jurisdiction can be created by contract. *Id.* at 1123-24.

38. *Manrique*, 493 So. 2d at 439.

39. *Id.* at 440.

40. *Id.*

41. *Id.*

42. *Id.* n.4 (quoting *Zapata*, 407 U.S. at 18).

man⁴³ was able to snatch a partial victory from the jaws of constitutional defeat. His weapons were two classic contract doctrines, used in the context of insurance law.⁴⁴

Pohlman is yet another case arising out of Florida's legislation on "stacking." Where stacking is allowed, an insured may collect uninsured motorist coverage on all the vehicles covered under all of his insurance policies.⁴⁵ The Florida Supreme Court has held that both stacking and antistacking laws can constitutionally apply only to future insurance contracts.⁴⁶ For instance, last year in *State Farm Mutual Automobile Insurance Co. v. Gant*,⁴⁷ the court invalidated a 1980 stacking law insofar as it applied retrospectively, *i.e.*, to policies already in effect before the new law's effective date.⁴⁸ Retrospective application of either kind of law, so held the court, violated the Contract Clause of the Florida Constitution.⁴⁹

Pohlman is a follow-up to *Gant*. It presents the question: what is the result when a policy is already in force under an anti-stacking law, but is amended after a pro-stacking law goes into effect? Plaintiff Pohlman argued that in these circumstances he could avail himself of the benefits of the new law.

Before his legal theories are presented, some factual background is necessary. Pohlman owned a number of vehicles. He insured two of

43. 485 So. 2d 418 (Fla. 1986).

44. See *infra* discussion accompanying notes 54-55.

45. *Pohlman*, 485 So. 2d at 419. FLA. STAT. § 627.4132 (1980) currently provides that uninsured motorist coverage may be stacked. This amended law went into effect on October 1, 1980.

Stacking laws permit stacking; anti-stacking laws prohibit it. That is, under an anti-stacking law, the insured may recover only those benefits provided by the policy covering the vehicle involved in the accident.

Stacking and anti-stacking laws have a bewildering history in Florida. In the last fifteen years, Florida has held at least three different positions on the issue: stacking permitted, stacking prohibited, stacking reinstated. See *State Farm Mut. Auto. Ins. Co. v. Gant*, 478 So. 2d 25, 27 (Fla. 1985); *Dewberry v. Auto-Owners Ins. Corp.*, 363 So. 2d 1077 (Fla. 1978).

46. *Gant*, 478 So. 2d at 25.

47. 478 So. 2d at 25.

48. *Id.* at 26. (A retrospective application of the new stacking law violated the constitutional restriction on the impairments of contracts found in the Florida Constitution.) See FLA. CONST. art. I, § 10.

49. "No . . . law impairing the obligation of contracts shall be passed." FLA. CONST. art. I, § 10. See *Gant*, 478 So. 2d at 27 (retrospective application of stacking law violates the contract clause); *Dewberry*, 363 So. 2d at 1077 (retrospective application of anti-stacking law violates the contract clause).

them through a policy with Fireman's Fund Insurance Company. That policy was entered into under the older anti-stacking statute.⁵⁰ Indeed, it contained an anti-stacking clause. Under *Gant*, the anti-stacking clause remained in effect even after enactment of the 1980 stacking law.⁵¹

However, in 1981, after the stacking law had gone into effect, Pohlman insured a third vehicle with Fireman's Fund. This was accomplished by his signing an endorsement adding the third vehicle to his existing policy. Fireman's Fund charged Pohlman a substantial additional premium in connection with the endorsement.⁵²

Some time after the post-stacking endorsement had been signed, Pohlman was injured in an accident involving a fourth vehicle. The vehicle belonged to him but was insured by a different company. Pohlman sought to take advantage of the new stacking law by recovering the uninsured motorist benefits provided not only under the fourth vehicle's policy but also that provided for all three vehicles insured under the Fireman's Fund policy.

Had the original Fireman's Fund policy been issued after the post-stacking law went into effect, such stacking would occur automatically.⁵³ The *Gant* decision, however, seemed an insuperable obstacle to this tantalizing result. Pohlman was not deterred; he asserted two hoary contract counter-defenses to the insurance company's *Gant* defense.

First, he argued that the changes made when the post-stacking endorsement was signed and the new premium was charged were "of such magnitude as to constitute the issuance of a new contract on that date."⁵⁴ If a new contract had issued at that time, the stacking law would apply and Pohlman would receive the additional uninsured motorist benefits connected with all three vehicles insured with Fireman's Fund.

In the event the court rejected this first scenario, Pohlman contended in the alternative that the endorsement constituted the issuance of a "separate and severable contract," that is, one legally distinct from the underlying, original policy.⁵⁵ Under this version of his case, Pohl-

50. FLA. STAT. § 627.4132 (1977).

51. See *Gant*, 478 So. 2d at 27.

52. *Pohlman*, 485 So. 2d at 419.

53. FLA. STAT. § 627.4132 (1980).

54. *Pohlman*, 485 So. 2d at 420.

55. *Id.*

man could recover the uninsured motorist benefits provided with respect to the third vehicle, since the endorsement would be a post-stacking contract of insurance. He would still not recover additional benefits attached to the first two vehicles because of the *Gant* rule.

The supreme court held that Pohlman passed the second test.⁵⁶ It held that "the addition of an automobile to an existing policy of insurance along with an additional premium constitutes a separate and severable contract of insurance."⁵⁷ Because Pohlman's new, separate contract came into existence after the stacking law went into effect, the law's stacking provisions were incorporated into it.⁵⁸ The result: Pohlman could stack the uninsured motorist coverage on the vehicle added by the post-statute endorsement.

Although the court did not find the issuance of a "new" contract here — which would have enabled Pohlman to stack coverage from all four vehicles — it allowed for that possibility in other instances.⁵⁹ "A court must examine the risk covered by the additional premium."⁶⁰ If a post-stacking, additional premium reflects the "risk of insuring *all* of the vehicles at increased liability coverage," the endorsement would constitute the issuance of a completely new contract and the new statute would apply to all covered vehicles.⁶¹

Clearly, *Pohlman*-type issues must be decided on the facts of the individual case, particularly by examining the amount of the additional premium charged at the time of the post-statute endorsement.⁶² The

56. *Id.*

57. *Id.* The court approvingly cited an earlier determination of the same issue by the Fourth District Court of Appeal in *United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 627 (Fla. 4th Dist. Ct. App. 1977). In *Van Iderstyne*, the district court determined that a separate and severable contract was created by the simultaneous addition of a new vehicle to an existing insurance policy and the charging of an additional premium.

58. *Pohlman*, 485 So. 2d at 420 (citing with approval *Allison v. Imperial Casualty and Indem. Co.*, 222 So. 2d 254 (Fla. 4th Dist. Ct. App. 1969)).

59. *Id.* at 420-21.

60. *Id.* at 420.

61. *Id.* at 421. The question of when an endorsement constitutes a new insurance policy is addressed at greater length in *Sentry Ins. A. Mut. Co. v. McGowan*, 425 So. 2d 98 (Fla. 5th Dist. Ct. App. 1982), *review denied*, 434 So. 2d 888 (Fla. 1983); *Maxwell v. United States Fidelity and Guar. Co.*, 399 So. 2d 1051 (Fla. 1st Dist. Ct. App. 1981); *Hartford Accident and Indem. Co. v. Sheffield*, 375 So. 2d 598 (Fla. 3d Dist. Ct. App. 1979).

62. *Pohlman*, 485 So. 2d at 420 ("A court must examine the risk covered by the additional premium").

Pohlman case will prove helpful to at least some other insureds who have run into the *Gant* barrier. The case also serves as a helpful review of two concepts from the contracts toolbox which counsel should probably consider more frequently than is now the case.

IV. Clarifications of Statutes Governing Contracts

In two cases from the Survey Period, the court merely interpreted or clarified rather unambiguous statutory provisions.⁶³ Since both the cases and the statutes concern contracts, they warrant some attention here.

A. *Innocent Misrepresentations in an Insurance Policy*

*Continental Assurance Co. v. Carroll*⁶⁴ concerns the effect of an innocent misrepresentation of fact in answering questions on an insurance application. The Court held that, under a Florida statute, rescission is available when the misrepresentation — whether knowing or innocent — was “material to the risk assumed”⁶⁵ by the insurer.⁶⁶

The underlying facts in *Carroll* were at best melancholy and at worst tragic. Mr. and Mrs. Carroll were the parents of a baby boy, Brian. When Brian was just over two months old, his mother took him for a medical checkup. The examining doctor reported to Mrs. Carroll that her son was generally healthy, but that he had developed a heart murmur.

A week after the checkup the Carrolls applied for a life insurance policy on the baby. The insurance application required the Carrolls to state whether the child was “in good health and free from any deformity or defect.” They answered “Yes.” In response to another question, about what the child’s physician had said after last being consulted, the Carrolls wrote “Normal.”⁶⁷

Continental Assurance Company issued a \$20,000 policy after receiving the application. Only nine days later, however, Brian died of congenital heart failure. Complaining of the incomplete or inaccurate information provided by the Carrolls, Continental sought rescission of

63. *ITT Indus. Credit Co. v. Regan*, 487 So. 2d 1047 (Fla. 1986); *Continental Assurance Co. v. Carroll*, 485 So. 2d 406 (Fla. 1986).

64. 485 So. 2d 406 (Fla. 1986).

65. FLA. STAT. § 627.409(1) (1981).

66. *Carroll*, 485 So. 2d at 409.

67. *Id.* at 407.

the insurance contract. The company claimed that it would never have issued the policy had the true facts been disclosed. Predictably, however, the trial jury, the trial judge and the district court, all found for the grieving parents.⁶⁸

Still, Continental had strong legal support for its position. Florida legislation had, for over twenty years, provided that an insurance company could obtain rescission if a misrepresentation or omission on an application were "fraudulent," "material" to the risk assumed, or the insurer would have denied coverage or modified the policy had the true facts been discovered.⁶⁹

Moreover, Continental could presumably rely on a 1967 opinion of the supreme court interpreting that legislation.⁷⁰ According to *Life Insurance Co. v. Shifflet*,⁷¹ rescission could be granted upon proof of a misrepresentation even if there was no proof that it had been made knowingly. All that was required to deny recovery was that the misrepresentation was "material to the risk" assumed.⁷² That is, even a completely innocent misrepresentation could result in avoidance of the policy.

Continental's problem arose out of *National Standard Life Insurance Co. v. Permenter*,⁷³ a case that had been dismissed by the supreme court only a short time after the *Shifflet* decision. The *Permenter* court had engaged in an unusual — if not peculiar — exercise. To the one-sentence per curiam dismissal, one justice had appended a "special concurrence" in which a majority of the court had joined.⁷⁴

68. *Id.*

69. See FLA. STAT. § 627.409 (1981). The three grounds for rescission were exceptions to a general rule of the governing statute. The general rule provided that representations of fact by an applicant on an application for insurance were deemed "representations and not warranties." Under this formulation of the law, a misrepresentation or omission would not ordinarily prevent recovery on the policy. *Carroll*, 485 So. 2d at 407 (citing FLA. STAT. § 627.409(1) (1981)).

As suggested in the text, however, the same section provided three exceptions. Under FLA. STAT. § 627.409(1) (a)-(c) (1981), recovery of the proceeds of the policy could be denied where the representation or omission was (1) fraudulent; (2) material to the risk being assumed; or (3) such that, had the true facts been known, the insurer would not have issued the policy at all or would have modified it.

70. *Life Ins. Co. v. Shifflet*, 201 So. 2d 715 (Fla. 1967).

71. 201 So. 2d at 715.

72. *Id.* at 719, 720.

73. 204 So. 2d 206 (Fla. 1967). The case was dismissed for lack of jurisdiction. *Id.*

74. *Id.* at 206-08.

The concurrence expressed concern that *Shifflet* would prove to be a harsh rule, and that its effects might be softened by creating a distinction on the one hand, answers to questions which a lay applicant could be expected to understand unambiguously and, on the other, those concerning which he was lacking in appropriate expertise.⁷⁵ By applying such a test, the statute could be observed but coverage might still be preserved for insureds who had innocently made misrepresentations in the second category of questions. The stage was thus set for the *Shifflet* rule to be tested in *Carroll* almost two decades later.

The supreme court of 1986 was no longer troubled by the reservations of the *Permenter* court. The court strongly affirmed *Shifflet*, finding that the statute was utterly "unambiguous" and would not submit to the kind of interpretation *Permenter* sought to engraft.⁷⁶

The court held, implicitly, that when an insurance company relies on an "innocent misrepresentation" in issuing a policy, a "mutual mistake of fact" occurs.⁷⁷ The statute, in this view, is simply a legislative recognition of the common law principle that "a contract issued on a mutual mistake of fact is subject to being voided."⁷⁸ The district court's opinion upholding the Carroll's recovery on the policy was consequently quashed.⁷⁹

The court took the opportunity to scold the district court for having bypassed *Shifflet*, the "binding precedent" in the state, in favor of the *Permenter* dictum.⁸⁰ The supreme court admonished that if the district court [agreed with *Permenter*] the proper course would have been to rule in accordance with *Shifflet* and then certify the question to this Court."⁸¹

B. Secured Transactions and Priority Conflicts

Florida did not adopt the Uniform Commercial Code until 1965, after the UCC had already been enacted by thirty-eight of her sister

75. *Id.* at 206-07.

76. *Carroll*, 485 So. 2d at 408.

77. *Id.*

78. *Id.* at 409. *See id.* at n.2 (citing *Rood Co. v. Board of Pub. Instruction*, 102 So. 2d 139 (Fla. 1958), in which it was held that mutual mistake of fact constitutes an equitable ground for rescission under general contract law).

79. *Id.* at 409.

80. *Id.*

81. *Id.*

states.⁸² Relatively few cases arising under the Florida version of the Code have made their way to the supreme court. The Survey Period perpetuates this pattern, in that the court passed on only one case raising a UCC issue.⁸³

In *ITT Industrial Credit Co. v. Regan*,⁸⁴ the court was presented with an issue arising under the Code's Article 9, on secured transactions.⁸⁵ Respondent Regan held a security interest in various forms of personal property owned by a certain hotel in Jacksonville. The agreement which created the security interest contained an "after-acquired clause," under which Regan's interest automatically extended to additional personal property that might later be obtained by the hotel.⁸⁶

While the security agreement with Regan was still in effect, the hotel purchased some computer equipment. This purchase was financed by a new secured creditor, ITT Industrial Credit Company. Regan's after-acquired clause gave him a security interest in the new equipment; ITT's credit agreement also gave it a secured interest in the same equipment. ITT's was, of course, a "purchase money security interest."⁸⁷

The hotel apparently defaulted on its obligations to Regan at some time after this purchase, for Regan sought to foreclose on the hotel's property, including the equipment purchased from ITT. ITT objected,

82. See Harrison, *General Introduction to the Uniform Commercial Code*, 19A FLORIDA STATUTES ANNOTATED ix (West 1966). Florida's version of the U.C.C. is codified at FLA. STAT. §§ 671.101 through 680.111 (1985) (corresponding to §§ 1-101 through 10-111 of the 1962 version of the U.C.C.).

83. In the ten year period beginning in 1976 and ending in 1985, the supreme court handed down only seven opinions dealing with U.C.C. issues. Last year, the court decided one such case, involving the U.C.C. choice-of-law provision. See *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985) (construing FLA. STAT. § 671.105(1) (1975)). The *Burroughs* decision is discussed in O'Dempsey, *Contracts*, 10 NOVA L.J. 954, 959-61 (1986).

84. 487 So. 2d 1047 (Fla. 1986).

85. Article 9, "Secured Transactions," is codified at FLA. STAT. §§ 679.100-679.114. (West 1985).

86. After-acquired clauses are explicitly permitted by FLA. STAT. § 679.204(1) (1975). A broad after-acquired clause creates a "floating lien" on the property of the debtor. See, e.g., Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963).

87. A "purchase money security interest" can be of two types. In *ITT Indus. Credit*, the "PMSI" was of the second type, or one taken by a third party who is unrelated to the transaction except insofar as he has supplied the money used for the purchase. The first type is one taken by the seller of the collateral when he allows the purchaser to make the purchase on credit. See FLA. STAT. § 679.107 (1985).

asserting that its purchase money security interest was superior to Reagan's earlier perfected lien.⁸⁸ A classic Article 9 priority contest was thus presented.

The UCC's general rule is that, when two secured creditors possess security interests in the same collateral, the creditor who "filed or perfected" earlier in time has priority over the other.⁸⁹ Florida follows this rule.⁹⁰

The UCC provides a special exception, however, which benefits an alert creditor who has just taken a "purchase money secured interest" in a debtor's property.⁹¹ The exception permits the later-in-time purchase money secured creditor to obtain priority through the simple expedient of filing a financing statement within a specified number of days after the debtor takes possession of the new collateral.⁹²

This provision affects the intent of the commercial law and the drafters of the UCC to encourage creditors to finance new acquisitions by permitting them a simple means of achieving priority over earlier secured creditors.⁹³ Of course, the new creditor lost his opportunity to achieve superior standing if the filing was not made within the stated time or the "grace period," because he was then subject to the general rule favoring the "earlier-in-time" creditor.⁹⁴

Despite Florida's legislative enactment of these rules, the Florida Supreme Court had upset their normal application in 1974.⁹⁵ In *International Harvester Credit Corp. v. American National Bank*,⁹⁶ the court had created a "debtor's equity" doctrine under which the purchase money security interest was superior to earlier-perfected interests even when not filed within the statutory grace period.⁹⁷ If *Inter-*

88. *ITT Indus. Credit*, 487 So. 2d at 1049.

89. U.C.C. § 9-312.

90. See FLA. STAT. § 679.312(5) (1985).

91. U.C.C. § 9-312(4).

92. The U.C.C. version is found at § 9-312(4). Florida law provides the same exception, with slightly different wording, at FLA. STAT. § 679.312(4) (1985).

Prior to October 1, 1984, the purchase money secured creditor had to file within ten days of the debtor's taking possession in order to claim the exception. See *ITT Indus. Credit*, 487 So. 2d at 1049 n.*. In 1984, the "grace period" was extended to fifteen days. See 1984 Fla. Laws 84-53, FLA. STAT. § 679.312(4) (Supp. 1984).

93. *ITT Indus. Credit*, 487 So. 2d at 1050.

94. *Id.*

95. *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32 (Fla. 1974).

96. 296 So. 2d at 32.

97. *Id.* at 34-35. This result was reached by holding that the earlier creditor's

national Harvester applied in the instant case, Regan's security interest could be effective against ITT only to the extent that the hotel had already paid for the new equipment and thus acquired "equity" in it.⁹⁸

The Legislature, however, had attempted to overturn *International Harvester* by amending the relevant section of the Florida Code in 1978.⁹⁹ The preamble to the amending legislation stated that "it is the intent of the Legislature that the concept of 'debtor's equity' should not be applicable in the State of Florida"¹⁰⁰ Language was added to the existing statute to make clear the legislature's intention that the later purchase money security interest was subordinate to an earlier filed interest unless the grace-period requirement had been observed.¹⁰¹

The court upheld the plain meaning of the legislation, and "receded" from *International Harvester* with respect to the debtor's equity concept.¹⁰² A final decision in *ITT Industrial Credit* was not possible, however, because the record was unclear as to the date on which the hotel took possession of the computer equipment. The court remanded for a hearing on the issue.¹⁰³

Under the new legislation and the court's acceptance of it, Regan's claim will now be decided just as it would be in the majority of other UCC jurisdictions. That is, if ITT failed to perfect within the applicable grace period its lien will be subordinate to Regan's.¹⁰⁴ On the other hand, if ITT did perfect within the time allotted, its purchase money security interest will have priority over Regan's earlier lien.¹⁰⁵

At its most basic level, *ITT Industrial Credit* simply aligns Florida law with that of most other UCC jurisdictions on a rather narrow

security interest was limited to the debtor's equity in the newly acquired property. *Id.* at 35. The court had reasoned that value represented by the purchase money security interest had not yet passed to the debtor and therefore had not yet become subject to the earlier secured creditor's claim. *Id.* at 34.

98. Under this reading of the statute, the grace period had little if any practical significance.

99. 1978 Fla. Laws 222.

100. *Id.*

101. *ITT Indus. Credit*, 487 So. 2d at 1049. As mentioned above, the grace period has been extended from ten to fifteen days. See *supra* note 92.

102. *Id.* at 1050.

103. *Id.*

104. *Id.*

105. *Id.* Under the Code, formal "title" to the property has little significance. Even under a conditional sales contract, for example, the seller retains only a security interest and the property becomes the purchaser's. See, e.g., FLA. STAT. §§ 671.201(39), 679.102(1)(a), and 672.401(1) (1985).

issue of the law of secured transactions. In the long run, its greater significance may lie in the court's acceptance of the principle that, as provided elsewhere in the UCC, when a buyer takes possession of newly-purchased property, he acquires the property and not merely an equity interest in the property.¹⁰⁶

V. Conclusion

Once again, the Florida Supreme Court has proven itself a non-activist court in the area of contract law. It is strongly inclined to hold litigants to their agreements. In 1986 it went to considerable length to protect individual freedom of contract as classically conceived. At the same time, the court continued its other pattern of construing legislation affecting contracts most literally and almost diffidently.

The drama of 1986 clearly lies in *Consumer Advocate's Office*, where these two tendencies were pitted against each other by a statutory regulation restricting freedom of contract. The court held for freedom of contract for Florida consumers, in the absence of a clear-cut rationale for the legislative enactment.

106. See *Dade County Consumer Advocate's Office*, 492 So. 2d at 1032.