Nova Law Review

Nova Law Review 35, 1

Nova Law Review*

Copyright ©2010 by the authors. Nova Law Review is produced by The Berkeley Electronic Press (bepress). https://nsuworks.nova.edu/nlr
SURVEYS AND ARTICLES ON FLORIDA LAW


Barbara Landau

A Survey of Physician Non-Compete Agreements in Employment Under Florida Law

John Sanchez


Pearl Goldman

2010 Survey of Juvenile Law

Michael J. Dale

The Illusory Imputation of Income in Marital Settlement Agreements: "The Future Ain't What It Used to Be"

Timothy Arcaro
Laura Miller Cancilla

Health Care Reform: Presumptively Reasonable Rates for Necessary Medical Services

David Stahl

NOTES AND COMMENTS

Accommodations for the Hearing Impaired in the Florida State Court System

Arlette Abdallah

Labor Relations in Florida’s Public Sector: Visiting the State’s Past and Present to Find a Future Solution to the Fight Over the Public Purse Under Florida’s Financial Urgency Statute

Jennifer L. Rosinski
NOVA LAW REVIEW

VOLUME 35 FALL 2010 NUMBER 1

SURVEYS AND ARTICLES ON FLORIDA LAW


A Survey of Physician Non-Compete Agreements in Employment Under Florida Law ............................................. John Sanchez 63


2010 Survey of Juvenile Law ......................................................................................................................... Michael J. Dale 137

The Illusory Imputation of Income in Marital Settlement Agreements:
“The Future Ain’t What It Used to Be” ........................................... Timothy Arcaro

Laura Miller Cancilla 157

Health Care Reform: Presumptively Reasonable Rates for Necessary Medical Services ........................................... David Stahl 175

NOTES AND COMMENTS

Accommodations for the Hearing Impaired in the Florida State Court System ............................................. Arlette Abdallah 203

Labor Relations in Florida’s Public Sector: Visiting the State’s Past and Present to Find a Future Solution to the Fight Over the Public Purse Under Florida’s Financial Urgency Statute ................................................................................................................................. Jennifer L. Rosinski 227

https://nsuworks.nova.edu/nlr/vol35/iss1/1

Barbara Landau*

I. Introduction ........................................................................................................... 3

II. Alternative Dispute Resolution .......................................................................... 4

III. Attorneys' Fees .................................................................................................. 6

IV. Business Entities, Arrangements, and Agreements ........................................... 7
   A. Administratively Dissolved Foreign Corporation: Right to Maintain Suit in Florida........................................................................................................................................... 7
   B. Execution on Member's Entire Interest in Single-Member LLC ......................... 8
   C. Statutory Indemnification of Corporate Officer/Employee ................................. 9
   D. Statute of Limitations: Florida Securities Law ............................................... 11

V. Choice of Law and Conflict of Laws .................................................................... 12
   A. Recognition of Out-of-Country Judgment ....................................................... 12
   B. Choice of Law: Provision in Mortgage but Not in Related Note ....................... 14

VI. Consumer Rights ................................................................................................ 15
   A. Truth in Lending Act Disclosures ................................................................. 15
   B. Deposit in Escrow ........................................................................................... 16
   C. FDUTPA Damages .......................................................................................... 17

VII. Contracts ........................................................................................................... 18
    A. Broker's Commission ..................................................................................... 18
    B. Mutuality of Obligation Versus Mutuality of Remedies ................................. 19
    C. Indemnification Agreement ............................................................................ 20
    D. Rescission ....................................................................................................... 22
    E. Plain Meaning Rule ....................................................................................... 24

VIII. Deeds, Mortgages, and Lis Pendens ................................................................. 26
     A. Mortgage Foreclosure: Appointment of Receiver .......................................... 26
     B. Mortgage Foreclosure: Disposition of Cash Surplus ..................................... 27

* Assistant Professor of Taxation and Business Law, Master of Taxation and Master of Accounting Programs, Nova Southeastern University H. Wayne Huizenga School of Business and Entrepreneurship; Florida Supreme Court Certified Circuit Civil and County Court Mediator; B.A., New York University; J.D., New York Law School; LL.M. (Tax), New York University School of Law.
C. Mortgage Foreclosure: Payment of Condominium Assessments .......................................................... 28
D. Mortgage Foreclosure: Right to Statutory Attorney Fees .... 30
IX. EMINENT DOMAIN.................................................................................. 31
X. EMPLOYMENT LAW.................................................................................. 32
A. Benefits Accrued Prior to Termination of an At-Will Employee .......................................................... 32
B. Covenant Not to Compete: Attorney’s Fees Against Third Party .......................................................... 33
XI. FIDUCIARY DUTY AND GOVERNANCE .......................................................... 34
XII. INSURANCE .......................................................................................... 35
XIII. INTELLECTUAL PROPERTY AND THE INTERNET ................................. 36
XIV. JURISDICTION,VENUE, FORUM NON CONVENIENS, AND STANDING.................................................. 37
A. Long-Arm Jurisdiction .............................................................................. 37
B. Forum and Jurisdiction Selection Clause: Mandatory Versus Permissive .................................................. 42
XV. LANDLORD AND TENANT RELATIONSHIP .................................................. 43
A. Formalities of Lease Execution: Limited Liability Company ....................................................................... 43
B. Purchase Option in Lease ........................................................................ 45
XVI. PIERCING THE CORPORATE VEIL ................................................................ 46
XVII. TAXES .................................................................................................. 47
XVIII. TORTS .................................................................................................. 47
A. Claims Arising from Alleged Misrepresentations by Mortgage Lender .......................................................... 47
B. Product Liability and Negligence ............................................................... 49
C. Professional Liability ................................................................................... 50
XIX. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS ... 50
A. Jurisdiction Over Judgment Debtor .............................................................. 50
B. Creditors’ Claims: Inherited IRA ................................................................. 51
C. Construction Lien: Strict Compliance ......................................................... 52
D. Usury ........................................................................................................... 53
E. National Bank: Right to Sue in Florida ....................................................... 54
F. “No Lien” Notice .......................................................................................... 55
G. Secured Party’s Right to Consigned Property ............................................ 56
H. Tolling of Statute of Limitations ................................................................. 57
I. Disposition of Collateral .............................................................................. 58
J. Documentary Tax Stamps: Promissory Note .............................................. 59
I. INTRODUCTION

This year’s survey of cases includes a number of important decisions affecting business owners’ interests in personal and real property. For example, in Olmstead v. Federal Trade Commission, the Supreme Court of Florida held, but not without a strong dissenting opinion—and not without creating uncertainty as to the right of a creditor to reach the membership interest of a member of a multi-member limited liability company (LLC)—that a judgment creditor may reach the entire membership interest of the owner of a single-member of a Florida LLC. A Florida district court of appeal decided in Robertson v. Deeb that an individual retirement account (IRA) beneficiary’s interest in an “inherited IRA” is subject to garnishment by creditors. And in State v. Hanson, another Florida district court of appeal held that enforcement of a foreign income tax judgment in Florida was not against Florida’s public policy. On the takings front, in M & H Profit, Inc. v. City of Panama City, yet another Florida district court of appeal held that the Bert J. Harris, Jr. Private Property Rights Protection Act (Bert Harris Act) did not apply where the property owner had not formally filed its development application at the time the city enacted a height and set-back ordinance, but dissent was voiced here as well.

This year’s survey addresses, with only limited exceptions, cases of first impression, cases certifying or identifying conflicts between the Florida District Courts of Appeal, and questions certified to the Supreme Court of Florida by the Florida District Courts of Appeal or the United States Court of Appeals for the Eleventh Circuit.

1. 44 So. 3d 76 (Fla. 2010); see infra note 63 and accompanying text.
2. See Olmstead, 44 So. 3d at 86 (Lewis, J., dissenting, in whose opinion Polston, J., concurred).
3. Id. at 83 (majority opinion).
4. 16 So. 3d 936 (Fla. 2d Dist. Ct. App. 2009); see infra note 521 and accompanying text.
5. Robertson, 16 So. 3d at 939–40.
6. 36 So. 3d 879 (Fla. 5th Dist. Ct. App. 2010) (per curiam).
7. Id. at 880.
8. 28 So. 3d 71 (Fla. 1st Dist. Ct. App. 2009).
9. Id. at 73, 76.
10. Id. at 78 (Thomas, J., dissenting).
II. ALTERNATIVE DISPUTE RESOLUTION

In a contract dispute, the parties agreed to the abatement of litigation and the submission of the case to arbitration. After the arbitrator rendered his decision in favor of Commercial Interiors Corp. of Boca Raton (Commercial), Pinkerton & Laws, Inc. (Pinkerton) successfully moved the trial court to set aside the order of the arbitrator. Pinkerton’s argument was that the contracts were illegal under section 489.128 of the Florida Statutes because Commercial did not have a contractor’s license. The trial court concluded that the arbitration provision in both contracts and the contracts themselves—which were on forms that Pinkerton drafted—were unenforceable, finding that “the arbitrator had misapplied section 489.128.” Commercial appealed, and the Fifth District Court of Appeal reversed. In Buckeye Check Cashing, Inc. v. Cardegna, the Supreme Court of the United States held that under the Federal Arbitration Act, also applicable to cases brought in state court, “the issue of [a] contract’s validity is [decided] by the arbitrator in the first instance” and not by the court. This rule has also been applied to decisions under the Florida Statutes. Here, the arbitrator had in the first instance decided that the contracts were valid. Next, the appellate court listed the five grounds under section 682.13 of the Florida Statutes for asking the court to set aside the arbitrator’s decision:

(a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by the arbitrator appointed, corruption in any of the arbitrators or umpire, or misconduct pre-

12. Id.
13. Id. Section 489.128 of the Florida Statutes provided that “[a]s a matter of public policy,” contracts made by unlicensed contractors are unenforceable by the contractor. FLA. STAT. § 489.128 (2002) (amended 2003).
14. Commercial Interiors Corp. of Boca Raton, 19 So. 3d at 1063.
15. Id. at 1063, 1065.
17. Id. at 446; Commercial Interiors Corp. of Boca Raton, 19 So. 3d at 1063; accord Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778–79 (2010).
18. See Commercial Interiors Corp. of Boca Raton, 19 So. 3d at 1064. The Fifth District Court of Appeal did not rule as to whether this case was governed by the Federal Arbitration Act (FAA), but that on the issue of who decides the contract’s validity, the law is effectively the same, and on the other issue—the grounds to set aside an arbitration award—it did not matter whether the Florida statute or the FAA applied, since “the grounds for relief are essentially the same.” Id. at 1063–64, 1064 n.2.
19. Id. at 1063.
judicating the rights of any party; (c) the arbitrators or the umpire in the course of exercising jurisdiction exceeded their powers; (d) the arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 682.06, as to prejudice substantially the rights of a party; (e) there was no agreement or provision for arbitration subject to this law...  

It appeared to the Fifth District Court of Appeal that the trial judge "simply disagreed with the arbitrator's application of the law to the facts." That was not enough to set aside the arbitrator's ruling. In conclusion, the district court noted that under Schnurmacher Holding, Inc. v. Noriega, the arbitrator's error of law was insufficient to set aside an arbitration award.  

In another arbitration case, a provision in an arbitration agreement allowed the contesting parties to each choose an arbitrator, and the two arbitrators so chosen would then pick a "neutral arbitrator." Another provision directed that claims under the agreement be decided by a "neutral panel of arbitrators." One party objected to the other's choice of an arbitrator as being biased. The other party argued that the arbitrator selected by a party did not have to be neutral. The trial court agreed with the objecting party and ordered that another arbitrator be chosen. The Second District Court of Appeal affirmed the trial court per curiam. Judge LaRose, in a specially concurring opinion written in support of the per curiam decision, noted that the American Arbitration Association allows for the parties to select non-neutral arbitrators if the parties so agree, but there was no agreement to that effect here.  

20. Id. at 1064.
21. Id.
22. Commercial Interiors Corp. of Boca Raton, 19 So. 3d at 1064.
23. 542 So. 2d 1327 (Fla. 1989).
24. Commercial Interiors Corp. of Boca Raton, 19 So. 3d at 1064 (citing Schnurmacher Holding, Inc., 542 So. 2d at 1329).
26. Id. (quoting the parties' arbitration agreement).
27. Id.
28. Id.
29. Id.
30. Whitehead, 23 So. 3d at 1281 (per curiam) (denying the petitioners' writ of certiorari).
31. Id. at 1281–82 (LaRose, J., specially concurring).
III. ATTORNEYS' FEES

In *BDO Seidman, LLP v. Bee*, Mr. Bee (Partner) had been a Florida partner in BDO Seidman, LLP (Partnership), and Partner and Partnership had executed a three-page agreement titled "Understanding Regarding Continued Employment" (the Understanding). The Understanding provided compensation to Partner that included a guaranteed payment for the following four years and a bonus for the fiscal year in which the agreement was signed. Partnership sought to rescind the Understanding and to "terminate[e] [Partner]'s partnership interest for cause." After prevailing in arbitration, Partner sued Partnership for attorney's fees under section 448.08 of the Florida Statutes. Section 448.08 allows an award of costs and attorney's fees in a suit seeking unpaid wages. Neither the Understanding nor the partnership agreement contained a provision regarding an award of costs and attorney's fees to the prevailing party should a dispute arise under the agreements. The trial court awarded Partner $286,655.50 as attorney's fees based on section 448.08, and Partnership appealed. The Third District Court of Appeal stated the question before it as "whether an attorney's fee statute applicable to an action for 'unpaid wages' . . . applies to a compensation dispute between a partner and an LLP." Partnership asserted that Partner was a co-owner asking for partnership profits, not an employee claiming unpaid salary. Partner testified that he reported his income from Partnership based on the information provided in the partnership Form Schedule K-1 provided to him. Noting that this appeared to be a matter of first impression, the Third District, based on the record presented, decided that section 448.08 did apply. The arbitrator had determined that the Understanding existed separately from the partnership agreement, and the trial court found that the Understanding could be characterized as an employment agreement. The arbitrator's findings of fact or law, even if mistaken, were not within Florida's sta-

32. 24 So. 3d 1278 (Fla. 3d Dist. Ct. App. 2010).
33. 1d. at 1279.
34. 1d.
35. 1d. at 1280.
36. 1d. at 1281; Fl. Stat. § 448.08 (2008).
37. *BDO Seidman, L.L.P.*, 24 So. 3d at 1279 n.1.
38. 1d. at 1280.
39. 1d. at 1281.
40. 1d. at 1279 (citations omitted).
41. 1d. at 1281.
42. *BDO Seidman, L.L.P.*, 24 So. 3d at 1280.
43. 1d. at 1279, 1281.
44. 1d.
tutory grounds for setting aside an arbitration award under section 682.13 of the Florida Statutes. The Third District Court affirmed the fee award, adding that if partnerships wish to avoid the effect of section 448.08, "it may be advisable to put that intention in writing."

IV. BUSINESS ENTITIES, ARRANGEMENTS, AND AGREEMENTS

A. Administratively Dissolved Foreign Corporation: Right to Maintain Suit in Florida

Once a foreign corporate plaintiff has been administratively dissolved, may it continue to pursue an action in court? Under the facts presented in Selepro, Inc. v. Church, the Fourth District Court of Appeal answered yes. Selepro, Inc. (Corporation), a Delaware corporation, qualified in 2003 to do business in Florida. In 2004, Corporation sued an officer/shareholder, a former employee, and another corporation alleging breach of contract and several torts, including conversion and misappropriation. Corporation filed amended complaints, and in 2005, at the time of the filing of its Third Amended Complaint, Corporation was a valid corporation in Delaware and was still "authorized to do business in Florida." However, in March 2006, approximately five years after it had incorporated in Delaware, Corporation's existence was terminated by the State of Delaware. About six months later, in September 2006, Florida administratively revoked Corporation's authority to do business in Florida. More than a year later, in December 2007, the two non-corporate defendants successfully moved for summary judgment relying on sections 607.1501 and 607.1502(1) of the Florida Statutes. The

46. BDO Seidman, L.L.P., 24 So. 3d at 1281.
47. 17 So. 3d 1267 (Fla. 4th Dist. Ct. App. 2009).
48. Id. at 1268.
49. Id.
50. Id. at 1268, 1268 n.1. The other claims were "diversion of corporate assets, . . . fraud, . . . defamation, and tortious interference with business opportunity." Id. at 1268.
51. Selepro, Inc., 17 So. 3d at 1268.
52. Id.
53. Id.
54. See id. at 1269. Section 607.1501 of the Florida Statutes provides that "[a] foreign corporation may not transact business in [Florida] until it obtains a certificate of authority from the Department of State." Id. at 1270 (quoting Fla. Stat. § 607.1501(1) (2010)). Under section 607.1502(1) of the Florida Statutes, if a foreign corporation engages in business without obtaining such certificate, "the corporation 'may not maintain a [court proceeding]' until a certificate has been obtained. Selepro, Inc., 17 So. 3d at 1270 (quoting Fla. Stat. § 607.1502(1)). However, section 607.1501(2)(a) says that "'[m]aintaining, defending, or set-
Fourth District reversed.\textsuperscript{55} The district court cited \textit{Allied Roofing Industries, Inc. v. Venegas}\textsuperscript{56} for the proposition that under sections 607.1421(3) and 607.1405(1) of the \textit{Florida Statutes}, winding up of a dissolved corporation's business may include suing and defending claims connected to the winding up of the corporation's business.\textsuperscript{57} The Fourth District said that "an administratively dissolved corporation has the capacity to sue . . . if necessary" in winding up its business and liquidating.\textsuperscript{58} Although the statutory provisions relied on by the defendants require that a foreign corporation "transacting business" in Florida keep its Florida authorization to do so, in effect, if it desires to maintain actions in Florida courts, Corporation was not transacting business.\textsuperscript{59} Rather, it was winding up its business affairs, and as part of that process was permitted by section 607.1421(3) of the \textit{Florida Statutes} to maintain a court action.\textsuperscript{60} The Fourth District Court said that "[i]n conclusion, the plaintiff filed suit when it was in good standing" and "[w]hen the defendants filed their motion for summary judgment," the plaintiff was no longer transacting business.\textsuperscript{61} Accordingly, Corporation "should be permitted to maintain the proceeding solely to wind up its affairs [under] section 607.1421(3)."\textsuperscript{62}

B. Execution on Member's Entire Interest in Single-Member LLC

"Whether Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member limited liability company to satisfy an outstanding judgment" was the rephrased question certified by United States Court of Appeals for the Eleventh Circuit to the Supreme Court of Florida in \textit{Olmstead.}\textsuperscript{63} The Supreme Court of Florida

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{55} \textit{Id.} at 1270.
\item \textsuperscript{56} 862 So. 2d 6 (Fla. 3d Dist. Ct. App. 2003).
\item \textsuperscript{57} \textit{Selepro, Inc.}, 17 So. 3d at 1269 (citing \textit{Allied Roofing Indus., Inc.}, 862 So. 2d at 8); see also \textit{FLA. STAT.} §§ 607.1405(1), .1421(3).
\item \textsuperscript{58} \textit{Selepro, Inc.}, 17 So. 3d at 1269. Did the Fourth District Court of Appeals intend to limit its holding to situations where the plaintiff-corporation's suit had been filed prior to its administrative dissolution?\textsuperscript{59} \textit{Id.} at 1270.
\item \textsuperscript{59} \textit{Id.} at 1270. Section 607.1421(3) of the \textit{Florida Statutes} provides that a dissolved corporation may not engage in "business except [as] . . . necessary to wind up and liquidate." \textit{FLA. STAT.} § 607.1421(3).
\item \textsuperscript{60} \textit{Selepro, Inc.}, 17 So. 3d at 1269. \textit{Id.} (citing \textit{FLA. STAT.} § 607.1421(3)).
\item \textsuperscript{61} \textit{Selepro, Inc.,} 17 So. 3d at 1270.
\item \textsuperscript{62} \textit{Selepro, Inc.,} 17 So. 3d at 1270.
\item \textsuperscript{63} \textit{Olmstead v. Fed. Trade Comm'n}, 44 So. 3d 76, 78 (Fla. 2010); see also \textit{supra} note 1 and accompanying text.
\end{enumerate}
\end{footnotesize}
answered in the affirmative. The court looked to section 56.061 of the Florida Statutes, which noted that "real and personal property, including 'stock in corporations, shall be subject to levy [by a judgment creditor] and sale under execution.'" The court stated that "[a]n LLC is a type of corporate entity," and an LLC ownership interest constitutes personal property "reasonably understood to fall within the scope of 'corporate stock.'" In the Florida Revised Uniform Partnership Act and the Florida Revised Limited Partnership Act, a charging order giving the judgment creditor access only to the judgment debtor's rights to profits and distributions from the partnership is made the exclusive remedy available to a judgment creditor with respect to partnership and limited partnership interests. Section 608.433(4) of the Florida Statutes authorizes a charging order against an LLC member's interest similar to that available to a judgment creditor against partnership and limited partnership interests. However, unlike partnership charging orders, LLC charging orders are not stated to be the exclusive remedy available to judgment creditors with respect to LLC interests. Therefore, a judgment creditor may proceed under section 56.061 against the judgment debtor member's entire right title and interest in the LLC. Justice Lewis, joined by Justice Polston, wrote a strong dissent. The ramifications of this decision remain to be seen.

C. Statutory Indemnification of Corporate Officer/Employee

The United States alleged that the vice president and general manager (Officer/Employee) of Banco Industrial de Venezuela, C.A. (Bank) for its Miami agency "facilitated the deposit" of drug money into accounts at Bank. Officer/Employee was prosecuted by the United States for alleged money laundering. The jury found her guilty on each of the ten counts, but "the trial judge granted [her] motion for judgment of acquittal [on] all

64. Olmstead, 44 So. 3d at 78.
65. Id. at 80 (quoting Fla. Stat. § 56.061 (2008)).
66. Id.
67. See id. at 82 (citing Fla. Stat. §§ 620.8504, .1703).
68. Id. at 81; Fla. Stat. § 608.433(4) (2010).
69. Olmstead, 44 So. 3d at 82.
70. See id.
71. See id at 83 (Lewis, J., dissenting, joined by Polston, J.).
72. See supra note 2 and accompanying text.
73. Banco Indus. de Venez., C.A., v. de Saad, 21 So. 3d 46, 47 (Fla. 3d Dist. Ct. App. 2009), reh'g granted by 28 So. 3d 44 (Fla. 2010).
74. Id.
counts." The United States appealed the trial court’s judgment. Officer/Employee subsequently agreed with the government that she would plead guilty to a single “count of money structuring,” and the government would withdraw its appeal. Officer/Employee, being unsuccessful in her subsequent request that Bank indemnify her for her attorney’s fees incurred in the federal prosecution and pay her past wages under the employment contract, brought an action against Bank. Her claim for indemnification was based on section 607.0850 of the Florida Statutes. In summary, this section provides that if a person is brought into an action by a third party “by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation,” the person is entitled to corporate reimbursement of his or her defense expenses “[i]f successful on the merits or otherwise” in defending against such claims. On motion for summary judgment, the trial court awarded Officer/Employee almost $3 million as indemnification and more than $1.6 million as indemnification to the assignee of Officer/Employee’s right to attorney’s fees and costs. The Third District Court of Appeal affirmed, relying heavily on the Delaware case of Perconti v. Thornton Oil Corp., that the Third District said interpreted a Delaware statute quite similar to section 607.0850 under facts similar to the case before it. The appellate court determined that Officer/Employee had been “successful on the merits or otherwise” in the federal proceeding and that she had been prosecuted by the government “by reason of the fact” that she was an officer of Bank. The Third District quoted Perconti for the proposition that the statute “does not require a determination that the corporate officer was ‘innocent.’” Officer/Employee’s plea deal did not change the result. Thus, the Third District followed the Delaware court’s holding when the court con-

75. Id.
76. Id.
77. Id. at 47–48.
78. Banco Indus. de Venez., C.A., 21 So. 3d at 48.
79. Id.
80. Id. (alteration in original) (quoting FLA. STAT. § 607.0850(1), (3) (1999)).
81. Id. The assignee-attorney—who had defended Officer/Employee in the criminal action—intervened in Officer/Employee’s action against Corporation. Id. at 48 n.2 (citing Beeler v. Banco Indus. de Venez., 834 So. 2d 952 (Fla. 3d Dist. Ct. App. 2003), reh’g granted Banco Indus. de Venez., C.A., v. de Saad, 28 So. 3d 44 (Fla. 2010) (unpublished table decision).
83. Banco Indus. de Venez., C.A., 21 So. 3d at 48–49.
84. Id. at 49.
85. Id. (quoting Perconti, 2002 WL 982419, at *4).
86. See id.

https://nsuworks.nova.edu/nlr/vol35/iss1/1
cluded that for purposes of *Florida Statutes* section 607.0850, dismissal equals “success on the merits” as does “any result other than conviction.”

Another issue in the case was Officer/Employee’s claim for breach of her employment contract for which the lower court awarded her more than $1 million. Apparently, Bank had only suspended Officer/Employee without pay and had not actually fired her under the terms of her employment contract. The breach of employment contract award was also affirmed. Judge Schwartz specially concurred, expressing considerable displeasure over the result on the breach of contract claim. “Legal consequences are ‘determined not by what [something] is called, but by what it does’ and is.”

**D. Statute of Limitations: Florida Securities Law**

Sellers sold several Millennium Tower Condominium Hotel units to Purchasers in 2004. In 2008, after reading an article in *The Wall Street Journal* to the effect that “sale of the condominium could be considered the sale of securities,” Purchasers sued Sellers alleging that Purchasers had not received the required securities registration documentation. Purchasers relied on Chapter 517 of the *Florida Statutes*, the Florida Securities and Investor Protection Act, which requires, among other things, that purchase agreements be registered by securities sellers, and that purchasers be provided a prospectus. The suit was dismissed with prejudice as barred by the applicable statute of limitations. Purchasers appealed, and the Third District Court of Appeal affirmed. Under section 95.11(4)(e), the statute of limitations for a violation of Chapter 517 is two years, and it begins to run “from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence.” The statute of limitations is not tolled when the plaintiffs “are ignorant of the law on

87. *Id.*
88. *Banco Indus. de Venez., C.A.*, 21 So. 3d at 48.
89. *Id.* at 50.
90. *Id.*
91. *Id.* (Schwartz, J., specially concurring).
92. *Id.* at 51 (quoting Miami-Dade Cnty. v. Valdes, 9 So. 3d 17, 18 n.2 (Fla. 3d Dist. Ct. App. 2009)).
94. *Id.*
95. *Id.*; see *FLA. STAT.* §§ 517.011, 517.07(2) (2010).
96. *GLK, L.P.*, 22 So. 3d at 636.
97. *Id.*
98. *Id.* at 637 (quoting *FLA. STAT.* § 95.11(4)(e)).
which their claim is based” if they have “all the facts necessary to determine whether they have a cause of action.” Purchasers had “the necessary factual information” by the closing date of the sale in 2004. There was no concealment of the facts by Sellers because Purchasers “broadly alleged concealment [and] failed to plead fraud with particularity.” The delayed discovery doctrine, which applies in cases of fraud, would have delayed accrual of the statute of limitations only until Purchasers discovered or should have discovered a violation, and then only if Purchasers were blameless. The Third District Court of Appeal, citing McCullough v. Leede Oil & Gas, Inc., said that the delayed discovery rule is inapplicable here because “[a] seller of securities cannot conceal the fact that the securities ... are not registered.” The Third District held that Purchasers, having had possession in 2004 of all documents necessary to determine whether Purchasers had a claim, “cannot be considered blamelessly ignorant and invoke the delayed discovery rule for their nonregistration claim.”

V. CHOICE OF LAW AND CONFLICT OF LAWS

A. Recognition of Out-of-Country Judgment

Agri-Source Fuels, LLC (Buyer), a Florida limited liability company, with its principal office in Pensacola, Florida, conducted business in Florida only. Buyer bought steel tanks from a California company. The tanks were in Canada, and Buyer entered into an oral contract with EOS Transport, Inc. (Transporter), a Canadian company, under which Transporter would ship the tanks to Florida. Buyer never did business in Canada, but there were numerous communications between Buyer and Transporter regarding the shipments of the tanks, and payment was to be made in Canada. Buyer disputed payment for several of the shipments, and Transporter sued Buyer.
in the Supreme Court of British Columbia for breach of contract. Buyer did not defend in Canada, and a default judgment was entered against it. Transporter tried to have the judgment recognized under the Florida Uniform Out-of-Country Foreign Money-Judgment Act, sections 55.601-.607 of the Florida Statutes. The Escambia County Circuit Court concluded that the Canadian court did not have personal jurisdiction over Buyer, and the Canadian judgment was held unenforceable. Transporter appealed, and the First District Court of Appeal affirmed. A mandatory basis for not enforcing a foreign judgment is that the foreign court did not have personal jurisdiction over the defendant. Thus, there first needed to be a determination as to which country's law applies when determining if it was proper for the foreign court to exercise personal jurisdiction. Second, did the Canadian court properly exercise personal jurisdiction over Buyer? The appellate court observed that the Act does not address which country's law applies in making the determination of the acquisition of personal jurisdiction, and that this was an issue that has not been "squarely addressed" by any Florida court. The First District then discussed two approaches that have been used in other United States forums where similar statutes were involved. One line of cases first applies the law of the foreign jurisdiction but adds a due process "minimum contacts" requirement. The other approach applies the law of the forum asked to recognize the foreign judgment. The First District chose the first approach. The necessary minimum contacts with Canada by Buyer were not found. Purchases made from the forum state (Canadian) entity and contracting with the forum-state entity, whether

---

110. Id.
111. EOS Transp., Inc., 37 So. 3d at 351.
112. Id. at 351-52 (citing Uniform Out-of-Country Foreign Money-Judgment Recognition Act, Fla. Stat. § 55.601-.607 (2009)).
113. Id. at 351.
114. Id. at 351, 355.
115. Id. at 352.
116. EOS Transp., Inc., 37 So. 3d at 352.
117. Id.
118. Id.
119. Id.
120. Id.
121. EOS Transp., Inc., 37 So. 3d at 352 (citing Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 142 n.10 (1st Cir. 2010)).
122. Id. at 352-53.
123. Id. at 354.
considered separately or together, were not sufficient to establish Buyer’s minimum contacts with Canada.\textsuperscript{124}

**B. Choice of Law: Provision in Mortgage but Not in Related Note**

Mortgagors, who were Florida residents, borrowed against real property they owned in Georgia.\textsuperscript{125} The second mortgage they signed contained a Georgia choice of law provision.\textsuperscript{126} However, the mortgage note they signed was silent as to choice of law.\textsuperscript{127} Mortgagors defaulted on the first and second mortgages, and the first mortgagee, in Georgia proceedings, foreclosed on its mortgage.\textsuperscript{128} The assignee of the second mortgage and promissory note, New Falls Corporation (Assignee), did not participate in the Georgia proceedings, and its mortgage lien was extinguished.\textsuperscript{129} Assignee did subsequently bring suit against Mortgagors in the Circuit Court in Miami-Dade County to enforce the note.\textsuperscript{130} Mortgagors argued that the suit on the note was time barred by the five-year statute of limitations of section 95.11(2)(b) of the *Florida Statutes* for a suit based “on a contract, obligation, or liability founded on a written instrument.”\textsuperscript{131} Assignee contended that the action was timely instituted, claiming that the Georgia statute of limitations of six years applied because the choice of law provision in the mortgage also applied to the note.\textsuperscript{132} The trial court found that the Georgia six-year statute of limitations applied to the note and entered summary judgment in favor of Assignee.\textsuperscript{133} Mortgagors appealed, and the Third District Court of Appeal reversed.\textsuperscript{134} The appellate court agreed with Mortgagors that the Florida

\begin{itemize}
\item \textsuperscript{124} *Id.* (citing Bohlander v. Robert Dean & Assoc. Yacht Brokerage, Inc., 920 So. 2d 1226, 1229 (Fla. 3d Dist. Ct. App. 2006) (per curiam); Aluminator Trailers, L.L.C. v. Loadmaster Aluminum Boat Trailers, Inc., 832 So. 2d 822, 824 (Fla. 2d Dist. Ct. App. 2002); Bruzzone Roldos v. Americargo Lines, Inc., 698 So. 2d 1368, 1370 (Fla. 3d Dist. Ct. App. 1997) (per curiam); Marsh Supermarkets, Inc. v Queen’s Flowers Corp., 696 So. 2d 1207, 1209 (Fla. 3d Dist. Ct. App. 1997)).
\item \textsuperscript{125} *Sims v. New Falls Corp.*, 37 So. 3d 358, 359 (Fla. 3d Dist. Ct. App. 2010).
\item \textsuperscript{126} *Id.* at 360–61.
\item \textsuperscript{127} *Id.* at 360.
\item \textsuperscript{128} *Id.* at 359.
\item \textsuperscript{129} *Id.*
\item \textsuperscript{130} *Sims*, 37 So. 3d at 360. No document other than the promissory note was attached to Assignee’s complaint. *Id.*
\item \textsuperscript{131} *Id.* at 360 n.2 (quoting *FLA. STAT.* § 95.11(2)(b) (2007)).
\item \textsuperscript{132} *Id.* at 360 n.2, 361. The provision in the mortgage provided that “[t]he state and local laws applicable to this Deed shall be the laws of the jurisdiction...[where] the Property is located.” *Id.* at 360 (emphasis added).
\item \textsuperscript{133} *Sims*, 37 So. 3d at 363 (Cope, J., dissenting).
\item \textsuperscript{134} *Id.* at 362 (majority opinion).
\end{itemize}
statute of limitations applied, and the suit was time-barred.\textsuperscript{135} The mortgage and note were separate documents not to be read \textit{in pari-materia}.\textsuperscript{136} "Florida follows the doctrine of \textit{lex loci contractus}," which calls for choosing Florida's law to apply to the promissory note.\textsuperscript{137} Justice Cope dissented.\textsuperscript{138}

\section*{VI. CONSUMER RIGHTS

A. \textit{Truth in Lending Act} Disclosures

Mortgagor was married, but was the sole owner of the couple's principal residence in Florida.\textsuperscript{139} Mortgagees loaned money to Mortgagor in 2005 and took back a second mortgage on the homestead.\textsuperscript{140} Both Mortgagor and Mortgagor's wife (Wife) signed the mortgage, but only Mortgagor signed the mortgage note.\textsuperscript{141} Mortgagor defaulted, and Mortgagees instituted the subject foreclosure action in 2008.\textsuperscript{142} In 2006, however, Wife "purportedly exercised her right to cancel the transaction" because she had not been provided federal Truth in Lending Act (TILA)\textsuperscript{143} disclosures.\textsuperscript{144} Wife claimed that she had been entitled to the TILA disclosures and thus "was entitled to TILA's extended three-year time period for cancellation," and the trial court agreed, granting summary judgment in favor of Wife in the foreclosure action.\textsuperscript{145} Mortgagees appealed, taking the position that they were not required to provide TILA disclosures to Wife because she did not have an "ownership interest in the property at the time of the mortgage execution."\textsuperscript{146} Thus, the issue before the Fourth District Court of Appeal was whether Wife qualified as a "consumer" within the meaning of TILA and Regulation Z promulgated

\begin{thebibliography}{99}
\bibitem{135} Id.
\bibitem{136} Id. at 364.
\bibitem{137} Id. at 360. The appellate court noted that although Mortgagors were Florida residents when they signed the note, "they actually signed the documents while traveling to New Jersey, there [was] no contention made that the place of contract was New Jersey." \citeauthor{138}, 37 So. 3d at 360 n.3.
\bibitem{138} Id. at 362 (Cope, J., dissenting).
\bibitem{139} Gancedo v. Del Carpio, 17 So. 3d 843, 844 (Fla. 4th Dist. Ct. App. 2009).
\bibitem{140} Id. There apparently was no question that the property was in fact Mortgagor's homestead. Id. at 845.
\bibitem{141} Id. at 844.
\bibitem{142} Id.
\bibitem{144} Gancedo, 17 So. 3d at 844. Mortgagees did not provide the required disclosures to either Mortgagor or Wife. Id.
\bibitem{145} Id.
\bibitem{146} Id.
\end{thebibliography}
under TILA by the Federal Reserve Board. Only if Wife so qualified would she have been entitled to a TILA disclosure. To be a consumer, Wife had to have an ownership interest in the property. The Fourth District, on motion for rehearing, found the necessary ownership interest by reason of Wife's homestead interest under article X, section 4(c) of the Florida Constitution, and the summary judgment of the trial court was affirmed. Wife's ownership interest when she signed the mortgage made her a TILA consumer entitled to disclosure. Wife, therefore, could rescind the mortgage transaction and was entitled to the extended rescission period available in the case of TILA non-disclosure.

B. Deposit in Escrow

"Whether the escrow deposit requirement of Section 501.1375, Florida Statutes, applies to general contractors who contract to build a single-family residence upon land owned by the consumer at the time the contract is signed" was the question certified by the trial court to the Fourth District Court of Appeal, as restated by the District Court, in JPG Enterprises, Inc. v. McLellan. The Fourth District answered "no" to the question. Section 501.1375 of the Florida Statutes requires "building contractor[s]" and "developer[s]" of single-family and two-family residences to hold in escrow, deposits made with them by purchasers—absent a waiver of the requirement

147. Id. Judge May specially concurred to express her concern that the issue of homestead was "raised for the first time [on the] motion for rehearing." Gancedo, 17 So. 3d at 845 (May, J., specially concurring). Judge May stated that, while issues not raised in the brief of a party "are deemed waived and may not be considered for the first time in a motion for rehearing," Id. (citing Polyglycoat Corp. v. Hirsch Distrib., Inc., 442 So. 2d 958, 960 (Fla. 4th Dist. Ct. App. 1983)), she pointed out, relying on Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 644-45 (Fla. 1999), that "[a]s an appellate court, however, we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue." Gancedo, 17 So. 3d at 845 (May, J., specially concurring).

148. Gancedo, 17 So. 3d at 844 (majority opinion).

149. Id. at 844-45. Regulation Z defines "consumer" as:

a cardholder or a natural person to whom consumer credit is offered or extended. However, for purposes of rescission under [sections] 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

Id. (quoting 12 C.F.R. § 226.2(a)(11) (2010)).

150. Id. at 845.

151. Id.

152. Gancedo, 17 So. 3d at 845.

153. 31 So. 3d 821, 822 (Fla. 4th Dist. Ct. App. 2010) (emphasis omitted).

154. Id. at 823.
by the purchaser. 155 The Fourth District emphasized that the statute, in defining the terms "building contractors" and "developers" for the purpose of the section 501.1375 escrow provision, used the terms "purchase," "purchaser," "purchase price," "sale," and "seller," and in related provisions, referred a number of times to the "closing." 156 The "plain and ordinary sense" of these words "refer[s] to the purchase and sale of real property, in addition to" any structure that might be constructed on the land. 157 The Fourth District viewed this all as referring to transactions where the builder or developer was selling lots owned by the builder or developer—with buildings constructed or to be constructed on them—and not to transactions where the purchaser already owned the land. 158

C. FDUTPA Damages

Purchaser, in her fifth amended complaint, alleged that she bought a 2005 Bombardier Sea Doo Sportster (jet-boat), which started burning while she was riding it and later sank. 159 She sued Recovery Performance & Marine, LLC (Seller) under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) 160 asking for damages, which she described as her "'down payment, payments on the loan, interest, [and the] balance on the loan.'" 161 Seller successfully moved for summary judgment, Purchaser appealed, 162 and

155. Id. (discussing Fla. Stat. § 501.1375(3) (2008)).
156. Id. at 824.
157. Id.
161. Rodriguez, 38 So. 3d at 179.
162. Id. at 180. Purchaser also sought reversal of the trial court’s order that denied her motion to file a sixth amended complaint. Id. at 179–80. Purchaser claimed that the cause of action contained in the sixth amended complaint—breach of warranty—had not been alleged in any of the prior complaints, and therefore it was an abuse of discretion for the trial court to deny the motion. Id. at 181. The appellate court said that a review of the record showed that the cause of action had previously been raised in the fourth amended complaint with respect to which the trial court granted leave to amend. Id. at 182. Purchaser subsequently filed a fifth amended complaint that did not allege breach of warranty. Rodriguez, 38 So. 3d at 181. The Third District Court of Appeal, quoting its decision in Kohn v. City of Miami Beach, 611 So. 2d 538, 539 (Fla. 3d Dist. Ct. App. 1992) noted that "'[w]hile there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion.'' Rodriguez, 38 So. 3d at 181 (quoting Kohn, 611 So. 2d at 539). The trial court’s denial of Purchaser’s motion to file a sixth amended complaint was affirmed. Id. at 182.
the Third District Court of Appeal affirmed. Purchaser was asking for consequential damages, but FDUTPA only allows recovery of actual damages. Actual damages, in the context of FDUTPA, are defined by the case law as "the difference in the market value of the product . . . in the condition in which it was delivered and its market value in the condition in which it should have been delivered."

VII. CONTRACTS

A. Broker’s Commission

Business Specialists, Inc. (Broker) alleged that it contracted with Land & Sea Petroleum, Inc. (Seller) to find a purchaser for Seller’s real estate and business, and that Broker was to be paid a nine percent commission under the agreement. Seller entered into a written contract to sell the real estate and business. The contract with the prospective purchaser provided, among other things, that contract terms regarding Seller’s partial financing of the sale and the contemplated employment by the purchaser of Seller’s principal remained “to be negotiated during the due-diligence period.” When the sale did not close, Broker sued for its commission, alleging that Seller breached the agreement between Seller and Broker by failing to take certain required action pursuant to Seller’s agreement with the purchaser “during the due diligence period.” Seller’s motion for summary judgment was granted, and Broker appealed. The Fourth District Court of Appeal affirmed. An enforceable contract between purchaser and Seller had not been formed. A meeting of the minds is required for the contract to be an enforceable contract, and if essential contract terms have not been agreed upon, there is no meeting of the minds. The Fourth District, citing the Supreme Court of Florida’s decision in David v. Richman, held that for

163. Rodriguez, 38 So. 3d at 182.
164. Id. at 180.
165. Id. (quoting Rollins, Inc. v. Heller, 454 So. 2d 580, 585 (Fla. 3d Dist. Ct. App. 1984)).
167. Id. at 695.
168. Id.
169. Id.
170. Id. at 694.
172. Id. at 695.
173. Id.
174. 568 So. 2d 922 (Fla. 1990).
real estate transactions, terms of financing are essential.175 The district court held that not only were the terms of financing essential, but the continued employment of the seller’s principal was also an essential term.176 Absent an enforceable sales contract, Broker was not entitled to a commission.177 The Fourth District affirmed the trial court’s order of summary judgment in favor of Seller, noting that although there were some disputed issues of fact, those issues “were not genuine issues of material fact” since without an enforceable contract between Seller and the prospective purchaser, disputes—such as whether or not Seller complied with its obligations during the due-diligence time frame—“were not material to the cause of action.”178

B. Mutuality of Obligation Versus Mutuality of Remedies

Buyers entered into essentially identical contracts with Redington Grand, LLP (Developer) to buy condominium units.179 The contracts provided that if Developer defaulted, Buyers could choose between specific performance and repayment to them of their deposits, but if a Buyer defaulted, Developer could choose between specific performance and liquidated damages to be satisfied by keeping the Buyers’ deposits.180 The obvious difference between the two provisions was that Developer could recover damages upon default, but Buyers could not.181 Developer claimed that it finished the building on time, but Buyers refused to close.182 Buyers then sued Developer to recover their deposits, and Developer counterclaimed seeking specific performance, or alternatively, an award of damages.183 On

175. Bus. Specialists, Inc., 25 So. 3d at 695. Broker alleged that the missing financing terms were agreed to verbally. See id. at 696 n.1. However, one reason why this did not matter was that the Statute of Frauds required that those terms be in writing. Id. 176. Id. at 696. 177. Id. 178. Bus. Specialists, Inc., 25 So. 3d at 696. 179. Redington Grand, L.L.P. v. Level 10 Prop., L.L.C., 22 So. 3d 604, 605 (Fla. 2d Dist. Ct. App. 2009). 180. Id. at 606. The contracts required two deposits: one at the inception and the second when the roof of a unit was finished. Id. at 605–06. 181. Id. at 606. 182. Id. When Developer informed Buyers that the roofs were done, Buyers refused to pay the additional deposits taking the position that the roofs were not finished. Redington Grand, L.L.P., 22 So. 3d at 606. Buyers requested certain assurances, and when those were not forthcoming, Buyers declared Developer in default and demanded their deposits be returned to them. Id. Developer did not return the deposits and, prior to the originally agreed completion date, finished working, obtained certificates of occupancy, and set a closing date for the originally agreed to completion date. Id. 183. Id. at 606–07.
cross-motions for summary judgment, the trial court determined that "the default provisions in the contract[s are] illusory and mutually unenforceable, as the [Developer] has no real obligation." The trial court thus concluded that the contracts were unenforceable, entered summary judgment for Buyers, and ordered Developer to return Buyers' deposits. Developer appealed, and the Second District Court of Appeal reversed and remanded. The judgment below confused "mutuality of remedies," which relates to the method of enforcement, with "mutuality of obligation," which relates to the issue of consideration for the agreement. Mutuality of obligation is essential to the formation of a valid contract, but remedies "may differ without necessarily affecting the reciprocal obligations of the parties." The district court concluded that there was no question that "mutuality of obligation" existed, based on the mutual promises of Developer and Buyers, to sell and buy the units. The district court also held that even if there had been a lack of mutuality of obligation initially, complete performance under the contract by Developer would have cured the lack of mutuality, so that summary judgment in favor of Buyers would have been error. Furthermore, Buyers alleged that performance by Developer was not completed, which may have created a question of material fact which would have precluded the entry of summary judgment in favor of Buyers.

C. Indemnification Agreement

Homeowners hired On Target, Inc. (On Target) to find and repair a water leak in their home. The agreement Homeowners signed with On Target included an indemnification provision, which stated in part that "[p]roperty owner... hereby agrees to hold harmless On Target and On Target Technicians absolutely" with respect to any damages that might be caused by On Target's work in locating the leak "and to defend same in any action which

184. Id. at 607 (citations omitted).
185. Redington Grand, L.L.P., 22 So. 3d at 607. The court ordered Developer to pay interest on the deposits from the date of the contracts. Id.
186. Id. at 605, 609.
187. Id. at 608.
188. Id. (quoting Bacon v. Karr, 139 So. 2d 166, 169 (Fla. 2d Dist. Ct. App. 1962)).
189. Redington Grand, L.L.P., 22 So. 3d at 608.
190. Id.
191. Id. n.4; see also Bus. Specialists, Inc. v. Land & Sea Petroleum, Inc., 25 So. 3d 693, 695 (Fla. 4th Dist. Ct. App. 2010).
may develop pursuant to any of these activities." In doing the work, On Target found it necessary to drill a hole through a floor tile in the foyer of the residence. When all the repair work was finished, Homeowners were not able to find a tile that matched the damaged tile, and in response to the Homeowners' insurance claim with their insurance carrier, Allstate Floridian Insurance Company (Insurance Company), Insurance Company approved retiling the entire foyer at a cost of over $17,000. Insurance Company, as Homeowners' subrogee, then sought to recover that amount from On Target alleging breach of contract. "On Target answered [the] complaint and filed a third-party complaint against [Homeowner seeking] indemnification." Insurance Company later dismissed its action against On Target, and On Target then sued Homeowners, seeking attorney fees and costs incurred in defense of the subrogation action brought against it by Insurance Company. The trial court ruled against On Target, finding the indemnification language "vague and ambiguous" and thus not enforceable. A number of cases hold that indemnity agreements will not be enforced "to indemnify a party against its own wrongful conduct," unless the agreement so states clearly and unequivocally. Here, however, the indemnification clause was specific enough to enforce. The district court

193. Id. at 181–82.
194. Id. at 182.
195. Id. On Target's job was to be a temporary fix with permanent repairs to be provided independently by a plumber. Id.
196. On Target, Inc., 23 So. 3d at 182.
197. Id.
198. Id.
199. Id.
200. Id. at 181–82.
201. On Target, Inc., 23 So. 3d at 181, 186.
202. Id. at 183 (citing Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992); Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 489 (Fla. 1979); Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973); Gulf Oil Corp. v. Atl. Coast Line R.R. Co., 196 So. 2d 456, 457 (Fla. 2d Dist. Ct. App. 1967)).
203. Id. at 185. The Second District Court of Appeal distinguished the language in the Gulf Oil Corp. v. Atlantic Coast Line Railroad Co., 196 So. 2d 456 (Fla. 2d Dist. Ct. App. 1967), indemnification agreement previously before that court, where the agreement was not enforced, from the agreement currently under review, saying that in the earlier case, there was no "reference to indemnifying against the indemnitee's negligence." Id. at 184. The appellate court also pointed out that the cases, see supra note 202 and accompanying text, all involved indemnification against negligent acts of the indemnitee, whereas, in the present case, Insurance Company's action alleged breach of contract by On Target, Inc. Id. at 184. Even though "[t]he parties [did] not address the distinction between this case . . . and the other cases . . .
stated that “the indemnification provision in [the agreement] puts the [Homeowner] . . . on notice that the [work] may cause limited damage to the property and that On Target cannot be held liable for damage caused by it in performing the work that it was hired to do.”204 Further, since Insurance Company’s lawsuit against On Target sought relief for damages resulting from the work done by On Target, in connection with locating the leak, “the indemnity clause was applicable to On Target’s defense of the lawsuit” brought by Insurance Company.205

D. Rescission

Seller “transferred” its lease interest, as tenant of certain business premises, to Buyer as part of the installment purchase by Buyer of Seller’s business.206 Seller’s lease agreement with its landlord provided that Seller could not assign the lease nor sublet without the landlord’s consent, but Seller did not make written request for consent nor did Seller receive prior written consent from the landlord as required by the terms of the lease.207 Nevertheless, Buyer took possession of the premises, began doing business there, and made rent payments directly to the landlord.208 The landlord apparently did not object to Buyer’s occupancy of the premises.209 After about seven months, Buyer stopped making rent payments.210 Seller began to pay rent again, gave Buyer notice to vacate, started eviction proceedings against Buyer, and sought damages, alleging breach of contract.211 Buyer counterclaimed seeking rescission of the contract based on Seller’s failure to obtain the landlord’s

[Insurance Company’s] complaint could be interpreted as an attempt to plead an intentional tort” and “[viewed in this light, [Insurance Company’s] complaint does portray On Target’s conduct as ‘wrongful.’ On Target, Inc., 23 So. 3d at 184 (emphasis added). If pleading an action in negligence was required to bring the case within the rules of the cited decisions, one might wonder if On Target, Inc., under the broad language of the “indemnification” agreement, could exculpate itself from intentional torts. See, e.g., Loewe v. Seagate Homes, Inc., 987 So. 2d 758, 760 (Fla. 5th Dist. Ct. App. 2008); Barbara Landau, 2007–2008 Survey of Florida Law Affecting Business Owners, 33 NOVA L. REV. 81, 127 (2008).

204. On Target, Inc., 23 So. 3d at 185.
205. Id.
206. AVVA-BC, L.L.C. v. Amiel, 25 So. 3d 7, 8–9 (Fla. 3d Dist. Ct. App. 2009). The agreement for sale was a one-page handwritten document. Id. at 8.
207. Id. at 9 n.1.
208. Id. at 9.
209. See id. at 11. The appellate court found that there was conflicting evidence as to “whether the landlord acquiesced to [Buyer’s] tenancy,” but it does not appear that either Buyer or Seller claimed that the Landlord expressly objected to Buyer’s presence. Amiel, 25 So. 3d at 12.
210. Id. at 9.
211. Id.
consent to the lease "assignment." 212 The trial court, on motion for summary judgment, granted rescission to Buyer. 213 The Third District Court of Appeal reversed and remanded. 214 "[R]escission will not be granted for breach of contract, in the absence of fraud, mistake, undue influence, multiplicity of suits, cloud on title, trust, or some other independent ground for equitable interference." 215 Further, "rescission will not be granted for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one." 216 The district court explained that a dependent covenant goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. 217

The Third District concluded that the covenant to consent to the assignment could not be said to be dependent because the landlord never complained, and the lease assignment was not the "whole consideration," but rather, it was part of a business purchase agreement. 218 In addition, Buyer's actions over the seven months during which he knew that the landlord's consent had not been obtained amounted to "a waiver of [any] right to rescind." 219 Thus, the summary judgment granting Buyer's request for rescission was reversed. 220 What remained was Buyer's counterclaim that amounted to a breach of contract claim against Seller. 221 The Third District Court held that summary judgment would not be proper as to Buyer's breach of contract counterclaim because of the existence of genuine issues of material fact. 222 Specifically, there remained "a factual dispute regarding

---

212. Id. at 10.
213. Id.
214. Amiel, 25 So. 3d at 12.
215. Id. at 11 (quoting Richard Bertram & Co. v. Barrett, 155 So. 2d 409, 411–12 (Fla. 1st Dist. Ct. App. 1963)).
216. Id. (quoting Steak House, Inc. v. Barnett, 65 So. 2d 736, 737 (Fla. 1953)).
217. Id. (quoting Steak House, Inc., 65 So. 2d at 738).
218. Id.
219. Amiel, 25 So. 3d at 11.
220. Id. at 12.
221. Id.
222. Id.
whether the landlord acquiesced to [Buyer's] tenancy, an issue that lies at the heart of this case."

E. Plain Meaning Rule

Buyers contracted with Sellers to purchase a house that was being constructed. The purchase price was $620,000, and Buyers made a deposit of $124,000. Buyers insisted on inclusion of a provision that made the contract "contingent upon this property appraising for no less than $620,000 to be conducted by a local appraiser." Prior to closing, Buyers obtained a local appraisal that valued the property at $560,000. Sellers obtained an appraisal for $635,000. Buyers declared the agreement terminated based on the $560,000 appraisal, and Sellers sued for breach of contract, asking the trial court to award them liquidated damages, consisting of Buyers' deposit. The trial court considered parol evidence regarding "the parties' intent and conduct relating to the contingency" and ultimately ruled for Sellers. The Second District Court of Appeal reversed and remanded. Parol evidence should not have been allowed because there was nothing ambiguous about the contract. The appellate court concluded that, as the contract was drafted, Buyers were entitled to walk away from the deal "if any appraisal valued the property at less than $620,000." Sellers argued that the court should read the language of the contract "to mean 'contingent upon any appraisal of at least $620,000,'" but the appellate court declined to rewrite the contract to relieve Seller from the "apparent hardship of an improvident bargain."

223. Id. In addition, if Buyer "abandoned the premises" rather than being forced to leave, there may have been "no compensable injury" suffered by Buyer, and consequently, no recovery for breach of contract—an element of the cause of action being absent. Amiel, 25 So. 3d at 12 n.3. And that was not all. Even if there were damages to Buyer, there was still the issue of mitigation. Id.


225. Id.

226. Id.

227. Id.

228. Id. at 785.

229. Gibney, 32 So. 3d at 785.

230. Id.

231. Id. at 786.

232. See id. at 785.

233. Id.

234. Gibney, 32 So. 3d at 785–86 (quoting Beach Resort Hotel Corp. v. Wieder, 79 So. 2d 659, 663 (Fla. 1955) (en banc)).
F. Latent Versus Patent Ambiguity

Ms. Barrington and Mr. Unger (Agents) entered into contracts to serve as real estate agents for Gryphon Investments, Inc. doing business as Re/Max Excellence (Re/Max). Their independent contractor agreements with Re/Max provided in part, with respect to termination of the agreements, "that Re/Max ‘may retain 25% of the commission earned by [the Agent], above and beyond the amounts required in this Agreement, to cover [Re/Max’s] costs of bringing the transaction to closure after [the Agent’s] termination date.’" Agents notified Re/Max that they were terminating the agreements, and after the notice, several transactions as to which Agents had previously been involved went to closing. Agents sued Re/Max alleging breach of contract and failure to pay Agents more than $46,000 due to them, claiming that Re/Max improperly withheld these amounts as commissions under the 25% provision in the agreement. The court granted summary judgment in favor of Re/Max. The Second District Court of Appeal reversed and remanded. The Second District took the opportunity to discuss the difference between latent and patent contract ambiguities. "[A] patent ambiguity is that which appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." A latent ambiguity exists "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." A latent ambiguity existed because of

236. Id.
237. Id.
238. Id. The claim for $46,221.39 is a summation of $18,550.07 from Barrington and $27,671.32 from Unger. Id.
239. Barrington, 32 So. 3d at 670.
240. Id. at 670–71.
241. Id. The Second District Court of Appeal believed that the agreement contained a patent ambiguity because of what it considered two conflicting provisions. Id. at 670. One provision allowed Re/Max to retain, after termination of the agreements, 25% of the commission that the Agents earned. Id. However, a later provision said that the retaining of the commissions was to cover the costs of completing the transactions. Barrington, 32 So. 3d at 670. Thus, noted the appellate court, it was unclear whether Re/Max could keep the full 25% even if the actual costs were less than the full 25%. Id. But since "Agents did not raise this specific issue, it is not before us," the court said. Id.
242. Id. (quoting Crown Mgmt. Corp. v. Goodman, 452 So. 2d 49, 52 (Fla. 2d Dist. Ct. App. 1984)).
243. Id. at 670–71 (quoting Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, L.L.C., 915 So. 2d 657, 659 (Fla. 2d Dist. Ct. App. 2005)).
evidence submitted by affidavit on the motion for summary judgment to the
effect that Re/Max had not withheld the full 25% in other instances, suggest-
ing that perhaps it was not the intent of the parties to withhold the full 25% if
actual costs of completing Agents' transactions were not that much.244
Summary judgment should not have been granted in the face of the latent
ambiguity.245 "[W]hen an agreement contains a latent ambiguity, . . . the
issue of the correct interpretation of the agreement is an issue of fact which
precludes summary judgment."246 Judge Kelly dissented.247

VIII. DEEDS, MORTGAGES, AND LIS PENDENS

A. Mortgage Foreclosure: Appointment of Receiver

Lender held a mortgage on rental real estate, and when the mortgage
went into default, the trial court ordered that Borrower (Landlord) comply
with the assignment of rents clause in the mortgage.248 This order, entered in
January 2009, directed Borrower to use the rents only for the property's
maintenance and operation.249 Any rents not needed for those purposes were
to go into the court registry.250 Borrower was also to provide monthly ac-
countings to Lender and the court.251 Two months later, Lender, by emer-
gency motion, asked the court to appoint a receiver.252 Although there was
no dispute about Borrower's failure to comply with the court's order,253 the
trial court refused Lender's emergency request for a receiver.254 Lender ap-
pealed, and the Third District Court of Appeal reversed and remanded.255
First, Lender demonstrated substantial likelihood of success on the merits of
its case, a prerequisite for the appointment of a receiver.256 In addition, in a

244. Barrington, 32 So. 3d at 671.
245. Id.
246. Id. (quoting Mac-Gray Servs., Inc., 915 So. 2d at 659–60).
247. Id. at 671–72 (Kelly, J., dissenting).
The order was entered in January 2009 but was made retroactive to December 15, 2008. Id.
249. Id.
250. Id.
251. Id.
252. Keybank Nat'l Ass'n, 15 So. 3d at 940.
253. Id. No rents had been deposited into the court registry, and no accountings had been
given with respect to the three-month period between the December 2008 effective date of the
court's order and the March hearing on the emergency motion seeking appointment of a re-
ceiver. Id.
254. Id.
255. Id. at 940–41.
256. Keybank Nat'l Ass'n, 15 So. 3d at 940.
mortgage default setting, if additional security is given in the form of a pledge of rents, a receiver should be appointed upon application if the rents are not being applied to the mortgage, unless the mortgagor makes it clear that the mortgaged real estate "will sell for enough to pay the debt and charges due the mortgagee" and the mortgagor establishes "that there is no equitable need to disturb the [mortgagor's] possession." The mortgagor failed to do so. The fact that the trial court had issued a contempt show cause order to the mortgagor was not a substitute for the appointment of a receiver.

B. Mortgage Foreclosure: Disposition of Cash Surplus

Mortgagor owned real estate subject to a first mortgage held by Wells Fargo Bank, N.A. (First Mortgagee) and to a second mortgage held by Mr. Suarez (Second Mortgagee). Mortgagor defaulted on both mortgages, and in September 2007, a notice of lis pendens was filed by First Mortgagee, followed by the filing in January 2008 of foreclosure action naming Mortgagor and Second Mortgagee as defendants. On the date of the filing of the lis pendens notice, Mortgagor owned the property. Beginning approximately two months after First Mortgagee's filing of its lawsuit, Second Mortgagee started an independent suit against Mortgagor to foreclose the second mortgage, obtained a final judgment of foreclosure, bought the property at the foreclosure sale, and received a certificate of title to the property from the Clerk of the Circuit Court. This title was, of course, subject to First Mortgagee's mortgage. Then there was another foreclosure sale after First Mortgagee obtained its judgment of foreclosure, and Second Mortgagee again purchased the property. This foreclosure sale resulted in a surplus of over $20,000, and both Mortgagor and Second Mortgagee claimed the surplus. The Third District Court of Appeal affirmed. Section 45.032(1)(a)


258. *Id.* at 941.

259. *Id.*


261. *Id.*

262. *Id.*

263. *Id.* at 410–11.

264. *Id.* at 411. On appeal, the Third District Court of Appeal noted, "There is no issue in this appeal regarding disposition of the proceeds from that sale." *Suarez*, 20 So. 3d at 410.

265. *Id.* at 411.

266. *Id.*
of the *Florida Statutes*, as amended in 2006, provides that, for purposes of disposition of foreclosure surplus, the "owner of record" of the property is defined as "the person or persons who appear to be owners" on the date the lis pendens is filed. Entitlement of the owner of record to the surplus after subordinate liens have been satisfied is a rebuttable legal presumption. Here, Second Mortgagee was unable to overcome the presumption on any basis set forth in the statute as grounds for rebutting the presumption. Second Mortgagee was the owner of the property at the time of the First Mortgagee's foreclosure sale, but that is not what the statute requires. To overcome the presumption, Second Mortgagee had to prove that he was a "grantee or assignee" of the right to the surplus as the result of an involuntary transfer or assignment such as by inheritance or the appointment of a guardian. The Third District emphasized several times that the legislature "abrogated the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale." 

C. Mortgage Foreclosure: Payment of Condominium Assessments

Is a mortgagee liable for monthly condominium assessments during foreclosure proceedings on a condominium unit? In *U.S. Bank National Ass'n v. Tadmore*, the Third District Court of Appeal said no, even though there had been more than a year's delay in the activity of record with respect to the litigation. The trial court had entered an order that the Mortgagee proceed with the foreclosure action within thirty days, and if it did not, it would be required to pay the monthly condominium assessments on the unit involved. The Third District reversed because the condominium association conceded that the Mortgagee was not contractually obligated to pay the assessments, and section 718.116(1)(b) of the *Florida Statutes* requires such payments only after title is acquired. The Third District, quoting the Su-
Supreme Court of Florida in *Flagler v. Flagler*, 278 said that "'courts of equity have [no] right or power under the law of Florida to issue such order[s] it considers to be in the best interest of 'social justice' at the particular moment without regard to established law.' " 279 Several months later, when the Fourth District Court of Appeal in *Deutsche Bank National Trust Co. v. Coral Key Condominium Ass’n (at Carolina)* 280 was presented with the same question as the Third District, the Fourth District, relying on *U.S. Bank National Ass’n* and section 718.116(1)(b) of the *Florida Statutes*, also said no. 281

A related issue involving unpaid common expenses that accrued or came due prior to the mortgagee’s acquisition of title to the mortgaged property was presented to the Second District Court of Appeal in *Coral Lakes Community Ass’n v. Busey Bank, N.A.* 282 In 2006, Busey Bank (Mortgagee) loaned the Mortgagors over $250,000 for the purchase of property in Coral Lakes, and the loan was secured by a first mortgage and note. 283 Mortgagors were behind in their payments toward the mortgage and note as well as on homeowners’ association (the Association) assessments. 284 Mortgagee filed suit naming Mortgagors and the Association as defendants, and Mortgagee successfully foreclosed on Mortgagors’ property. 285 The Association sought to collect its past due assessments on the property from the Mortgagee. 286 Although section 720.3085(2) of the *Florida Statutes*, which became effective in 2007, would, on its face, seem to dispose of the matter, there was a question of the constitutionality of retroactive application of the statute. 287 Section 720.3085(2) provides that mortgages are subordinate to the claims for common expense assessments—with a cap provided by the statute. 288

---

(b) The liability of a first mortgagee . . . who acquire[s] title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that become due prior to the mortgagee’s acquisition of title is limited to the lesser of: 1. The unit’s unpaid common expenses and regularly periodic assessments which accrued or came due during the [six] months immediately preceding the acquisition of title . . . or 2. One percent of the original mortgage debt . . .

*Id.* (quoting FLA. STAT. § 718.116(1)(b) (2009)).

278. 94 So. 2d 592 (Fla. 1957) (en banc).
279. *U.S. Bank Nat’l Ass’n*, 23 So. 3d at 824 (quoting Flagler, 94 So. 2d at 594).
280. 32 So. 3d 195 (Fla. 4th Dist. Ct. App. 2010).
281. *Id.* at 196. The trial court, in *Deutsche Bank National Trust Co.* had, like the trial court in *U.S. Bank National Ass’n*, ruled that it was only "fair and equitable" to require the mortgagee to pay monthly assessments if the foreclosure proceedings were delayed without good reason. *Id.* at 195.
282. 30 So. 3d 579, 581 (Fla. 2d Dist. Ct. App. 2010).
283. *Id.*
284. *Id.*
285. *Id.* at 581, 583.
286. *Id.* at 582.
287. *Coral Lakes Cnty. Ass’n*, 30 So. 3d at 583.
288. FLA. STAT. § 720.3085(2)(a), (c) (2010).
The Declaration of Covenants and Restrictions of Coral Lakes Community Ass’n, Inc. (the Declaration), on the other hand, contained a provision that subordinated claims for unpaid homeowners’ association assessments to a first mortgagee’s claim upon foreclosure or deed in lieu of foreclosure.\footnote{Coral Lakes Cmty. Ass’n, 30 So. 3d at 581.} The trial court held that the Declaration trumped the statute and ruled for Mortgagee.\footnote{Id. at 583–584.} The Second District affirmed, concluding that “[t]o hold otherwise would implicate constitutional concerns about impairment of vested contractual rights.”\footnote{Id. at 584.}

D. Mortgage Foreclosure: Right to Statutory Attorney Fees

The Coastal Community Bank (Mortgagee) brought a foreclosure action, and the Mortgagors defaulted.\footnote{See Coastal Cmty. Bank v. Jones, 23 So. 3d 757, 758 (Fla. 1st Dist. Ct. App. 2009).} Mortgagee, relying on the attorney’s fee provisions in the note securing the mortgage, then sought attorney’s fees of ten percent of the principal amount remaining on the promissory note.\footnote{Id.} The note provided that “‘reasonable attorneys’ fees shall be construed to mean 10% of the principal sum named in this note.’”\footnote{Id. (quoting language from the promissory note at issue in the case).} The trial court found the 10% amount to be “unconscionable” and refused to enforce the attorney’s fee provision of the promissory note.\footnote{Id.} Mortgagee did not put on any evidence regarding the claimed fees and instead on appeal relied on section 687.06 of the \textit{Florida Statutes}.\footnote{Coastal Cmty. Bank, 23 So. 3d at 758 (quoting FLA. STAT. § 687.06 (2008)).} This section states in part that “‘it shall not be necessary for the court to adjudge an attorney’s fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed [ten] percent of the principal sum named in said note, or other instrument in writing.’”\footnote{Id. at 759.} However, “‘unconscionability is an affirmative defense’” that Mortgagors were required to raise in responsive pleadings, but Mortgagors, having defaulted, did not raise the defense.\footnote{Id. at 759.} On the other hand, the attorney’s fee statute did not prevent the trial court from requiring...
evidence showing an entitlement to a fee; that is, evidence that Mortgagee
had paid its attorney any fees.\footnote{299}{See id.} Therefore, the First District Court of Ap-
peal affirmed the trial court but "[not] because the fee was unreasonable or unjust."\footnote{300}{Id.} Instead, the court "affirm[ed] because [Mortgagee] declined to
demonstrate at all the fee due from it to its lawyers."\footnote{301}{Coastal Cmty. Bank, 23 So. 3d at 759.}

IX. EMINENT DOMAIN

M & H Profit, Inc. (M & H) bought property that was not subject to any
city restrictions as to height or setback.\footnote{302}{M & H Profit, Inc. v. City of Panama City, 28 So. 3d 71, 73 (Fla. 1st Dist. Ct. App. 2009).} About six weeks later, the City of
Panama City (the City) enacted an ordinance that imposed such restrictions
in the zoning district where M & H's newly-purchased property was lo-
cated.\footnote{303}{Id.} When the City passed the ordinance, M & H had not yet applied to
the City for development approval.\footnote{304}{Id.} There were informal discussions be-
tween M & H and the City Planning Manager to the effect that M & H's in-
tended use would not satisfy the new restrictions.\footnote{305}{Id.} M & H sued the City for
damages under section 70.001 of the \textit{Florida Statutes}, the Bert Harris Act
(the Act).\footnote{306}{Id. at 74.} The trial court granted the City's motion to dismiss, and M & H
appealed.\footnote{307}{Id. at 74.} In \textit{M & H Profit, Inc.}, the First District Court of Appeal was
called upon to decide for the first time:

[\textit{W}hether a property owner can state a cause of action under \ldots
[\textit{the Bert Harris Act}], based upon \textit{mere} adoption of an ordinance of
general applicability pursuant to the police powers of a city in a
situation where that municipality has taken no further action con-
cerning application of the ordinance to a particular piece of proper-
ty.\footnote{308}{Id. at 73 (emphasis added).}

The First District affirmed.\footnote{309}{Id. at 78.} The Act only compensates owners who
suffer economic loss from the actual application of the regulation com-
plained of to an owner’s property.\textsuperscript{310} Here, there had been no specific application of the zoning ordinance to M & H’s property because M & H had not submitted a development plan for the property and been turned down.\textsuperscript{311} The Act did not change any “land use classification or zoning category [with respect to] any particular piece of property.”\textsuperscript{312} “District-wide height and setback restrictions are normally considered” related to the general welfare.\textsuperscript{313} M & H brought only a “facial challenge” to the ordinance when what was required to sustain its position was an “as-applied” challenge to the ordinance.\textsuperscript{314} Judge Thomas dissented, saying that “[t]he Act establishes broad protection for property owners who suffer economic loss from governmental property regulations and actions that attempt to impose societal costs onto property owners. . . . It seems quite clear to me that this legislation has not excluded an ordinance of general applicability . . . .”\textsuperscript{315} Judge Thomas concluded that the court “must simply enforce the plain terms of the statute.”\textsuperscript{316}

X. EMPLOYMENT LAW

A. Benefits Accrued Prior to Termination of an At-Will Employee

Mr. Patwary (Employee) entered into a contract with Evana Petroleum Corporation (Corporation) that provided, among other things, that Employee would manage a motel for Corporation in exchange for half of the motel’s net profits, and should the motel be sold during the term of the agreement, Employee would receive half of the net sale proceeds.\textsuperscript{317} In December 2001, Employee was told that a contract had been made to sell the motel.\textsuperscript{318} In January 2002, Corporation fired Employee without prior notice.\textsuperscript{319} The motel sale was completed, and Corporation refused to pay Employee any part of the net sale proceeds or any accrued net profits.\textsuperscript{320} Employee sued to collect, and the trial court, on motion for summary judgment regarding these claims,

\begin{itemize}
    \item \textsuperscript{310} Id. at 76.
    \item \textsuperscript{311} Id. at 73, 76.
    \item \textsuperscript{312} M & H Profit, Inc., 28 So. 3d at 74.
    \item \textsuperscript{313} Id. (citing WCI Cmtys., Inc. v. City of Coral Springs, 885 So. 2d 912, 915 (Fla. 4th Dist. Ct. App. 2004); Moviematic Indus. Corp. v. Bd. of Cnty. Comm’rs, 349 So. 2d 667, 669 (Fla. 3d Dist. Ct. App. 1977)).
    \item \textsuperscript{314} See id. at 74–76.
    \item \textsuperscript{315} Id. at 79 (Thomas, J., dissenting).
    \item \textsuperscript{316} Id.
    \item \textsuperscript{317} Patwary v. Evana Petroleum Corp., 18 So. 3d 1237, 1238 (Fla. 2d Dist. Ct. App. 2009).
    \item \textsuperscript{318} Id.
    \item \textsuperscript{319} Id.
    \item \textsuperscript{320} Id.
\end{itemize}
held that Employee’s "claim was barred because it concerned . . . an agree-
ment without a definite duration." The Second District Court of Appeal
reversed as to denial of the claim and remanded. It was true that Employee
worked as an employee at-will, and thus could not maintain an action for
wrongful employment termination. However, an employment at-will
agreement does not bar recovery of employee compensation and benefits
earned prior to termination.

B. Covenant Not to Compete: Attorney’s Fees Against Third Party

Section 542.335(1)(k) of the Florida Statutes was at issue in Bauer v.
Dilib, Inc. This section states that ""[i]n the absence of a contractual pro-
vision authorizing an award of attorney’s fees and costs to the prevailing
party, a court may award attorney’s fees and costs to the prevailing party in
any action seeking enforcement of, or challenging the enforceability of, a
restrictive covenant." Dilib, Inc. (Former Employer) had a written non-
compete agreement with two of its employees. The two employees were
found by the trial court to have violated the agreement by going to work for
Ms. Bauer (New Employer). There was evidence to the effect that New
Employer knew of the non-compete agreement, although New Employer
denied this. Former Employer succeeded in obtaining a permanent injunc-
tion against New Employer forbidding New Employer from associating with
the two employees for a certain period of time. New Employer then fired
the two employees. The trial court awarded Former Employer attorney’s
fees against New Employer based on section 542.335(1)(k). New Em-
ployer appealed the fee award, and the Fourth District Court of Appeal re-
versed.

321. Id.
322. Patwary, 18 So. 3d at 1239.
323. Id. at 1238–39 (citing De Felice v. Moss Mfg., Inc., 461 So. 2d 209, 210 (Fla. 3d
Dist. Ct. App. 1984) (per curium)).
324. Id. at 1238.
325. 16 So. 3d 318, 319 (Fla. 4th Dist. Ct. App. 2009).
326. Id. at 319 (quoting FLA. STAT. § 542.335(1)(k) (2007)).
327. Id.
328. Id.
329. See id.
330. Bauer, 16 So. 3d at 319.
331. Id. at 319.
332. Id. at 320.
333. Id. at 320, 322.
can only be enforced against a person who signs it.\footnote{334} Obviously, New Employer did not sign the agreement, and since the restrictive covenant could not be enforced against New Employer, Former Employer could not recover its attorney’s fees from New Employer.\footnote{335} Although the restrictive covenant could not be enforced against New Employer, as a third party, an injunction is a proper remedy if that party “aids and abets the violation of a restrictive covenant,”\footnote{336} provided there is proper notice and “an opportunity to be heard.”\footnote{337} The power to order injunctive relief in such cases derives from common law, not from section 542.335.\footnote{338} Thus, in the absence of a contractual fee agreement or a statute permitting a fee award, there was no basis to grant fees in connection with the injunction against New Employer.\footnote{339}

**XI. FIDUCIARY DUTY AND GOVERNANCE**

Karten (Plaintiff) and Woltin and Karmin (Defendants) were the shareholders of 201 East Atlantic, Inc. (the Corporation).\footnote{340} Plaintiff owned 25% of the stock, and Defendants owned the remaining 75%.\footnote{341} The Corporation was in the restaurant business.\footnote{342} Plaintiff sued Defendants for breach of fiduciary duty, alleging that Defendants: 1) went into a competing restaurant and bar business but failed to give Plaintiff the chance to become an owner; 2) diverted the Corporation’s assets to the competing business; 3) prevented Plaintiff from carrying out his responsibilities as a corporate officer and director; 4) agreed to “deprive” Plaintiff of his share of corporate profits; and 5) agreed to pay one of the Defendants a salary that was excessive.\footnote{343} Plaintiff alleged that only he—that is, no other shareholder—was harmed by the conduct of Defendants.\footnote{344} Defendants contended that Plaintiff’s claims could only be pursued as a shareholder’s derivative action under section 607.07401 of the *Florida Statutes* because Plaintiff did not “allege injuries separate and

\footnote{334} Id. at 320; FLA. STAT. § 542.335(1)(a) (2010).
\footnote{335} Bauer, 16 So. 3d at 320.
\footnote{336} Id. at 320–21.
\footnote{337} Id. (quoting USI Ins. Servs. of Fla., Inc. v. Pettineo, 987 So. 2d 763, 767 (Fla. 4th Dist. Ct. App. 2008)).
\footnote{338} Id. at 321.
\footnote{339} Id. at 320.
\footnote{340} Karten v. Woltin, 23 So. 3d 839, 840 (Fla. 4th Dist. Ct. App. 2009). The Corporation was not made a party to the action. Id. at 840 n.1.
\footnote{341} Id. at 840.
\footnote{342} Id.
\footnote{343} Id.
\footnote{344} Karten, 23 So. 3d at 840.
distinct from those suffered by all other shareholders. The trial court agreed, granting summary judgment to Defendants, and Plaintiff appealed. The Fourth District Court of Appeal affirmed. Shareholders may only sue directly in their own names for an injury done to them individually. A lost business opportunity is an injury to the corporation, and the injury affects all of the corporation's shareholders. The district court concluded that Plaintiff's allegations were not of "the type of individualized harm" that would permit him to sue directly rather than derivatively.

XII. INSURANCE

The Supreme Court of Florida was presented with a question certified to it by the United States Court of Appeals for the Eleventh Circuit concerning insurance coverage for violation of the Telephone Consumer Protection Act (TCPA). Transportation Insurance Company (Insurance Company) issued a policy to Penzer's assignor, its insured, providing the insured with coverage for, among other things, "[o]ral or written publication of material that violates a person's right of privacy." The TCPA imposes monetary penalties on those who send unsolicited advertisements to fax machines. The offending incident in question occurred when the insured was allegedly instrumental in the transmission of 24,000 "blast-fax" advertisements. Insurance Company denied coverage under its policy, and Penzer sued seeking declaratory relief. The Southern District Court of Florida ruled for Insurance Company, and Penzer appealed.

345. Id.
346. Id.
347. Id. at 841.
348. Id. at 840 (citing Fort Pierce Corp. v. Ivey, 671 So. 2d 206, 207 (Fla. 4th Dist. Ct. App. 1996)).
351. Penzer v. Transp. Ins. Co., 29 So. 3d 1000, 1002 (Fla. 2010), answering certified question from 545 F.3d 1303 (11th Cir. 2008).
352. Id. at 1003.
354. Penzer, 29 So. 3d at 1007.
355. Id. at 1003.
356. Id. at 1004.
The Supreme Court of Florida ruled that the quoted policy coverage did apply to the alleged violation of the TCPA. The unwanted fax advertisement intruded on the recipient’s solitude and was thus a privacy violation. In a concurring opinion, Justice Pariente wrote that Insurance Company could have avoided liability for the mere act of sending the faxes if the coverage clause had instead read: “Oral or written publication of material, the content of which violates the right of privacy.”

XIII. INTELLECTUAL PROPERTY AND THE INTERNET

In Internet Solutions Corp. v. Marshall, the Supreme Court of Florida answered a long-arm jurisdiction question certified to it by the United States Court of Appeals for the Eleventh Circuit. As rephrased by the Supreme Court of Florida, the question was as follows:

Does a nonresident commit a tortious act within Florida for purposes of section 48.193(1)(b) when he or she makes allegedly defamatory statements about a company with its principal place of business in Florida by posting those statements on a website, where the website posts containing the statements are accessible and accessed in Florida?

The Supreme Court of Florida answered yes. Defendant, a Washington resident, owned and operated a noncommercial website on which she posted consumer information that allegedly defamed Plaintiff. Plaintiff, a Nevada corporation engaged in the employment, recruiting, and advertising business, alleged that its principal place of business was in Orlando, Florida, and claimed that Defendant had defamed it by posting on her website claims of illegal conduct by Plaintiff. The issue was whether Defendant had engaged in activity sufficient to subject her to personal jurisdiction in Florida.

357. Id. at 1005.
358. Id. at 1008.
359. Penzer, 29 So. 3d at 1007.
360. Id. at 1009 (Pariente, J., concurring in result only).
361. 39 So. 3d 1201 (Fla. 2010), answering certified question from 557 F.3d 1293 (11th Cir. 2009).
362. Id. at 1203.
363. Id. (emphasis omitted).
364. Id.
365. Id. at 1203–04.
366. Internet Solutions Corp., 39 So. 3d at 1203–04.
under section 48.193 of the Florida Statutes.\textsuperscript{367} The Supreme Court of Florida stated that:

\begin{quote}
[P]osting defamatory material on a website alone does not constitute the commission of a tortious act within Florida for purposes of section 48.193(1)(b), [of the] Florida Statutes. Rather, the material posted on the website about a Florida resident must not only be \textit{accessible} in Florida, but also be \textit{accessed} in Florida in order to constitute the commission of the tortious act of defamation within Florida under section 48.193(1)(b). \textsuperscript{368}
\end{quote}

It is the accessing of the information that constitutes the publication element of defamation—and the communication of the material into Florida—and thus the commission of the tortious act within Florida.\textsuperscript{369} The Supreme Court of Florida was careful to point out that it dealt with only the first part of the personal jurisdiction inquiry.\textsuperscript{370} The second part, a “minimum contacts” analysis, which requires that a court determine if its exercise of personal jurisdiction would offend due process, was beyond what the Eleventh Circuit asked of the Supreme Court of Florida in this case.\textsuperscript{371}

\section*{XIV. Jurisdiction, Venue, Forum Non Conveniens, and Standing}

\subsection*{A. Long-Arm Jurisdiction}

In \textit{Internet Solutions Corp.}, the previous case discussed, the United States Court of Appeals for the Eleventh Circuit certified a long-arm jurisdiction question to the Supreme Court of Florida that arose in the tort context.\textsuperscript{372} In \textit{Canale v. Rubin},\textsuperscript{373} the issue of communications into Florida was again presented, but in the context of a breach of contract claim.\textsuperscript{374} The case provided the Second District Court of Appeal with the opportunity to discuss the requirements for both general and specific personal jurisdiction under the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1205.
\item Id. at 1203.
\item Id. at 1215.
\item Id. at 1216.
\item \textit{Internet Solutions Corp.}, 39 So. 3d at 1216.
\item Id. at 1203; \textit{see supra} note 363 and accompanying text.
\item 20 So. 3d 463 (Fla. 2d Dist. Ct. App. 2009).
\item Id. at 465. The amended verified complaint contained allegations sounding in tort as well as breach of contract. \textit{Id.} However, the court held that it would be the defendant’s “communications” into Florida that were alleged to form a basis for jurisdiction based on section 48.193(1)(a), conducting a business in Florida, under the “specific jurisdiction” rules. \textit{Id.} at 469.
\end{enumerate}
\end{footnotesize}
long-arm statute, in addition to “minimum contacts” and burden of proof.\footnote{375} With respect to the two types of long-arm personal jurisdiction that could apply to this breach of contract case, specific and general, as described in sections 48.193(1)\footnote{376} and 48.193(2)\footnote{377} of the \textit{Florida Statutes}, the district court noted that general jurisdiction is the more difficult to prove.\footnote{378} General jurisdiction must be established by proving that “the defendant engages in substantial and not isolated activities in Florida.”\footnote{379} General jurisdiction subjects the defendant to any claim brought in Florida.\footnote{380} General jurisdiction activities alleged to have taken place in Florida are unrelated to a specific...

375. \textit{See id.} at 465, 469. One of the contracts involved provided that Florida law applied, and the parties consented to exclusive jurisdiction in Sarasota, Florida. \textit{Canale}, 20 So. 3d at 468. The district court said that “[n]o one appears to dispute these facts.” \textit{Id.} \textit{See Barbara Landau, 2008-2009 Survey of Florida Law Affecting Business Owners, 34 NOVA L. REV. 71, 121-24 (2009) [hereinafter Landau, 2008-2009 Survey], regarding the impact of such a provision under section 48.193, as well as under sections 685.101 and 685.102, of the \textit{Florida Statutes}.  

376. Section 48.193(1) of the \textit{Florida Statutes} provides in relevant part:

\begin{quote}
Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts: (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state. (b) Committing a tortious act within this state. (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state. (d) Contracting to insure any person, property, or risk located within this state. (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage. (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either: 1. The defendant was engaged in solicitation or service activities within this state; or 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use. (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state. (h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
\end{quote}


377. Section 48.193(2) of the \textit{Florida Statutes} provides that “[a] defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.” \textit{Id.} § 48.193(2).

378. \textit{Canale}, 20 So. 3d at 466.


380. \textit{Id.} at 466 (citing Christus St. Joseph's Health Sys. v. Witt Biomedical Corp., 805 So. 2d 1050, 1052 (Fla. 5th Dist. Ct. App. 2002)).
ic lawsuit. \textsuperscript{381} On the other hand, specific jurisdiction only requires proof that the defendant was ""operating, conducting, engaging in, or carrying on a business or business venture in [Florida]."" \textsuperscript{382} Specific jurisdiction contemplates isolated acts by the defendant, involving the plaintiff in the lawsuit, with the cause of action arising from one of the statutorily enumerated acts in section 48.193(1). \textsuperscript{383} The district court noted that the trial court found specific personal jurisdiction on account of the defendant having ""made and received hundreds of business telephone calls to and from Florida, and engaged in ongoing facsimile and email communication with Florida."" \textsuperscript{384} The problem with this finding was that communications to Florida would be pertinent to a tort claim against the defendant, rather than the contract claim involved in this case, based on doing business here. \textsuperscript{385}

\textit{Jaffe & Hough, P.C. v. Baine}, \textsuperscript{386} which is also a long-arm jurisdiction case, is another example of the evidentiary burden-shifting involved in establishing—or failing to establish—personal jurisdiction over an out-of-state defendant. \textsuperscript{387} Mr. and Mrs. Baine (Clients) of Polk County, Florida, retained Jaffe & Hough, P.C. (Law Firm), a Philadelphia law firm, to represent them in a products liability claim against Bausch & Lomb, Inc. (Defendants). \textsuperscript{388} Clients signed the attorney fee agreement in Pennsylvania. \textsuperscript{389} Clients discharged Law Firm and replaced it with Polk County counsel before suing Defendants. \textsuperscript{390} Clients sued Defendants in Polk County, and they eventually settled the lawsuit. \textsuperscript{391} Law Firm learned of the settlement and asked Defendants ""to hold distribution of the settlement mon[ey]"" to Clients until Law Firm’s lien issues could be resolved. \textsuperscript{392} Clients responded by suing Law Firm in the Polk County Circuit Court to determine its ""charging lien."" \textsuperscript{393} Law Firm moved to dismiss the Polk County action arguing that Clients had

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{381} \textit{Id.} (citing Madara v. Hall, 916 F.2d 1510, 1516 n.7 (11th Cir. 1990)).
\item \textsuperscript{382} \textit{Id.} at 468 (quoting FLA. STAT. § 48.193(1)(a) (2007)).
\item \textsuperscript{383} \textit{See Canale}, 20 So. 3d at 466.
\item \textsuperscript{384} \textit{Id.} at 468.
\item \textsuperscript{385} \textit{Id.} (citing Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002)). It was these types of activities—telephone, electronic, and facsimile transmission—that the Court reviewed in Internet Solutions Corp. in arriving at its decision involving internet transmission of material in the tort context. Internet Solutions Corp. v. Marshall, 39 So. 3d 1201, 1215–16 (Fla. 2010), answering certified question from 557 F.3d 1293 (11th Cir. 2009).
\item \textsuperscript{386} \textit{Id.} at 456 (Fla. 2d Dist. Ct. App. 2010).
\item \textsuperscript{387} \textit{Id.} at 459.
\item \textsuperscript{388} \textit{Id.} at 457–58.
\item \textsuperscript{389} \textit{Id.} at 458.
\item \textsuperscript{390} \textit{Id.}.
\item \textsuperscript{391} \textit{Jaffe & Hough, P.C.}, 29 So. 3d at 458.
\item \textsuperscript{392} \textit{Id.}
\item \textsuperscript{393} \textit{Id.}
\end{itemize}
\end{footnotesize}
failed to establish personal jurisdiction over Law Firm. The trial judge denied the motion, and Law Firm appealed. The Second District reversed and remanded. The appellate court succinctly described the hurdles that Clients needed to overcome before Law Firm could successfully and personally be brought before a Florida tribunal, all in the manner described by Venetian Salami Co. v. Parthenais, Kin Yong Lung Industries Co. v. Temple, World-Wide Volkswagen Corp. v. Woodson, and section 48.193 of the Florida Statutes:

(1) Plaintiff must allege jurisdictional facts sufficient to bring the out-of-state defendant into a Florida court under section 48.193.

(2) Plaintiff must then allege that “defendant possesses [enough] minimum contacts with Florida to satisfy constitutional due process requirements,” at which point, the court must rule as to whether the defendant has been doing business in Florida, or acted in such manner that it could anticipate having to answer for its actions in a Florida court.

(3) The burden then shifts to defendant to come up with evidence putting the accuracy of the jurisdictional facts plead by plaintiff at issue.

Clients failed to plead enough facts to subject Law Firm to personal jurisdiction in Florida.

In the next case, Singer v. Unibilt Development Co., the Fifth District Court of Appeal concluded that foreign entities that were no longer engaged in business in Florida were subject to the jurisdiction of the Florida court. At issue in Singer was whether Florida’s “general” personal jurisdiction long-arm statute, section 48.193(2), applied to the plaintiff’s lawsuit against Michigan entities—a limited partnership and its corporate general partners—so as to allow plaintiff to sue the foreign partnership and its foreign general partners in Florida. The trial court said no because at the time suit was filed, the evidence did not support a finding that the entities were engaged in

394. Id.
395. Id.
396. Jaffe & Hough, P.C., 29 So. 3d at 461.
397. 554 So. 2d 499, 501–02 (Fla. 1989).
398. 816 So. 2d 663, 666 (Fla. 2d Dist. Ct. App. 2002).
401. Jaffe & Hough, P.C., 29 So. 3d at 458.
402. Id. (quoting Venetian Salami Co., 554 So. 2d at 500).
403. Id. at 459.
404. Id. at 457.
405. 43 So. 3d 784 (Fla. 5th Dist. Ct. App. 2010).
406. Id. at 789.
407. Id. at 786.
"substantial business activity" in Florida. The trial court found that the entities "had ceased all activity in Florida," and relied on the Fourth District Court of Appeal's decision in Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Automotive Group, Inc. The Fifth District reversed, concluding that the Fourth District had construed the statutory phrase "is engaged in substantial . . . activity" in the present tense, requiring that the defendant be "currently" engaged in substantial business activity. The Fifth District refused to construe the statute "this narrowly," noting that the partnership in this case: (1) was established to develop residential property in Orange County, (2) carried on business activities in Florida for twenty years, (3) conducted nearly all of its business in Florida, (4) "had a registered agent in [Florida] until shortly before this suit was filed" against it, and (5) had litigated in Florida courts. The Fifth District concluded that the approach taken by the Fourth District was too focused on a temporal event—engagement in substantial business activities at the time suit was filed. The Fifth District also acknowledged that how long a nonresident defendant must be continuously and systematically conducting activities in Florida prior to suit being filed in order to pass long-arm muster "is not subject to specific delineation." In analyzing the provision of the "general jurisdiction" statutory prong at issue in Singer that says "is engaged," the district court concluded that "at a minimum, 'is engaged' must be interpreted to also involve past activities. We conclude that a better interpretation focuses on the activities of the nonresident during a reasonable period of time prior to filing the complaint, but not necessarily up until [the time] the complaint is filed." The Fifth District held that:

When the activities of the nonresident are of sufficient quality that it should in fairness expect to defend itself here, it should not make a difference that it happens to cease these activities prior to the fil-

408. Id. at 787–88.
409. Id. at 788.
410. 987 So. 2d 818 (Fla. 4th Dist. Ct. App. 2008). The court in Singer noted that "[a]lthough it did not say so expressly, the Buckingham panel apparently adopted the same reasoning as used in Arch Aluminum & Glass Co. v. Haney, 964 So. 2d 228 (Fla. 4th Dist. Ct. App. 2007)." Singer, 43 So. 3d at 788.
411. Id. (quoting Arch Aluminum & Glass Co., 964 So. 2d at 237).
412. Id. at 789.
413. Id. at 788.
414. Id.
415. Singer, 43 So. 3d at 789.
ing of the complaint, especially where the activities occur close in
time to the events giving rise to the cause of action.\textsuperscript{416}

The Fifth District found that both statutory and constitutional authority ex-
isted to permit the exercise of jurisdiction over the partnership and general
partners.\textsuperscript{417} Conflict was not certified with the Fourth District.\textsuperscript{418}

B. Forum and Jurisdiction Selection Clause: Mandatory Versus Permis-
sive

Celistics, LLC (Employer), which has its headquarters in Miami-Dade
County, allegedly hired Mr. Gonzalez (Employee) to work in the United
States pursuant to a written agreement providing that “[i]n the event of any
doubt, question or conflict which may arise from the interpretation or im-
plementation of this agreement, the parties agree to select the venue and ju-
risdiction of the Courts and Tribunals of the city of Madrid.”\textsuperscript{419} Employee
alleged that he relocated himself and his family from Argentina to Miami in
reliance on oral and subsequent written assurances that his employment
would not be for less than one year, but that his employment was ended by
Employer after Employee had completed only five months of employment.\textsuperscript{420}
Employee sued Employer in the Miami-Dade Circuit Court.\textsuperscript{421} Employer
moved for dismissal based on the forum selection clause, but the trial court
denied Employer’s motion “finding that the forum selection clause [was]
permissive,” not mandatory.\textsuperscript{422} Employer appealed, and the Third District
Court of Appeal reversed and remanded.\textsuperscript{423} The district court, relying on
principles set out in \textit{Golf Scoring Systems Unlimited, Inc. v. Remedio}\textsuperscript{424} and
\textit{Sauder v. Rayman},\textsuperscript{425} determined that the forum selection case was mandato-
ry, despite the absence of any “‘magic words’ of exclusivity, such as ‘shall’

\begin{flushleft}
\textsuperscript{416} \textit{Id.}
\textsuperscript{417} \textit{Id.} The general partners of the Michigan limited partnership were Michigan corpora-
tions. \textit{Id.} at 786.
\textsuperscript{418} \textit{See id.} at 788–89.
\textsuperscript{419} Celistics, L.L.C. v. Gonzalez, 22 So. 3d 824, 825 (Fla. 3d Dist. Ct. App. 2009).
\textsuperscript{420} \textit{Id.}
\textsuperscript{421} \textit{Id.} Employee, in his four-count complaint, sought unpaid wages under section
448.08 of the \textit{Florida Statutes}, alleged breach of two written agreements—one for employ-
ment and the other dealing with severance—and sought restitution based on equitable estop-
pel. \textit{Id.}
\textsuperscript{422} \textit{Id.}
\textsuperscript{423} \textit{Celistics, L.L.C.}, 22 So. 3d at 824–25.
\textsuperscript{424} 877 So. 2d 827 (Fla. 4th Dist. Ct. App. 2004) (per curiam).
\textsuperscript{425} 800 So. 2d 355 (Fla. 4th Dist. Ct. App. 2001).
\end{flushleft}
or "must" or "to the exclusion of all others." The "plain and unambiguous language" of the forum selection provision, including the words "agree" and "select," made the clause mandatory.

The Supreme Court of Florida, the Fifth District Court of Appeal, and the First District Court of Appeal have held that an "unambiguous and mandatory" forum selection clause may, nevertheless, be set aside if it is shown that it would not be reasonable, fair or just to enforce the provision. Indeed, the Third District Court of Appeal so held in *Copacabana Records, Inc. v. Wea Latina, Inc.* Presumably, the issue was not before the Third District in *Celistics, LLC v. Gonzalez.*

**XV. LANDLORD AND TENANT RELATIONSHIP**

**A. Formalities of Lease Execution: Limited Liability Company**

NMB Plaza, LLC (Landlord LLC) entered into a written business lease with Skylake Insurance Agency, Inc. (Tenant). The lease was for ten years, but had a delayed starting date of ninety days after completion of con-

---


427. Id.


429. 791 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2001) (per curiam) (citing *Manrique*, 493 So. 2d at 440).

430. 22 So. 3d 824, 825 (Fla. 3d Dist. Ct. App. 2009). As the Supreme Court of Florida held in *Manrique*, while "forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust," *Manrique*, 493 So. 2d at 440, "the test of unreasonableness is not mere inconvenience or additional expense." Id. at 440 n.4 (citation omitted). The Supreme Court of Florida quoted the Supreme Court of the United States in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972), where the Supreme Court of the United States said that:

[It should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.]


431. Skylake Ins. Agency, Inc. v. NMB Plaza, L.L.C., 23 So. 3d 175, 176 (Fla. 3d Dist. Ct. App. 2009). The lease was signed by a member of Landlord LLC and by the president and vice president of Tenant. Id.
struction of the building, which was under construction. None of the signatures were witnessed, and shortly before construction was finished, the lease was repudiated by Landlord LLC based on the lack of subscribing witnesses. Tenant sued for specific performance or alternatively for damages, alleging fraud. On motion for summary judgment, the trial court ruled in favor of Landlord LLC. Tenant appealed, and relying on section 608.4235 of the Florida Statutes, argued that two witnesses were not required since Landlord LLC was a limited liability company. Section 608.4235(3) specifies who may “sign and deliver” documents transferring or affecting the interest of a limited liability company in real estate. Unless otherwise provided in the articles of organization or a limited liability company’s operating agreement, if the company is member-managed, then any member may sign, and if it is a manager-managed company, then the manager may sign. Chapter 608 does not mandate that the signatures be witnessed. On the other hand, section 689.01 does require witnesses for real estate conveyances and leases for a term of more than a year, except for certain corporate conveyances. The district court concluded that the exception for corporations was inapplicable. Thus, on motion for rehearing, the Third District Court of Appeal held that the two subscribing witness requirement of section 689.01 was not satisfied. On the other words, while Chapter 608 of the Florida Statutes—which specifies how a limited liability company’s real estate interests may be conveyed—does not require that the member or manager sign in the presence of two subscribing witnesses, section 689.01 does. Tenant also argued Landlord LLC should be estopped from raising the section 689.01 requirement because Landlord LLC not only drafted the lease, but also drafted it without signature lines. Furthermore, Landlord LLC failed

432. Id.
433. Id.
434. Id.
436. Id. at 177.
437. Id. (citing Fla. Stat. § 608.4235(3) (2003)). The lease was signed by a member of Landlord LLC. Id. Landlord admitted that the lease was signed, and no claim was made on behalf of Landlord LLC that the signature was unauthorized. Id.
439. Id.
440. Id. at 178; Fla. Stat. § 689.01 (2003).
441. See Skylake Ins. Agency, Inc., 23 So. 3d at 177.
442. See id. at 178. In light of the Third District Court of Appeal’s decision on rehearing, the discussion in this Survey of this decision supersedes the discussion reported in Landau, 2008–2009 Survey, supra note 375.
444. Id at 178.
to have the signing member’s signature witnessed. The Third District held that in order to support an estoppel claim, “tenant must have changed [his or her] position in more than an insubstantial way.” The district court noted, “In the decided estoppel cases involving leases, the tenant took possession and the landlord accepted the rent.” The Third District found no such facts of the requisite changed position and upheld the trial court’s summary judgment that denied Tenant’s request for specific performance. However, the Third District, relying on the Supreme Court of Florida’s holding in Reed v. Moore, concluded that the lease agreement did serve as a contract under section 725.01 of Florida’s Statute of Frauds, even though it failed as the conveyance of real estate under section 689.01. The Third District, citing its decision in Cabrerizo v. Fortune International Realty, stated that “landlord will not be allowed to profit from its own wrong” in that Landlord could at anytime have corrected the lack of witnesses problem rather than relying on the problem “to disavow the contract.” The decision of the trial court granting summary judgment to Landlord LLC on Tenant’s breach of contract and fraud claims was reversed.

B. Purchase Option in Lease

A lease agreement gave Tenant the option to purchase the leased real estate “provided that the [Tenant] is not in default of any part of this Lease Agreement.” Tenant had paid the rent late several times, but in each case the default was cured. Tenant attempted to exercise the option but was met with Landlord’s objection that since Tenant had been in default under the lease, Tenant lost the right to exercise the option. The Third District Court of Appeal held that the trial court erred in concluding that language of the option provision meant that any default by Tenant under the lease termin...
nated the option, and the trial court agreed with Landlord. What the option provision meant was that Tenant could not be in default at the time Tenant exercised the option. The Third District Court of Appeal reversed and remanded for a determination by the trial court as to whether or not Tenant was in default under any of the lease provisions at the time the option exercise was attempted. If Tenant was not in default at even one of the times the option was exercised, then Tenant “was entitled to exercise the option.”

XVI. PIERCING THE CORPORATE VEIL

In this “reverse piercing” case, 17315 Collins Avenue, LLC (Subsidiary LLC) was the wholly owned subsidiary of Wavestone Properties, LLC (Parent LLC). Parent LLC made an agreement with Fortune Development Sales Corporation (Sales) whereby Sales would have the exclusive right to market and sell condominium units owned by Parent LLC. Parent LLC was found by the trial court to have breached the agreement, and Sales obtained a judgment against Parent LLC for more than $1,500,000. The trial court allowed Sales to record its judgment against Subsidiary LLC’s real estate, thus piercing the corporate veil of Parent LLC. The Third District Court of Appeal affirmed. Citing the Supreme Court of Florida in Dania Jai-Alai Palace, Inc. v. Sykes, the appellate court stated: “To pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them.” It was determined that Parent LLC and Subsidiary LLC were alter egos, and “there was little distinction between” them. The court found an improper use of Subsidiary LLC by Parent LLC when Parent LLC deposited with Subsidiary LLC $250,000 of real

457. Id.
458. Id.
459. Welde, 35 So. 3d at 120–21.
460. Id. at 120.
462. Id.
463. Id.
464. Id. at 167–68.
465. Id. at 170.
466. 450 So. 2d 1114 (Fla. 1984).
467. Fortune Dev. Sales Corp., 34 So. 3d at 168 (quoting Ocala Breeders’ Sales Co. v. Hialeah, Inc., 735 So. 2d 542, 543 (Fla. 3d Dist. Ct. App. 1999) (per curiam)).
468. Id.
estate sales commissions initially set aside to pay part of Sales' judgment, but later improperly used for Subsidiary LLC's operating expenses.469

XVII. TAXES

The state of Maine obtained a tax judgment against Taxpayer for over $64,000.470 Maine recorded the judgment in Citrus County pursuant to section 55.503 of the Florida Statutes471 and notified Taxpayer that it had done so.472 Taxpayer successfully moved to have the judgment vacated.473 The Fifth District Court of Appeal reversed and remanded.474 Taxpayer persuaded the trial court that section 72.041 of the Florida Statutes, entitled "Tax liabilities arising under the laws of other states," which reads in part "that [a]ctions to enforce lawfully imposed sales, use, and corporate income taxes and motor and other fuel taxes of another state may be brought in a court of this state," meant that it was the policy of Florida not to enforce foreign taxes not mentioned in that section, that is, foreign individual income taxes.475 The appellate court concluded that the trial court had misinterpreted section 72.041, and that section 55.503 applied, as did the requirement to give the judgment full faith and credit under the United States Constitution.476

XVIII. TORTS

A. Claims Arising from Alleged Misrepresentations by Mortgage Lender

Borrowers contracted with Builder to build them a home on North Captiva Island.477 Builder's agent suggested Bank as a resource for obtaining construction financing and Bank provided Borrowers with construction financing, with the home to serve as collateral.478 About ten months later,

469. Id. at 169.
470. State v. Hanson, 36 So. 3d 879, 879 (Fla. 5th Dist. Ct. App. 2010) (per curiam).
471. Section 55.503(1) of the Florida Statutes provides for recording of a certified copy of a foreign judgment with the circuit court clerk of Florida and gives such judgment the "same effect" as a Florida circuit court or county court judgment, and subjects the foreign judgment to the same rules as such Florida judgments. FLA. STAT. § 55.503(1) (2008).
472. Hanson, 36 So. 3d at 879.
473. Id. at 880.
474. Id.
475. Id. (quoting FLA. STAT. § 72.041 (2008)).
476. Id.
478. Id.
Bank sued Borrowers in foreclosure, "alleging that the project had been abandoned and that the loan funds improperly had been diverted from" the project.\footnote{Id.} The foreclosure action was settled, but Borrowers had filed several counterclaims that were not settled.\footnote{See id.} Among the counterclaims were two counts alleging misrepresentations by Bank regarding the soundness of Builder that induced Borrowers into making the construction contract with Builder.\footnote{Id.} One claim alleged negligent misrepresentation and the other alleged fraudulent misrepresentation.\footnote{Ladner, 32 So. 3d at 101.} An additional count alleged that Bank "breached the loan agreement by making improper [loan] disbursements."\footnote{Id.} The trial court dismissed all counts of the counterclaim.\footnote{Id.} The Second District Court of Appeal reversed and remanded.\footnote{Id.} The trial court correctly dismissed the counts alleging breach of the loan agreement, as well as the misrepresentation counterclaims based on the contract, because of the hold harmless and related provisions in the loan agreement and another document.\footnote{Ladner, 32 So. 3d at 102.} However, because of Borrower's allegation of detrimental reliance on the alleged negligent and fraudulent misrepresentations with respect to Borrower's entering into its contract with Builder, the trial court needed to further address these claims.\footnote{Id. at 105.} The appellate court noted that the trial court also found that all of the counterclaims were barred based upon the economic loss rule.\footnote{Id. at 105.} While that might bar all of the counterclaims that arose from the loan agreement, \footnote{Id.} "[w]hen . . . fraud occurs in . . . connection with misrepresentations, statements, or omissions which cause the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort."\footnote{Ladner, 32 So. 3d at 102.} The cause of action is not barred by the economic loss rule.\footnote{Id.} Thus, Borrower's counterclaim against Bank was reinstated.\footnote{Id.}
B. Product Liability and Negligence

Decedent “was run over and killed by a huge mobile crane at the Port of Miami.”\textsuperscript{493} Liebherr-America, Inc. (Seller) sold the crane to one of the other defendants and “agreed[d] to keep it in good repair.”\textsuperscript{494} Seller did not design or manufacture the crane, was not operating the crane when the accident occurred, and did not own or have control of the property where Decedent was killed.\textsuperscript{495} Nevertheless, the jury found Seller partially liable for the death of Decedent.\textsuperscript{496} Seller appealed, and the Third District Court of Appeal reversed, directing that judgment be entered in favor of Seller.\textsuperscript{497} Since the "jury found that the crane was not defective at the time of the sale," there could not be liability on the part of Seller, as "a seller and servicer."\textsuperscript{498} This is because "[t]he primary duty and responsibility of a seller and servicer of equipment like [Seller] is ordinarily found in the claim that, at the time of the sale, the equipment contained a defect which rendered it unreasonably dangerous to persons in the vicinity of the crane."\textsuperscript{499} As to the claim that Seller failed to properly perform its service obligations with respect to the crane, the evidence did not support such a claim.\textsuperscript{500} There were allegations that a horn was not working correctly, but no evidence that the horn had failed was presented, or if it had failed, that Seller had prior notice of it.\textsuperscript{501} In addition, there was no evidence of negligence in not repairing it.\textsuperscript{502} Moreover, there was no evidence that the horn “was even a legal cause of the accident.”\textsuperscript{503} “[T]here is simply no duty on the part of a seller—or anyone in the distributive chain—to warn of dangers presented by [the product’s] operation after it has passed from [the seller’s] control.”\textsuperscript{504}

\textsuperscript{493} Liebherr-America, Inc. v. McCollum, 43 So. 3d 65, 66 (Fla. 3d Dist. Ct. App. 2010).
\textsuperscript{494} Id.
\textsuperscript{495} Id.
\textsuperscript{496} Id.
\textsuperscript{497} Id.
\textsuperscript{498} Id.
\textsuperscript{499} Id.
\textsuperscript{500} Id. at 67–68.
\textsuperscript{501} Id. at 68.
\textsuperscript{502} Id.
\textsuperscript{503} Liebherr-America, Inc., 43 So. 3d at 68.
\textsuperscript{504} Id.
C. Professional Liability

In *Witt v. La Gorce Country Club, Inc.*, the Third District Court of Appeal issued a replacement opinion for its earlier decision that was discussed in a prior survey. The district court still held that a professional liability limitation in a contract does not apply to professionals involved in the work covered by the contract.

XIX. Uniform Commercial Code and Debtor/Creditor Rights

A. Jurisdiction Over Judgment Debtor

On December 6, 1988, Whitson & Whitson, P.A. (Creditor) obtained a judgment against Mr. Petersen (Judgment Debtor) in the Pinellas County Circuit Court. The judgment was in excess of $400,000. When the action was started and when judgment was obtained, Judgment Debtor was a Florida resident. Creditor assigned the judgment to Mr. Whitson (Judgment Creditor). Judgment Debtor became a Georgia resident in 2007. About ten months later, on April 25, 2008, which date was less than twenty years after the entry of the judgment in the original action, Judgment Creditor filed suit in Pinellas County Circuit Court seeking renewal of the original judgment. Process was served on Judgment Debtor in Georgia, and he responded by filing a motion to dismiss. Judgment Debtor asserted that he had moved to Georgia, and that “he had not ‘done any act which would submit himself to the jurisdiction’” under the long-arm statute, section 48.193 of the *Florida Statutes*, or otherwise. The trial court denied his motion to dismiss, and the Second District Court of Appeal affirmed. The Second District noted that the writ of *scire facias* had earlier been used to revive a judgment. A petition for writ of *scire facias* was considered to be “a con-

505. 35 So. 3d 1033 (Fla. 3d Dist. Ct. App. 2010).
506. Id. at 1035; see Landau, 2008–2009 Survey, supra note 375, at 138.
507. Witt, 35 So. 3d at 1039.
508. Petersen v. Whitson, 14 So. 3d 300, 301 (Fla. 2d Dist. Ct. App. 2009).
509. Id.
510. Id.
511. Id.
512. Id.
513. Petersen, 14 So. 3d at 301. The statute of limitations on a judgment entered by a court of record is twenty years. *Fla. Stat.* § 95.11(1) (2010).
514. Petersen, 14 So. 3d at 302.
515. Id.
516. Id. at 302–03.
517. Id. at 302.
tinuation of the original action," not a new action. The modern procedure is "by motion after notice" pursuant to Rule 1.100(d) of the Florida Rules of Civil Procedure. Like the earlier procedure, the modern procedure for reviving a judgment—and thereby resetting the statute of limitations—should be viewed as "a continuation of the original action" and as such, personal jurisdiction over a judgment debtor continues as to the "court that rendered the judgment in the original action."

B. Creditors' Claims: Inherited IRA

Lender sued Borrower "on a promissory note and obtained a judgment against him [for over] $188,000." Borrower had been named as the beneficiary of his late father's Individual Retirement Account (IRA). The account was administered by RBC Capital Markets Corporation (IRA Administrator). IRA Administrator explained to Borrower his options concerning the IRA, and Borrower decided to transfer his father's IRA to an "inherited IRA." When Lender sought to enforce his judgment against Borrower's inherited IRA account, Borrower relied on section 222.21(2)(a) of the Florida Statutes to prevent levy on the account. That section provides in part that "any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account," referring to a fund or account exempt from federal income taxation under any of sections 401(a), 403(a), 403(b), 408, 408A, 409, 414, 457(b) and 501(a) of the Internal Revenue Code, "is exempt from all claims of creditors of the owner, beneficiary, or participant." The trial court ruled that an inherited IRA was no longer an IRA under that definition, and Borrower's inherited IRA account was denied protection from levy. The Second District Court of Appeal affirmed, holding that the Florida statutory protection from creditors accorded to an IRA was intended only for the original account or fund of the IRA owner. The Second District also cited

518. Id.
519. Petersen, 14 So. 3d at 302 n.3; Fla. R. Civ. P. 1.100(d).
520. Petersen, 14 So. 3d at 302–03.
522. Id.
523. Id.
524. Id.
525. Id. at 937–38.
526. Robertson, 16 So. 3d at 938 (quoting Fla. Stat. § 222.21(2)(a) (2008)).
527. Id. at 938.
528. Id. at 938–39.
several bankruptcy cases to the same effect with respect to state law creditor exemptions.\textsuperscript{529}

\section*{C. \textit{Construction Lien: Strict Compliance}}

A construction lien was recorded in favor of Designerick, Inc. (Lienor) against the Unnerstalls' real estate to secure payment of more than $21,000 that Lienor claimed was due for installation of cabinets.\textsuperscript{530} The Unnerstalls started proceedings for cancellation of the lien pursuant to section 713.21 of the \textit{Florida Statutes}.\textsuperscript{531} It was then up to Lienor to "strictly comply with the statute to [protect] its lien."\textsuperscript{532} Lienor’s response to the Unnerstalls’ Complaint and the Order to Show Cause was an answer that contained affirmative defenses and counterclaims, but no request for foreclosure of its lien.\textsuperscript{533} Nevertheless, the trial court concluded that the counterclaims were sufficient to prevent discharge of the lien.\textsuperscript{534} The Second District Court of Appeal reversed, ruling that Lienor failed to strictly comply with the lien statute by not acting to enforce the lien within twenty days.\textsuperscript{535} The district court noted that Lienor could, despite discharge of the lien, still pursue its counterclaims.\textsuperscript{536}

The Fifth District Court of Appeal in \textit{KA Properties, LLC v. USA Construction, Inc.}\textsuperscript{537} also recently held that strict compliance with the statutory

\begin{itemize}
\item \textsuperscript{529} \textit{Id.} at 939; see \textit{In re Kirchen}, 344 B.R. 908, 914 (Bankr. E.D. Wis. 2006); \textit{In re Taylor}, No. 05-93559, 2006 WL 1275400, at *2 (Bankr. C.D. Ill. May 9, 2006); \textit{In re Greenfield}, 289 B.R. 146, 150 (Bankr. S.D. Cal. 2003); \textit{In re Sims}, 241 B.R. 467, 470 (Bankr. N.D. Okla. 1999).
\item \textsuperscript{530} \textit{Unnerstall v. Designerick, Inc.}, 17 So. 3d 900, 901 (Fla. 2d Dist. Ct. App. 2009).
\item \textsuperscript{531} \textit{Id.} (citing \textsc{Fla. Stat.} § 713.21(4) (2008)).
\item \textsuperscript{532} \textit{Id.} at 902 (citing Ruffolo v. Parish & Bowman, Inc., 966 So. 2d 434, 436 (Fla. 1st Dist. Ct. App. 2007)).
\item \textsuperscript{533} \textit{Id.} at 901. Lienor’s counterclaim alleged “breach of [an] oral contract, open account, and unjust enrichment,” and sought money damages. \textit{Id.} at 901–02.
\item \textsuperscript{534} \textit{Unnerstall}, 17 So. 3d at 901–02.
\item \textsuperscript{535} \textit{Id.} at 902. The Second District Court of Appeal cited two decisions, \textit{Brookshire v. GP Constr. of Palm Beach, Inc.}, 993 So. 2d 179 (Fla. 4th Dist. Ct. App. 2008), and \textit{Dracon Constr., Inc. v. Facility Constr. Mgmt, Inc.}, 828 So. 2d 1069 (Fla. 4th Dist. Ct. App. 2002), in support of its ruling that the counterclaims did not constitute strict compliance. \textit{Id.}
\item \textsuperscript{536} \textit{Unnerstall}, 17 So. 3d at 902 n.2.
\item \textsuperscript{537} 35 So. 3d 1015 (Fla. 5th Dist. Ct. App. 2010).
\end{itemize}
procedure is required to preserve the lien.\textsuperscript{538} Lienor’s answer to the complaint that the “lien was valid and not exaggerated” did not constitute strict compliance.\textsuperscript{539}

D. Usury

A member of a law firm received money from two foreign individual “investors” under agreements that promised what would have amounted to annual returns of 600% in one case and 580% in another.\textsuperscript{540} The agreements were purportedly made between each of the individuals and the law firm, with the law firm member signing as “trustee for” and initially, “on behalf of” an undisclosed client.\textsuperscript{541} “Invested” funds were deposited “to the law firm’s trust account.”\textsuperscript{542} There were extension agreements signed and the repayment amounts were increased, but the extension agreements did not refer to the law firm.\textsuperscript{543} When repayment was not made pursuant to the agreements as a result of the law firm members’ “fraudulent scheme,” the two foreign individuals sued the law firm and the firm’s clients, whose identities had been disclosed in the extension agreements.\textsuperscript{544} The trial court, on the law firm and client’s motions for summary judgment, held that the agreements amounted to usurious short-term loans and refused to enforce them.\textsuperscript{545} The trial court also held that the firm member did not have authority to bind the firm to the agreements, the agreements were “clearly illegal,” and the making of the agreements was not within the scope of the member’s employment.\textsuperscript{546} The Third District Court of Appeal affirmed.\textsuperscript{547} Under section 687.071 of the Florida Statutes, annual simple interest called for on loans of this type exceeding 25% constitutes criminal usury rendering unenforceable the payment of principal and interest.\textsuperscript{548} The Third District also rejected the

\textsuperscript{538} Id. at 1016. The Fifth District Court of Appeal noted that Lienor did file a counterclaim after it filed its answer, but the counterclaim was too late, having been filed twenty-nine days after service of the summons. Id. The opinion does not disclose what the counterclaim alleged or if the counterclaim would have satisfied the strict compliance requirement had it been timely filed.

\textsuperscript{539} Id.


\textsuperscript{541} Id. at 1050.

\textsuperscript{542} Id.

\textsuperscript{543} Id.

\textsuperscript{544} Id. at 1050, 1052.

\textsuperscript{545} Saralegui, 19 So. 3d at 1050–51 n.1.

\textsuperscript{546} Id. at 1050–51.

\textsuperscript{547} Id. at 1053.

\textsuperscript{548} Id. at 1051 n.1 (citing FLA. STAT. § 687.071(2) (2003)).
claim that the firm member acted as an apparent agent of the law firm. See id. at 1052.

There was no requisite representation of agency by the law firm in the particular transactions. See Saralegui, 19 So. 3d at 1052.

And as to both the usury issue and the apparent authority issue, the Third District said there were no genuine issues of material fact. Id.

The district court acknowledged that although foreigners may be accustomed to lawyers in their countries acting in various non-legal business roles, “our system draws clear distinctions among these roles and clear boundaries between the legal representation of a lender and a borrower.”

Surely, “[h]ad the ['investors'] retained a Florida lawyer [for] independent advice before making these loans . . . [the transaction] would have caused legal eyebrows to rise and the investors to flee.”

E. National Bank: Right to Sue in Florida

770 PPR, LLC and 140 Associates, Ltd. (Mortgagors) obtained mortgage financing from Seacoast National Bank (National Bank) secured by their Florida real estate. The mortgages went into default, and National Bank foreclosed on the mortgaged properties. Mortgagors defended by claiming that National Bank had failed to obtain a “certificate of authority” as called for by section 607.1501(1) of the Florida Statutes. Mortgagors argued that National Bank was a foreign corporation and thus the statute required it to get permission to do business, in Florida, by obtaining a certificate of authority from the Florida Department of State. They argued that the penalty for failure to do so was to deny National Bank the right to sue in this state. The trial court rejected Mortgagors’ argument, and the foreclo-

549. See id. at 1052.
550. See Saralegui, 19 So. 3d at 1052.
551. Id. at 1051. Regardless of what these transactions were called, they were loans, and the usury statute applied. Id. n.1. Further, “corrupt intent” does not require that the lenders know of the usury statutes or have “a specific intention to violate them.” Id. at 1051. What is required is proof of intent to collect payments on the loan that, when expressed as an annual simple rate of return, exceed the statutory amount. Saralegui, 19 So. 3d at 1051. “[I]gnorance of the usury statutes is not a defense.” Id. at 1051 n.2 (citing Mickler v. Marantha Realty Assoc., Inc., 50 B.R. 818, 828 (Bankr. M.D. Fla. 1985); Ross v. Whitman, 181 So. 2d 701, 703 (Fla. 3d Dist. Ct. App. 1966)).
552. Saralegui, 19 So. 3d at 1053.
553. Id.
554. 770 PPR, L.L.C. v. TJCV Land Trust, 30 So. 3d 613, 615 (Fla. 4th Dist. Ct. App. 2010).
555. Id.
556. Id. at 616; Fla. Stat. § 607.1501(1) (2010).
557. 770 PPR, L.L.C., 30 So. 3d at 616.
558. Id.
sures were permitted.559 The Fourth District Court of Appeal affirmed, stating that “this case presents a novel issue in Florida.”560 The appellate court quoted from section 24 of the National Bank Act with respect to the powers of a national banking association: “‘Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.’”561 The National Bank Act preempted Florida’s requirement that foreign corporations obtain permission to do business in Florida before being allowed to sue.562 The appellate court looked to decisions in other states to support its conclusion.563

F. “No Lien” Notice

In June, 2005, the then Owner (Landlord) of a Broward County shopping center, pursuant to section 713.10 of the Florida Statutes, recorded a notice to the effect that all leases Landlord had entered into with tenants contained language identical to that quoted in the notice stating Landlord’s interest in the property was not “‘subject to liens for improvements made by [t]enant[s].’”564 Landlord entered into a lease with a Tenant (Tenant) in 2006 that contained different “no lien” language than the recorded notice language.565 In March 2007, Landlord sold the shopping center to Landlord’s Assignee, to whom all of the leases were assigned.566 During this time, a sub-contractor (Subcontractor) had done construction work for Tenant.567 When Subcontractor failed to receive payment for some of its work, it filed a claim of lien against the property leased to Tenant, now owned by Landlord’s Assignee.568 Assignee was successful in having the lien discharged, relying on section 713.10.569 The Fourth District Court of Appeal reversed because section 713.10 notice was defective.570 The language of Tenant’s lease was “significantly different, and more conditional” than that contained

559. See id. at 615.
560. Id. at 617, 619.
561. Id. at 617 (quoting 12 U.S.C § 24 (2006)).
562. 770 PPR, L.L.C., 30 So. 3d at 618.
563. Id. at 617–18 (citing e.g., Ind. Nat’l Bank v. Roberts, 326 So. 2d 802, 802–803 (Miss. 1976)).
565. See id. at 236–37.
566. Id. at 236.
567. Id.
568. Id.
569. Everglades Elec. Supply, Inc., 28 So. 3d at 237; see generally FLA. STAT. § 713.10 (2010).
570. Everglades Elec. Supply, Inc., 28 So. 3d at 238.
in the recorded section 713.10 notice.\footnote{Id.} The district court noted that under section 713.10, Landlord could have shielded itself either by (1) recording Tenant’s lease or a short form of the lease that contained the lien protection language or (2) by filing a notice containing “[the specific language contained in the various leases prohibiting such liability]” for work done on the premises at the tenant’s behest.\footnote{Id. at 237-38 (quoting \textsc{Fla. Stat.} \S 713.10(2)(c)).} In this case, Landlord did not do any of the two.\footnote{See id. at 238.}

G. Secured Party’s Right to Consigned Property

A painting was consigned by its owner (Consignor) to an art gallery for sale.\footnote{Rayfield Inv. Co. v. Kreps, 35 So. 3d 63, 64 (Fla. 4th Dist. Ct. App. 2010).} At the time of the consignment, the gallery’s inventory was subject to a perfected security interest in all of the gallery’s inventory, securing $300,000 in loans made by Lender to the gallery.\footnote{Id.} Consignor, unlike Lender, did not file a UCC-1 financing statement regarding his ownership of the painting.\footnote{Id.} The painting was not tagged or similarly identified as being on consignment, and no notice was posted by the art gallery.\footnote{Id. After the gallery defaulted on the loan, Lender foreclosed its security interest, the trial court entered a judgment in favor of Lender, and a writ of replevin was issued for the gallery’s inventory.\footnote{Id. Consignor was allowed to intervene in the action, and the trial court declared his interest in the painting superior to Lender’s interest.\footnote{Rayfield Inv. Co., 35 So. 3d at 64.} The Fourth District Court of Appeal reversed.\footnote{Id. at 64, 67.} Consignor could have protected himself by (1) filing UCC-1 financial statements with respect to his interest in the painting “or (2) prov[ing] that the [art gallery] was generally known by its creditors to be substantially engaged in

\footnote{\textsc{Fla. Stat.} \S 686.502(2) of the \textit{Florida Statutes}: requires the cosignor of works of art to give notice to the public by: “affixing to such work of art a sign or tag which states that such work of art is being sold subject to a contract of consignment, or such consignee shall post a clear and conspicuous sign in consignee’s place of business giving notice that some works of art are being sold subject to a contract of consignment.” \textit{Id.} n.2 (quoting \textsc{Fla. Stat.} \S 686.502(2)). What would the result have been if there had been a tag or notice posted? Would that have been enough to give owner priority of prior perfected security interests?}
selling the goods of others." He did neither. The district court observed, "Some legal rules explicitly allow their application to be varied by individual circumstances, using equitable principles, but the commercial law on secured transactions is not among them."

H. Tolling of Statute of Limitations

Section 95.051(1) of the Florida Statutes provides in part: "(1) The running of the time under any statute of limitations except [sections] 95.281, 95.35 and 95.36 is tolled by ... (f) [t]he payment of any part of the principal or interest of any obligation or liability founded on a written instrument." "Mortgagors brought an action against Mortgagee alleging violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The problem faced by Mortgagors was that suit was filed eight years after the alleged violation and was thus apparently barred by the applicable statute of limitations. Mortgagors attempted to avoid the limitations period by proving their regular monthly mortgage payments, which they claimed brought them

581. Id. at 66. The district court stated that "[t]he consignor in this case could have defeated the priority of secured creditors only by proving that a majority of the gallery's creditors knew that it was substantially engaged in consignment sales." Id. (emphasis added). Was the district court saying that under the facts of this case where there was no UCC-1 filed, no tag or notice posted by consignee, the only remaining basis for defeating the Lender's prior perfected security interest would have been satisfying the "generally known" test? It is submitted that just how much is required of a consignor in order to defeat a prior perfected security interest is open to debate. The district court in Rayfield Investment Co., relying on In re Valley Media, Inc., 279 B.R. 105 (Bankr. D. Del. 2002), a case the court considered "factually similar" to the case before it, said that the court in In re Valley Media, Inc. "observed that the consignors could have obtained a prior interest in their consigned goods if they had either (1) filed UCC-1 financing statements ... or (2) proved that the consignee was generally known by its creditors to be substantially engaged in selling the goods of others." Rayfield Inv. Co., 35 So. 3d at 66 (citing In re Valley Media, Inc., 279 B.R. at 123). The district court concluded that:

[t]he law creating the priority rule afforded consignor effective tools to avoid a prior security interest in gallery's inventory. These tools were simple, not burdensome, and easily satisfied. He needed only to file a UCC-1 under Florida law. Aside from that, he could have required the gallery to affix a tag onto the painting and place a sign alerting prospective buyers of a consignment sale. He did none of these things.

Id. at 67.

582. Id.

583. Id.

584. FLA. STAT. § 95.051(1), (1)(f) (2010).


586. Id.
under the tolling provisions of section 95.051(1)(f). The trial court held that the statute of limitations applied and dismissed Mortgagors' complaint with prejudice. The First District Court of Appeal affirmed. "Without the protection of the statute, a compassionate obligee that accepts sporadic part-payments from the obligor could risk jeopardizing its collection rights." The appellate court acknowledged that the statute had to "be given its plain meaning to the extent its language is clear and unambiguous," unless doing that "would lead to an unreasonable or absurd result." Judge Thomas dissented, stating that the plain wording of the section did not limit its effect to creditors.

I. Disposition of Collateral

Borrower borrowed $840,000 from Bank and signed promissory notes that were guaranteed by several individuals (Guarantors) and secured by all of Borrower's then owned or later acquired "inventory, furniture, supplies, equipment, fixtures," and certain intangibles. Borrower defaulted, and Bank, having been granted a "pre-judgment writ of replevin," took possession of the tangible property pledged as security and hired a company to do an inventory of the assets. There were three auctions, and the auction proceeds from the sale of the collateral were approximately $317,000, which was less than half of the amount owed on the notes. Borrower and Guarantors alleged that several items of collateral taken by Bank were not auctioned, and no explanation was given for the omissions. On motion for summary judgment, the trial court granted Bank a deficiency judgment, but the Third District Court of Appeal reversed, concluding that there was "a}

587. Id.
588. Id.
589. Id. at 664.
590. See Brown, 32 So. 3d at 664.
591. Id. (quoting S. Motor Co. of Dade Cnty. v. Doktorczyk, 957 So. 2d 1215, 1218 (Fla. 3d Dist. Ct. App. 2007)).
593. Brown, 32 So. 3d at 664 (Thomas, J., dissenting).
595. Id.
596. Id. at 425–26.
597. Id. at 426.
genuine issue of material fact as to whether the collateral was disposed of in a commercially reasonable fashion. On remand, the trial judge considered the missing and unsold items of collateral, the advertising efforts made by the auctioneer, and the degree of the auctioneer’s experience in disposing of similar items of collateral, and concluded that the collateral was not disposed of in a commercially reasonable fashion. The Third District, in Tropical Jewelers, Inc. v. Bank of America, N.A. (Tropical II), affirmed the trial court’s decision denying Bank a deficiency judgment.

J. Documentary Tax Stamps: Promissory Note

Although prevailing party attorney’s fees were at issue in Glenn Wright Homes (Delray) LLC v. Lowy, the underlying issue presented to the Fourth District Court of Appeal arose from the institution of a suit seeking to enforce a promissory note prior to payment of the required documentary stamp tax. Lender loaned $300,000 to Borrower and took back an unsecured promissory note for that amount. Thus, there was no recorded instrument securing the note. Borrower defaulted and Lender sued Borrower. At the time suit was filed—and at the time Lender filed a motion for summary judgment—Florida documentary tax stamps had not been paid on the note as required by sections 201.01 and 201.08 of the Florida Statutes. Lender paid the stamp tax after the issue was raised by the court at the hearing on the motion for summary judgment, and the court entered judgment for Lender. Although the trial court did not then award attorney’s fees to Lender, it reserved jurisdiction to do so. Borrower did not appeal that judgment, but...
after the trial court granted Lender's subsequently-filed motion seeking attorney's fees, Borrower appealed the fee award.610 On appeal, Borrower argued that because documentary stamps had not been placed on the promissory note until after the hearing on Lender's motion for summary judgment, the note was unenforceable.611 Thus, the question was how attorney fees could be awarded for trying to enforce an unenforceable promissory note.612 The district court answered this question by noting the difference between subsections (a) and (b) in section 201.08(1) of the Florida Statutes.613 Subsection (a) covers unsecured promissory notes while subsection (b) deals with "notes or instruments secured by an instrument filed in the public records."614 Only subsection (b), which was not applicable in the present case, prevents the enforcement of a promissory note with respect to future advances as to which the documentary stamp tax has not been paid.615 The Fourth District, in affirming the trial court, receded from its opinions in Rappaport v. Hollywood Beach Resort Condominium Ass'n616 and Bonfiglio v. Banker's Trust Co. of California617 to the extent they each held that an unsecured note was not enforceable in a Florida court prior to payment of the documentary stamp tax.618 The district court also certified conflict with Silber v. Cn'R Industries of Jacksonville, Inc.,619 Somma v. Metra Electronics Corp.,620 and Klein v. Royale Group, Ltd.621 as they, like Rappaport and Bonfiglio, "appear[ed] to misread the statute."622 The Fourth District noted:

[Florida] has a substantial interest in ensuring collection of taxes owed. That is why it requires evidence of the payment of the tax prior to recordation of any taxable instrument. The state has

610. Id.
611. Id.
612. Lowy, 18 So. 3d at 694.
613. Id. at 695–96.
614. Id. at 696.
615. Id. Section 201.08(1)(b) of the Florida Statutes also provides that "any person who fails or refuses to pay such tax due by him or her is guilty of a misdemeanor of the first degree." Id. (quoting Fla. Stat. § 201.08(1)(b) (2009)).
616. 905 So. 2d 1024 (Fla. 4th Dist. Ct. App. 2005), overruled in part by Glenn Wright Homes (Delray) L.L.C. v. Lowy, 18 So. 3d 693 (Fla. 4th Dist. Ct. App. 2009).
617. 944 So. 2d 1087 (Fla. 4th Dist. Ct. App. 2006).
618. See Lowy, 18 So. 3d at 696–97.
620. 727 So. 2d 302 (Fla. 5th Dist. Ct. App. 1999).
621. 578 So. 2d 394 (Fla. 3d Dist. Ct. App. 1991) (per curiam).
622. Lowy, 18 So. 3d at 696.
elected to enforce its taxes on unsecured promissory notes, however, through the use of its criminal laws and substantial penalties. \(^{623}\)

The court went on to point out that the Legislature might elect to bring subsection (a) in line with subsection (b) of section 201.08(1). \(^{624}\)

\(^{623}\) Id.; accord FLA. STAT. § 201.17 (2010).

\(^{624}\) Lowy, 18 So. 3d at 696–97.
A SURVEY OF PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT UNDER FLORIDA LAW

JOHN SANCHEZ*

I. INTRODUCTION ................................................................................. 64
II. A BRIEF HISTORY OF FLORIDA NON-COMPETE LAW ............. 65
III. PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT .... 70
IV. SECTION 542.335 ............................................................................ 74
    A. Non-Compete Agreements Must Be in Writing ...................... 74
    B. What Constitutes a “Legitimate Business Interest?” ............ 74
        1. Valuable Confidential or Professional Information
           That Otherwise Is not a Trade Secret .......................... 74
        2. Substantial Relationships with Specific Prospective or
           Existing Customers, Patients, or Clients ...................... 75
        3. Customer, Patient, or Client Goodwill .......................... 78
        4. Extraordinary or Specialized Training .......................... 79
    C. Employer’s Prima Facie Case .............................................. 79
        1. Rebuttable Presumptions .............................................. 79
        2. Rules of Construction .................................................... 80
    D. Employee’s Burden of Proof ............................................. 80
    E. Employee Defenses ..................................................... 80
        1. Employer’s Breach of Contract ..................................... 81
        2. Employer’s Unclean Hands ........................................... 82
        3. Intervening Changes in the Employee’s Job Duties .......... 82
        4. Waiver ........................................................................ 82
        5. Lack of Consideration .................................................... 82
    F. Remedies ........................................................................... 83
        1. Injunction .................................................................... 83
           a. Irreparable Injury and Inadequate Legal Remedy .... 84
           b. No Balancing of the Hardships ............................. 84
           c. Substantial Likelihood of Success on the Merits .... 85
           d. The Public Interest ................................................ 86
           e. Injunction Bond ..................................................... 89
        2. Modifying Overbroad, Overlong, or Unreasonable
           Terms in the Non-Compete Agreement: Section
           542.335(1)(c) ................................................................ 89
        3. Damages ...................................................................... 91

* B.A. Pomona College (1974) cum laude; JD, University of California (Berkeley)
I. INTRODUCTION

"Under early English common law, noncompetition clauses . . . were considered per se invalid on the ground that they caused undue personal hardship and public injury." While several states continue to ban such re-
strictive covenants, most states, Florida included, generally enforce non-
compete agreements in employment.

This survey aims at assessing section 542.335 of the Florida Statutes through the lens of a physician non-compete agreement. While some states have invalidated such agreements on public policy grounds either by statute or by common law, Florida usually upholds such agreements and has always assessed their validity under the same statute governing all employment non-
compete agreements, section 542.335.

Part II provides a brief history of Florida non-compete law, during which time the law has seesawed between favoring and disfavoring such restrictive covenants. Part III gives an overview of physician non-compete agreements generally and offers reasons for either invalidating such cove-
nants altogether or narrowly restricting their impact on public policy grounds. Part IV assesses how physician non-compete agreements have been

1. Derek W. Loeser, The Legal, Ethical, and Practical Implications of Noncompetition
Clauses: What Physicians Should Know Before They Sign, 31 J.L. MED. & ETHICS 283, 285
(2003).
2. See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2009); MONT. CODE ANN. § 28-2-
703 (2009); N.D. CENT. CODE § 9-08-06 (2009); OKLA. STAT. tit. 15, § 217 (2010).
3. FLA. STAT. § 542.335(1) (2010).
4. William G. Porter II & Michael C. Griffaton, Using Noncompete Agreements to
5. See, e.g., COLO. REV. STAT. § 8-2-113(3) (2009); DEL. CODE ANN. tit. 6, § 2707
(2010); MASS. GEN. LAWS ch. 112, § 12X (2009).
(relying on public policy, the Supreme Court of Tennessee banned non-compete agreements
between physicians and their private employers), superseded by statute, Act of June 21, 2007,
7. See, e.g., 4UOrtho, L.L.C. v. Practice Partners, Inc., 18 So. 3d 41, 43-44 (Fla. 4th
2007); Univ. of Fla., Bd. of Trs. v. Sanal, 837 So. 2d 512, 515–16 (Fla. 1st Dist. Ct. App.
2003).
analyzed under Florida’s current non-compete statute, section 542.335, and explores how they unduly favor employers and unfairly treat physician-employees bound by restrictive covenants. This article concludes that physician non-compete agreements should be construed as narrowly as lawyer non-compete agreements are construed in Florida and for analogous public policy reasons: The physician-patient relationship is entitled to the same respect that the lawyer-client relationship is owed under Florida law.

II. A BRIEF HISTORY OF FLORIDA NON-COMPETE LAW

A Florida Bar Journal article, *Restrictive Covenants: Florida Returns to the Original “Unfair Competition” Approach for the 21st Century,* co-authored by the Florida Senate, sponsor of the 1996 non-compete statute section 542.335 of the *Florida Statutes* governing restrictive covenants in employment to the present day, and by the Florida Bar’s principal drafter of the statute, (hereafter referred to as Grant and Steele), traced the history of non-compete agreements under Florida law. The history can be divided into the following time periods: pre-1953, when restrictive covenants were interpreted under the common law doctrine known as the “rule of reason,” which generally disfavored non-compete agreements in employment; 1953–1990, when such covenants were governed by section 542.12, “the first Florida statute to explicitly authorize contractual restrictions upon competition;” 1990–1996, when restrictive covenants were governed by section 542.33 and were strictly construed; and finally, 1996 to the present, during which time restrictive covenants have been governed by section 542.335.
Non-compete agreements are governed by the law "in effect at the time the agreement was entered into." 15

The attitude of Florida courts toward non-compete agreements pre-1953 is illustrated in *Love v. Miami Laundry Co.*, 16 where the Supreme Court of Florida refused, on public policy grounds, to enjoin former employees from engaging in the service of driving laundry trucks belonging to competitors of their former employer over certain routes in Dade County, Florida. 17 As *Love* demonstrates, "Florida courts displayed an extreme distaste for agreements that restricted competition, especially agreements between employers and employees." 18

From 1953 to 1990, restrictive covenants in Florida were governed by section 542.12. 19 According to the Supreme Court of Florida, the goal of section 542.12 was to "protect the legitimate interests of the employer." 20 In addition, "[t]he statute is designed to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them." 21 Twice, the Supreme Court of Florida upheld the constitutionality of section 542.12 against equal protection and due process challenges. 22

Grant and Steele claim, "In the late 1970s and throughout the 1980s, the Florida courts lost sight of the original purpose of the statute and increasingly employed a judicial approach to such agreements that emphasized a 'contract-oriented' methodology and that abandoned the original 'unfair competition' theory of analysis and enforcement." 23 Grant and Steele criticize the pre-1990 period on the ground that "the 'contract-oriented' approach . . . led to a hodge-podge of conflicting and unprincipled decisions." 24 By way of contrast, however, in *King v. Jessup*, 25 the Fifth District Court of Appeal made clear that pre-1990, "a judicially-created presumption of irreparable [harm] upon breach [of non-compete agreements] evolved." 26 In *First Miami*
Securities, Inc. v. Bell, the Fourth District Court of Appeal noted that before 1990, "an employee’s only challenge, based on unreasonableness, had to focus on the time and geographic area, and a presumption of irreparable harm flowed from any violation of the agreement." In 1990, the Florida Legislature amended section 542.33 of the Florida Statutes. Grant and Steele criticize section 542.33 because

It created a standardless "unreasonableness" defense; it created a standardless "contrary to the public health, safety or welfare" defense; it shifted the focus of enforcement to "irreparable injury;" it erroneously suggested that a "customer list" need not be a trade secret to be granted a measure of protection by contract; and it specified narrow instances of presumptive "irreparable injury.

In short, Grant and Steele insist that section 542.33 "nowhere specifies any objective standard for the courts to use in determining the 'reasonableness' of a restriction upon competition." In other words, Grant and Steele reject the common law rule of reason that many states rely upon in assessing the validity of restrictive covenants in employment agreements.

In support of Grant and Steele’s assessment of the 1990 non-compete statute, the Fifth District noted that section 542.33 "eliminated the judicial presumption by requiring a showing of irreparable injury before an injunction could be entered."

King illustrates how, during the period between 1990 and 1996, it was harder for employers to enforce non-compete agreements by injunction. In King, the Fifth District Court of Appeal upheld the trial court’s finding that the employer failed to show that he suffered irreparable injury stemming from the physician-employee’s breach of a covenant not to compete.

27. 758 So. 2d 1229 (Fla. 4th Dist. Ct. App. 2000) (per curiam).
28. Id. at 1229 (citing Gupton v. Vill. Key & Saw Shop, Inc., 656 So. 2d 475, 478 (Fla. 1995)).
31. Id. at 54.
32. See id. at 55.
34. See id. at 341.
35. Id. at 341.
In *Hapney v. Central Garage, Inc.*, the Second District Court of Appeal noted how the 1990 non-compete statute, section 542.33 changed the 1953 non-compete statute, section 542.12:

We view the sweeping impact of this amendment to be threefold. First, the presumption of irreparable injury ... is strictly curtailed. Second, a test of reasonableness is injected into the enforcement process because the amendment prohibits the enforcement of an unreasonable covenant. ... “In determining the reasonableness of such an agreement, the courts employ a balancing test to weigh the employer’s interest in preventing the competition against the oppressive effect on the employee.” ... [But] this balancing test [is] limited ... to duration and geographic area. ... Third, the legislature has specifically identified and segregated for special treatment covenants which protect trade secrets and customer lists and prohibit solicitation of existing customers ... 

Finally, since July 1, 1996, restrictive covenants in Florida have been governed by section 542.335. Unsurprisingly, as the sponsors and drafters of the statute, Grant and Steele think it strikes the proper balance between protecting employers’ “legitimate business interests” and any infringement upon employees’ rights to make a living. According to the Fifth District, “[s]ection 542.335 contains a comprehensive framework for analyzing, evaluating and enforcing restrictive covenants” contained in employment contracts.

The thesis of this article is that while section 542.335 of the *Florida Statutes* may well have reduced uncertainty when it comes to interpreting restrictive covenants in employment, it unduly understates the interests of employees in the following four ways:

38. See FLA. STAT. § 542.335 (2010).
39. Grant & Steele, supra note 8, at 55. The term “legitimate business interest” seems to have originated in Florida from a Second District Court of Appeal decision. *Hapney*, 579 So. 2d at 134 (holding that a former employee should be barred from competing only if the employer had a “legitimate business interest” in avoiding such competition); see also Stanley H. Eleff, *Covenants Not to Compete Can Have Their Limitations*, TAMPA BAY BUS. J. (Mar. 29, 2004, 12:00 AM), http://tampabay.bizjournals.com/tampabay/stories/2004/03/29/focus4.html?printable.
1) It shifts the usual burden of proving irreparable injury from the employer to the employee in assessing whether an injunction should be granted;\footnote{See FLA. STAT. § 542.335(1)(j).}

2) "In determining the enforce[ment] of a restrictive covenant, a court shall not consider any individualized economic or other hardship that might be caused to the employee;"\footnote{Id. § 542.335(1)(g)1.} in other words, the usual balancing of hardships prong\footnote{Miller Mech., Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974).}—assessing whether an injunction should be issued—has been altogether abandoned;\footnote{See FLA. STAT. § 542.335(1)(g)1, (1)(i)-(j).}

3) "A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter . . .;"\footnote{Id. § 542.335(1)(h).} and

4) While paying lip service to the "public interest" prong for assessing the validity of non-compete agreements, in fact, the public interest rarely, if ever, has been relied upon to invalidate such restrictive covenants.\footnote{See id.; see generally FLA. STAT. § 542.335.} Specifically, section 542.335 "gives absolutely no weight to how physician non-compete agreements cause potential harm to patient choice and to the professional and ethical obligations of physicians to their patients."\footnote{S. Elizabeth Wilbom Malloy, Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests, 41 WAKE FOREST L. REV. 189, 194 n.23 (2006).}

Which party bears the burden of proof on an issue is often outcome determinative: Under section 542.33, the employer bore the burden of proving irreparable injury, a critical element in an effort to obtain an injunction.\footnote{See FLA. STAT. § 542.33(2)(a) (1989 & Supp. 1990).} By contrast, under section 542.335, the former employee bears the burden of proving that a violation of a non-compete agreement does not cause irreparable injury.\footnote{Id. § 542.335(1)(j) (2010).} As the Second District Court of Appeal put it:

[an employer] seeking to enforce a restrictive covenant by injunction need not directly prove that the [former employee's] specific activities will cause irreparable injury if not enjoined. Rather, the statute provides that "[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant."\footnote{Am. II Elecs., Inc. v. Smith, 830 So. 2d 906, 908 (Fla. 2d Dist. Ct. App. 2002) (quoting FLA. STAT. § 542.335(1)(j) (2001)).}
This key difference between the 1990 and 1996 statutes turns the common law of equity on its head. It is black letter law that the party seeking an injunction bears the burden of proving, among other things, that it will suffer irreparable injury if the injunction is denied.\textsuperscript{51}

Even though no drafter of legislation can foresee all potential ambiguities in proposed bills, the current controversies over 1) whether referral doctors constitute a ""legitimate business interest"" under section 542.335;\textsuperscript{52} 2) whether attorney's fees are recoverable from or by a prevailing non-party such as a rival employer;\textsuperscript{53} and 3) when access to confidential information will support a broad restriction on former employees,\textsuperscript{54} illustrates that uncertainty and ambiguity continues to plague even the best efforts of lawmakers to learn from the past.

\section*{III. PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT}

The relative merits of physician non-compete agreements in employment may be summarized by comparing and contrasting the Supreme Court of New Jersey case of \textit{Karlin v. Weinberg},\textsuperscript{55} and the Supreme Court of Arizona case of \textit{Valley Medical Specialists v. Farber}.\textsuperscript{56}

\textit{Karlin} involved ""medical doctors engaged in the practice of dermatology.""\textsuperscript{57} Dr. Weinberg's employment contract contained clauses barring him, post-termination, from engaging in the practice of dermatology for five years within a ten-mile radius of the site of his previous employer.\textsuperscript{58} Post-termination, Dr. Weinberg opened a competing dermatology practice ""just a few doors"" from his former employer where he treated sixty patients he had

\begin{itemize}
\item \textsuperscript{51} Hiles v. Auto Bahn Fed'n, Inc., 498 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1986) (per curiam).
\item \textsuperscript{52} Fla. Hematology & Oncology Specialists v. Tummala (\textit{Tummala II}), 969 So. 2d 316, 316-17 (Fla. 2007) (per curiam) (Lewis, C.J., dissenting) (quoting FLA. STAT. § 542.335(1)(b) (2004)).
\item \textsuperscript{53} Compare \textit{Sun Grp. Enters., Inc. v. DeWitte}, 890 So. 2d 410, 412 (Fla. 5th Dist. Ct. App. 2004) (holding appellees were entitled to attorney's fees), \textit{with} Bauer v. DILIB, Inc., 16 So. 3d 318, 320 (Fla. 4th Dist. Ct. App. 2009) (holding the plaintiff was not entitled to attorney's fees).
\item \textsuperscript{54} Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1235 n.12 (11th Cir. 2009).
\item \textsuperscript{55} 390 A.2d 1161 (N.J. 1978).
\item \textsuperscript{56} 982 P.2d 1277 (Ariz. 1999) (en banc).
\item \textsuperscript{57} \textit{Karlin}, 390 A.2d at 1163.
\item \textsuperscript{58} \textit{id.} at 1164 (reviewing the merits of the case, despite the restrictive covenant being oral). Unlike Florida, which requires that non-compete agreements be in writing under section 542.335(1)(a) of the \textit{Florida Statutes}, New Jersey recognizes and enforces oral restrictive covenants. \textit{See id.}.
\end{itemize}
previously treated while employed by Dr. Karlin.\textsuperscript{59} Dr. Karlin sued, seeking both an injunction and damages.\textsuperscript{60}

The Supreme Court of New Jersey began its analysis by stating that:

\begin{quote}
An employee’s post-employment restrictive covenant is enforceable to the extent that it is reasonable under all the circumstances of the case. A post-employment restrictive covenant will be found to be reasonable when it protects the “legitimate” interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public . . . .\textsuperscript{61}
\end{quote}

The court proceeded to say that Dr. Karlin had:

\begin{quote}
[A legitimate] interest in protecting his ongoing relationship with his patients. Dr. Karlin, by virtue of his efforts, expenditures and reputation, has developed a significant practice, and only if the restrictive covenant is given effect can he hope to protect in some measure his legitimate interest in preserving his ongoing relationship with his patients.\textsuperscript{62}
\end{quote}

The court noted that “a mere showing of personal hardship does not amount to an ‘undue hardship’ that would prevent enforcement of the covenant.”\textsuperscript{63}

Next, the court compared and contrasted lawyer non-compete agreements with physician non-compete agreements.\textsuperscript{64} While emphasizing “the unique relationship between attorney and client,” the court minimized the physician-patient relationship: “While . . . some patients may have to travel a greater distance to Dr. Weinberg’s new office . . . than they travelled to his former office, no patient will, by force of law, automatically be deprived of continuing his ongoing relationship with his physician.”\textsuperscript{65} While recognizing that the Supreme Court of New Jersey had adopted the American Bar Association rule prohibiting lawyer non-compete agreements in employment, it noted, “The regulations governing physicians within this State, however, do not contain any restriction similar to [the ABA prohibition on lawyer non-compete agreements].”\textsuperscript{66} The court refused to give weight to various prin-
principles of medical ethics that had not been adopted by any governmental body or court. 67 Ironically, the Karlin court invoked public policy in support of enforcing physician non-compete agreements in employment: Without such restrictive covenants,

established physicians [would be] hesitant to employ younger associates and in turn deprive the younger physician of the opportunity to gain experience and to husband the necessary resources needed to establish a practice of his own. [Invalidating such covenants] might discourage physicians from establishing partnerships, thereby depriving the public of the potentially lower fees which ordinarily flow from the economies of scale attendant upon a partnership operation. 68

In rejecting a per se rule in favor of a case-by-case determination of the validity of physician non-compete agreements, the Karlin court did note that a shortage of physicians within a restricted area should be taken into account in assessing the reasonableness of such agreements. 69

In Valley Medical Specialists, a medical practice hired Dr. Farber, an internist and pulmonologist. 70 "Dr. Farber became a shareholder and subsequently a minority officer and director" of the practice. 71 Dr. Farber's employment contract contained a non-compete agreement, which he violated when he left the practice and opened a new office within the restricted area. 72

Noting the law's traditional disfavor towards non-compete agreements, the Valley Medical Specialists court said:

This disfavor is particularly strong concerning such covenants among physicians because the practice of medicine affects the public to a much greater extent. In fact, "[f]or the past [sixty] years, the American Medical Association (AMA) has consistently taken the position that noncompetition agreements between physicians impact negatively on patient care." 73

67. See id. at 1168.
68. Id. at 1169.
69. Id. at 1170.
70. Valley Med. Specialists, 982 P.2d at 1278
71. Id. at 1279.
72. Id.
73. Id. at 1281 (quoting Paula Berg, Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense, 45 Rutgers L. Rev. 1, 6 (1992)).
Even though the agreement in Valley Medical Specialists was between partners, the court said it was closer "to an employer-employee agreement than a sale of a business."74 The court went on to note that "[u]nequal bargaining power may be a factor to consider when [assessing] the hardship on the departing employee."75 Most important to the court in Valley Medical Specialists, however, was that "in cases involving the professions, public policy concerns may outweigh any protectable interest the remaining firm members may have."76 Analogizing to lawyer non-compete agreements, the Valley Medical Specialists court concluded that the physician-patient relationship was entitled to the same protection the law gives to the lawyer-client relationship.77 Relying on public policy, the Valley Medical Specialists court concluded:

that the doctor-patient relationship is special and entitled to unique protection. It cannot be easily or accurately compared to relationships in the commercial context. In light of the great public policy interest involved in covenants not to compete between physicians, each agreement will be strictly construed for reasonableness.78

In assessing the validity of physician non-compete agreements in employment contracts, commentators, and courts have listed factors the law should consider:

1) whether the covenant goes beyond preventing a doctor from practicing the specialty performed by the employer;

2) whether the duration of the restriction is longer than the typical treatment interval of patients in the specialty;

3) whether the restriction unduly interferes with patients’ right to continue seeing the doctor of their choice by requiring patients to travel an unreasonable distance to see the doctor;

4) whether enforcement of the covenant would result in a shortage of doctors practicing the particular specialty in the area;

5) whether enforcement of the covenant would grant a monopoly over a specialty in an area to the employer for the duration of the restriction; and

6) whether enforcement of the covenant would bar doctors from engaging in activities not in competition with their former employers.79

74. Id. at 1282.
76. Id.
77. Id. at 1283.
78. Id.
IV. SECTION 542.335

A. Non-Compete Agreements Must Be in Writing

Under section 542.335(1)(a) of the Florida Statutes, a non-compete agreement must be in writing and signed by the former employee. Several Florida cases address this issue. In Sanz v. R.T. Aerospace Corp., the Third District Court of Appeal concluded that an employee was not bound by his non-compete agreement after the three-year term of his written contract expired, and he continued working under an oral agreement. Similarly, in Gray v. Prime Management Group, Inc., the Fourth District Court of Appeal concluded that an oral extension of the company’s president’s written employment contract did not apply to his non-compete agreement. In Zupnik v. All Florida Paper, Inc., the Third District Court of Appeal ruled that “post-termination restrictions expire upon the termination of [a contract] for a specific term, even if [the] employee remains an at-will employee after the [contract term ends].

B. What Constitutes a “Legitimate Business Interest?”

Even today, under Florida’s current “pro-employer” non-compete statute, an employer may not enforce a noncompetition agreement restriction on a former employee simply to eliminate competition per se, but rather an employer must establish a legitimate business interest to be protected.

1. Valuable Confidential or Professional Information That Otherwise Is Not a Trade Secret

As the Eleventh Circuit Court of Appeals pointed out in Proudfoot Consulting Co. v. Gordon, there is a split of authority in Florida on when confidential information accessible by employees will support a broad restriction barring former employees from working for a rival. 

80. FLA. STAT. § 542.335(1)(a) (2010).
81. 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).
82. Id. at 1059–60.
83. 912 So. 2d 711 (Fla. 4th Dist. Ct. App. 2005) (per curiam).
84. Id. at 713–14.
85. 997 So. 2d 1234 (Fla. 3d Dist. Ct. App. 2008).
86. Id. at 1238.
87. See FLA. STAT. § 542.335(1)(b) (2010).
88. 576 F.3d 1223 (11th Cir. 2009).
89. Id. at 1235 n.12.
O'Brien held that the employee’s access to confidential information justified a restriction against work for a competitor where the employee was in a position at his new employer to use that information to unfairly compete against his former employer.

By contrast, Grant and Steele suggest that in determining whether an employee’s knowledge of confidential information justifies a restriction against work for a competitor, courts should look to the definition of threatened misappropriation used in trade secrets law.

While acknowledging that the “principle of inevitable disclosure would appear to impose a higher standard than the approach set out in O'Brien,” the Eleventh Circuit concluded that “it is unclear if, in practice, the application of [these] two standards would produce different results.”

In AutoNation, Inc. v. Maki, the Florida Circuit Court noted that an analysis of whether an employee has the ability to use confidential information to compete unfairly against a former employer is “an objective one.”

2. Substantial Relationships with Specific Prospective or Existing Customers, Patients, or Clients

As the Third District Court of Appeal put it in Bradley v. Health Coalition, Inc., “the purpose of the [1990 non-compete statute] is to prevent an employee from taking advantage of a customer relationship which was developed during the term of the employee’s employment.”

There is a consensus in Florida on the question of whether a former physician violates a non-compete agreement when she places an advertisement announcing her new business address. While such ads are a form of solicitation, they are not direct solicitation and therefore not in violation of a non-compete agreement.

92. Id. (citing Grant & Steele, supra note 8, at 54–55).
93. Id. at 1236 n.12 (discussing O’Brien, 347 F. Supp. 2d at 1305-08).
95. Id. at *5.
97. Id. at 334–35.
99. See, e.g., Lotenfoe, 747 So. 2d at 424 (finding that an ad by former physician-employee was not a direct solicitation of former employer-physician’s patients); King, 698 So.
Currently, there is a district court of appeal split over whether “referring physicians” are a legitimate business interest in the hematology and oncology context.\textsuperscript{100} Supreme Court of Florida Justice Lewis succinctly summed up this controversy when he dissented from the majority’s decision not to resolve this issue.\textsuperscript{101} In \textit{Florida Hematology & Oncology v. Tummala (Tummala I)},\textsuperscript{102} the Fifth District Court of Appeal ruled that “referral physicians” are not a legitimate business interest.\textsuperscript{103} That court made clear that referring physicians secure a “stream of unidentified prospective patients.”\textsuperscript{104} In doing so, the Fifth District acknowledged “that this holding . . . appear[s] to conflict with \textit{[Torregrosa]},”\textsuperscript{105} where the Third District Court of Appeal concluded that “referral physicians” do constitute legitimate business interest worthy of protection under section 542.335.\textsuperscript{106} While Supreme Court of Florida Justice Lewis left no doubt that he believed “referral physicians” are a legitimate business interest under section 542.335(1)(b), a majority of the Supreme Court of Florida dismissed the appeal in \textit{Tummala I} as improvidently granted.\textsuperscript{107}

In \textit{Tummala I}, an oncologist’s employment contract included a restrictive covenant barring him from competing for two years after he left the practice, within a radius of fifteen miles of his former employment.\textsuperscript{108} After resigning, Tummala opened a competing oncology practice within the restricted geographic area, and his former employer sued to enforce the non-compete agreement.\textsuperscript{109} While Tummala scrupulously avoided providing medical services directly to any of his former employer’s existing patients, he did accept patient referrals from family physicians, internists, and general practitioners, who refer their patients to specialists.\textsuperscript{110} Tummala’s former

---


\textsuperscript{101} \textit{See Tummala II}, 969 So. 2d 316–18 (Lewis, C.J., dissenting).

\textsuperscript{102} 927 So. 2d 135 (Fla. 5th Dist. Ct. App. 2006), \textit{review dismissed by Tummala II}, 969 So. 2d 316 (Fla. 2007) (per curiam).

\textsuperscript{103} \textit{Id.} at 139.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.} at 139 n.4.


\textsuperscript{107} \textit{See Tummala II}, 969 So. 2d 316, 316 (Fla. 2007).

\textsuperscript{108} \textit{Tummala I}, 927 So. 2d at 137.

\textsuperscript{109} \textit{See id.}

\textsuperscript{110} \textit{See id.} at 137 n.1.
firms proved that its volume of referrals from existing referral physicians plunged seventy percent since Tummala opened his competing practice.111

Relying upon the First District Court of Appeal’s decision in University of Florida Board of Trustees v. Sanal,112 which held that before a relationship with a prospective patient could constitute a legitimate business interest, that relationship must be specific and identifiable,113 the trial court in Tummala I declined to enjoin the defendant from competing with his former practice or from securing referral patients from the same referral physicians.114 Despite acknowledging that such referral physicians were a vital source of patients, the trial court argued that since Tummala was not directly providing services to any existing patients, he was not infringing upon any “specific prospective and existing’ patients.”115 If unknown prospective patients cannot constitute legitimate business interests, the Tummala I court reasoned, then neither can the doctors who refer them to specialists: “‘[T]he lack of [a specific and identifiable] relationship with a patient does not become a legitimate business interest simply by virtue of being referred by a physician.” 116

As one critic of the Tummala I ruling put it:

[Tummala I] is a stunning curtailment of the scope of Florida Statute [section] 542.335. Worse, the rationale for refusing to protect an employer’s interest in its referral relationships is not limited to the medical profession. Any business or profession which receives clients, customers or patients from referral relationships developed, nurtured and maintained by the business will, at least in the Fifth District, be unable to protect those relationships by use of restrictive covenant.117

In Southernmost Foot & Ankle Specialists v. Torregrosa, P.A.,118 the Third District Court of Appeal concluded, “The trial court properly found . . . that the restrictive covenant was reasonably necessary to protect Southern-
most's legitimate business interests in its patient base, referral doctors, specific prospective and existing patients, and patient goodwill."

In the absence of resolution of this conflict by the Supreme Court of Florida, Justice Lewis urged the Florida Legislature to clarify the law on this issue.

3. Customer, Patient, or Client Goodwill

As case law makes clear, a former employer has a legitimate business interest in its patients which it can protect against a physician who violates an enforceable non-compete agreement.

In Medtronic, Inc. v. Janss, the Eleventh Circuit affirmed the district court’s injunction against a pacemaker salesman who by “his contacts with former customers [prescribing physicians],” he “plainly tried to trade on Medtronic’s—[his former employer]—goodwill.”

In Kephart v. Hair Returns, Inc., the Fourth District Court of Appeal ruled that a non-compete agreement cannot bar a former employee from servicing “customers who voluntarily follow an employee to her new place of employment.”

In Austin v. Mid State Fire Equipment of Central Florida, Inc., the Fifth District Court of Appeal barred the former employee from soliciting customers of his former employer but did not bar the employee from working for a competitor.

119. Id. at 594. In Open Magnetic Imaging, Inc. v. Nieves-Garcia, the Third District Court of Appeal again upheld the trial court’s finding that the employer had a legitimate business interest in its referral doctors. 826 So. 2d 415, 419 (Fla. 3d Dist. Ct. App. 2002) (per curiam).

120. Tummala II, 969 So. 2d 316, 318 (Fla. 2007) (per curiam) (Lewis, C.J., dissenting).


122. 729 F.2d 1395 (11th Cir. 1984).

123. Id. at 1401.


125. Id. at 960 (emphasis added).

126. 727 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1999).

127. Id. at 1098.
4. Extraordinary or Specialized Training

An employer’s right to protect his investment in an employee’s training was addressed by the Second District Court of Appeal under the 1990 non-compete statute in *Hapney v. Central Garage, Inc.*

To constitute a protectable interest, however, the providing of training or education must be extraordinary. . . . The third category is difficult to define with any degree of precision. . . . [I]t is generally required that the employer provide more in training than that acquired by simply performing the tasks associated with a job. . . . The precise degree of training or education which rises to the level of a protectible [sic] interest will vary from industry to industry and is a factual determination to be made by the trial court.

C. Employer’s Prima Facie Case

1. Rebuttable Presumptions

"The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant." Although "[t]his presumption is rebuttable, not conclusive," it is rare indeed for a former employee to successfully rebut this presumption. A common way to rebut this presumption, however, is for the employee to prove that damages are readily calculable. What is clear is that Florida law does not require the employer to prove that the former employee intentionally breached a restrictive covenant in order for the employer to obtain an injunction.

129. *Id.* at 132.
130. *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*, 939 So. 2d 268, 271 (Fla. 4th Dist. Ct. App. 2006) (quoting FLA. STAT. § 542.335(1)(j) (2006)). Whether a restrictive covenant has been violated is a question of fact. *See id.*
131. *Id.; see also Passalacqua v. Naviant, Inc.*, 844 So. 2d 792, 796 (Fla. 4th Dist. Ct. App. 2003).
132. *See, e.g.*, First Miami Sec., Inc. v. Bell, 758 So. 2d 1229, 1230 (Fla. 4th Dist. Ct. App. 2000) (per curiam).
According to section 542.335(1)(d)1 of the Florida Statutes, "In the case of a restrictive covenant sought to be enforced against a former employee . . . a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration."\textsuperscript{134}

2. Rules of Construction

Under section 542.335(1)(h) of the Florida Statutes:

A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.\textsuperscript{135}

D. Employee's Burden of Proof

Once the employer establishes a prima facie case that a restrictive covenant is reasonably necessary, the employee "has the burden of establishing that the [restriction] is overbroad, overlong, or otherwise not reasonably necessary."\textsuperscript{136} Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.\textsuperscript{137} illustrates just how hard it is for a physician-employee to overcome the presumption of irreparable harm once the former employer proves the existence of one or more "legitimate business interests."\textsuperscript{138}

E. Employee Defenses

In a 2004 Florida Bar Journal article, N. James Turner offered employees advice and strategies for defending against non-compete agreements.\textsuperscript{139} Turner suggests that the restricted employee try a preemptive strike—file a declaratory judgment action—"which should seek a determination of the enforceability of the noncompete agreement and a declaration of

\textsuperscript{134.} FLA. STAT. § 542.335(1)(d)(1) (2010).
\textsuperscript{135.} Id. § 542.335(1)(h).
\textsuperscript{136.} Anich Indus., Inc. v. Raney, 751 So. 2d 767, 770 n.2 (Fla. 5th Dist. Ct. App. 2000);
FLA. STAT. § 542.335(1)(c).
\textsuperscript{137.} 939 So. 2d 268 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{138.} See id. at 271–72.
its invalidity." But, as the Eleventh Circuit made clear in Proudfoot, it is no defense that "an employee reasonably believed that his conduct did not violate the restrictive covenants at issue."

1. Employer’s Breach of Contract

Turner notes:

"[I]t is generally easier to convince a court of a prior material breach if the noncompete covenant is part of an overall employment contract which contains compensation and other provisions which were arguably breached, than if the covenant is a stand-alone agreement. It is generally easier to prove the breach of an explicit term of the contract than an implied term, such as a requirement of existing law."

Turner notes "[t]he employer’s failure to pay compensation under a contract of employment is the most common material breach available as a defense to employees who have previously signed noncompete agreements. Florida courts have regularly denied injunctive relief in these situations." If an employer breaches the employment contract first, "the general rule is that a material breach . . . allows the non-breaching party to treat the breach as a discharge of [her] contract liability." Florida courts have accepted the following kinds of employer breaches that will serve to release the former employee from obligations contained in the non-compete agreement: 1) "refusing to credit [a physician] with all . . . services performed in calculating her bonus;" 2) evidence that the former employer sexually harassed the former employee; Turner notes that an employer’s "[f]ailure to pay an

140. Id. at 46.
141. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1239 (11th Cir. 2009). The Eleventh Circuit noted that all Florida court cases "referring to an 'intent' element" were decided under an earlier version of the state's non-compete statute. Id. at 1239–40.
142. Turner, supra note 139, at 46.
143. Id. at 45.
145. Id. at 94.
employee in accordance with the [Fair Labor Standards Act]" is an often-neglected source of an employer's prior breach of contract. 147

2. Employer's Unclean Hands

Since an injunction is an equitable remedy, equitable defenses such as unclean hands and latches may be raised to successfully defeat an employer's efforts to obtain a temporary injunction. 148 Bradley provides an example of how a physician was released from his promise not to compete by showing unclean hands on the part of the employer.149

3. Intervening Changes in the Employee's Job Duties

Intervening changes in an employee's job duties and/or compensation have served, in other jurisdictions, to terminate the employment agreement that includes the non-compete clause when it is replaced with an agreement lacking one. 150 There is no reason such an employee defense would not work in Florida as well.

4. Waiver

If the restricted employee can demonstrate that "the former employer [never] enforced the non-compete agreement in the past against other employees," she may argue that the employer has waived the right to enforce it against her. 151

5. Lack of Consideration

"Courts will not enforce a non-compete [agreement if] there is no consideration." 152 States vary, however, "on whether the continuation of at-will employment of a physician is sufficient consideration for a non-compete

147. Turner, supra note 139, at 45–46.
148. See id. at 46.
152. Id.
agreement.” Some states require that “additional consideration, not the mere continuation of employment, must be given to support a restrictive covenant once employment has begun.” Other states have “recognized continued employment as [sufficient] consideration to support a covenant not to compete.”

F. Remedies

1. Injunction

Even under Florida’s original non-compete statute, section 542.12 of the Florida Statutes, it was recognized that the normal remedy for breach of a non-compete agreement was an injunction. This is so “because of the inherently difficult, although not impossible, task of determining just what damage actually is caused by the employee’s breach of the agreement.”

Florida courts have not been consistent in identifying the elements necessary to be proven before an injunction will be issued. For example, in *Environmental Services, Inc. v. Carter,* the Fifth District Court of Appeal of Florida lists four requirements for a temporary injunction. By contrast, in *Litwinczuk,* the court listed five requirements for a temporary injunction. In *In re Estate of Barsanti,* the Third District Court of Appeal of Florida noted that the party seeking a temporary injunction must demonstrate that: “1) immediate and irreparable harm will otherwise result, 2) the moving party [has] a clear legal right thereto, 3) [the moving party has] no adequate remedy at law and 4) the public interest will not be disserved.” Of the four elements, it is typically irreparable injury and substantial likelihood of success on the merits “that drive the outcome of most noncompete cases. The

---

153. *Id.*
154. *Id.*
155. *Id.*
156. See, e.g., *Capelouto v. Orkin Exterminating Co. of Fla.,* 183 So. 2d 532, 535 (Fla. 1966).
159. 9 So. 3d 1258 (Fla. 5th Dist. Ct. App. 2009).
160. *Id.* at 1261.
161. *Litwinczuk,* 939 So. 2d at 271.
162. 773 So. 2d 1206 (Fla. 3d Dist. Ct. App. 2000) (per curiam).
163. *Id.* at 1208.
fourth factor, the public interest, rarely has much impact, since most cases involve purely commercial issues between private parties."\(^{164}\)

a. **Irreparable Injury and Inadequate Legal Remedy**

Under the common law of equity, the equitable remedy of an injunction is not available if the legal remedy is adequate.\(^{165}\) The usual way of proving the inadequacy of the legal remedy, when it comes to injunctions, is to prove irreparable injury.\(^{166}\) As one Florida court put it, an injunction is the usual remedy for breach of non-compete agreements because "it is extremely difficult for a court to determine what damages are caused by breach of the covenant."\(^{167}\) In *Masters Freight, Inc. v. Servco, Inc.*,\(^{168}\) the Second District Court of Appeal of Florida discussed the necessity of weighing all the factors for the granting of a temporary injunction, including irreparable injury, in the context of non-compete agreements.\(^{169}\)

b. **No Balancing of the Hardships**

Under Florida’s original non-compete statute, section 542.12, courts of equity retained the power to "employ a balancing test to weigh the employer's interest in preventing the competition against the oppressive effect on the employee."\(^{170}\) In sharp contrast, sections 542.335(1)(g) and (1)(g)(1) state: "In determining the enforceability of a restrictive covenant, a court: Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."\(^{171}\) In utter disregard of the common law elements that must be proved to obtain a temporary injunction, Florida’s non-compete statute leaves no doubt that whatever hardship a restrictive covenant has on the former employee, such hardship is irrelevant. So, if obeying the injunction means the former employee must relocate out-


\(^{165}\) Envtl. Servs., Inc. v. Carter, 9 So. 3d 1258, 1261 (Fla. 5th Dist. Ct. App. 2009).

\(^{166}\) See id. at 1261–62.

\(^{167}\) Id. at 1261 (citing Sentry Ins. V. Dunn, 411 So. 2d 336, 336 (Fla. 5th Dist. Ct. App. 1982)).

\(^{168}\) 915 So. 2d 666 (Fla. 2d Dist. Ct. App. 2005).

\(^{169}\) Id. at 666–67.

\(^{170}\) Miller Mech., Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974) (citing Capelouto v. Orkin Exterminating Co. of Fla., 183 So. 2d 532, 534 (Fla. 1966)).

\(^{171}\) FLA. STAT. § 542.335 (1)(g)(1) (2010).
side the restricted area, these costs are not to be taken into account.\textsuperscript{172} By contrast, the Supreme Court of Pennsylvania, in New Castle Orthopedic Associates v. Burns,\textsuperscript{173} invalidated a physician non-compete agreement in part because, in balancing the hardships, the court concluded that greater harm would result from issuing the injunction than from its denial.\textsuperscript{174}

c. \textit{Substantial Likelihood of Success on the Merits}

A temporary injunction is issued pre-trial by a court of equity sitting without a jury.\textsuperscript{175} Solely on the basis of affidavits, the judge must guess which party is likely to prevail on the merits of the case in the event it proceeds to trial.\textsuperscript{176} Usually, the party seeking the injunction bears the burden of proving this element by a preponderance of the evidence.\textsuperscript{177}

Certainly under earlier versions of Florida's non-compete statute, it was generally accepted that before a temporary injunction would be issued, the employer must prove a substantial likelihood of success on the merits in the event the case goes to trial.\textsuperscript{178}

As the Fifth District Court of Appeal makes clear, when an employer cannot prove a legitimate business interest, it cannot satisfy the substantial likelihood of success element for obtaining a preliminary injunction.\textsuperscript{179} As the Fourth District Court of Appeal put it, whether the employer breached the employment contract first also relates to whether the employer has a substantial likelihood of success on the merits.\textsuperscript{180} In JonJuan Salon, Inc. v. Acosta,\textsuperscript{181} the Fourth District discussed the substantial "likelihood of success on

\textsuperscript{172} See id.
\textsuperscript{173} 392 A.2d 1383 (Pa. 1978).
\textsuperscript{174} \textit{Id.} at 1385–86.
\textsuperscript{175} See \textit{FLA. R. CIV. P.} 1.610(a).
\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See, e.g., Sarasota Beverage Co. v. Johnson, 551 So. 2d 503, 508 (Fla. 2d Dist. Ct. App. 1989), \textit{superseded by statute, FLA. STAT.} § 542.335 (2009) (rejecting the notion that success on the merits, a traditional requirement for injunction, need not be considered in an employment non-compete case and noting that under the 1989 non-compete statute, section 542.33 of the \textit{Florida Statutes}, it is proper to consider the likelihood that the movant will succeed on the merits).
\textsuperscript{179} Anich Indus., Inc. v. Raney, 751 So. 2d 767, 770 (Fla. 5th Dist. Ct. App. 2000).
\textsuperscript{180} Benemerito & Flores, M.D.'s, P.A. v. Roche, 751 So. 2d 91, 93 (Fla. 4th Dist. Ct. App. 1999) (citing Cordis Corp. v. Prooslin, 482 So. 2d 486, 489 (Fla. 3d Dist. Ct. App. 1986)).
\textsuperscript{181} 922 So. 2d 1081 (Fla. 4th Dist. Ct. App. 2006).

https://nsuworks.nova.edu/nlr/vol35/iss1/1
the merits” element in assessing an employer’s right to a temporary injunction.\textsuperscript{182}

d. \textit{The Public Interest}

As one critic of physician non-compete agreements put it:

\[ \text{ Courts must modify the traditional rule of reason test in future evaluation of physician restrictive covenants. Courts must consider the impact that enforcement of restrictive covenants will have on the relationships between physicians and their patients within the public-interest prong of the rule of reason analysis. . . . Courts must weigh the potential harm to patient choice and to the professional and ethical obligations of physicians to their patients.} \textsuperscript{183} \]

While section 542.335(1)(g)\textsuperscript{4} states that a court “[s]hall consider the effect of enforcement upon the public health, safety, and welfare,”\textsuperscript{184} section 542.335(1)(i) states:

\[ \text{No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.} \textsuperscript{185} \]

Though section 458.301 expressly recognizes the importance of patients “mak[ing] an informed choice when selecting a physician,”\textsuperscript{186} I have found only one case citing this source of public policy in a physician non-compete case, and it was decided under the 1991 version of the Florida Statutes.\textsuperscript{187}

As H. Gregory McNeill put it in \textit{Restrictive Covenants: The New Loophole}, while asserting that an injunction will “‘adversely affect the public health, safety and welfare’” is a valid defense under Florida law, it almost

\begin{footnotesize}
\textsuperscript{182} \textit{Id}. at 1083.
\textsuperscript{184} \textit{Id}. § 542.335(1)(g)\textsuperscript{4} (2010).
\textsuperscript{185} \textit{Id}. § 542.335(1)(i).
\textsuperscript{186} \textit{Id}. § 458.301.
\end{footnotesize}
never works. In fact, "[o]ver the last 30 years, doctors have been enjoined as often as former employees in any other business or profession. It is a rare circumstance that doctors are able to avoid enforcement of a restrictive covenant based upon the public interest argument." By contrast, courts in other states have considered whether the enforcement of a restrictive covenant would cause a shortage of specialists in the restricted area in invalidating non-compete agreements on public policy grounds. When it comes to lawyer non-compete agreements in Florida, however, an Ethics Opinion makes clear that under Rules 4-1.4, 4-1.5(g), and 4-5.6(a) of the Rules of Professional Conduct of the Florida Bar, such restrictive covenants should be narrowly construed on grounds of protecting the lawyer-client relationship. The 'special trust and confidence' inherent in an attorney-client relationship dictates 'that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships.' Moreover, "prohibiting a departing attorney from attempting to hire other lawyers from the firm, [such a covenant] restricts the right of association between attorneys and, indirectly, the right to practice." The same solicitude Florida law bestows on the lawyer-client relationship should apply with equal force to the physician-patient relationship especially in light of section 458.301 which evidences Florida's public policy recognizing the special status of the physician-patient relationship.

188. McNeill supra note 117, at 15 n.1 (quoting Fla. STAT. § 542.335(1)(g)(4)).
189. Id. (citing Jewett Orthopaedic Clinic, P.A. v. White, 629 So. 2d 922, 925 (Fla. 5th Dist. Ct. App. 1993)).
190. See, e.g., Idbeis v. Wichita Surgical Specialists., P.A., 112 P.3d 81, 92 (Kan. 2005) (discussing that while the Supreme Court of Kansas upheld a physician non-compete agreement, the Court also suggested that restrictive covenants in medically necessary specialties might be unenforceable if the community would be left with a shortage in that specialty); New Castle Orthopedic Assocs. v. Burns, 392 A.2d 1383, 1388 (Pa. 1978) (explaining how the Supreme Court of Pennsylvania held that a non-compete agreement between an orthopedic practice and its former physician employee would not be enforced, mainly on the grounds that there was a shortage of orthopedic specialists in the geographic areas encompassed by the non-compete agreement).
192. Id. (quoting Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982)).
Public policy also comes into play when assessing non-compete agreements entered into in other states, but effective in Florida, or when such agreements are executed in Florida but take effect in other states. Several Florida cases have addressed these issues. In Palmer & Cay, Inc. v. Marsh & McLennan Cos., a panel of the Eleventh Circuit, strictly construing non-compete agreements, ruled Georgia's public policy strictly construing non-compete agreements superseded the public policy of other states with more substantial contacts. Authors of a Florida Bar Journal article make the case that:

Under the apparently sweeping holding of Palmer & Cay, a Florida employer who entered into a non-compete, valid under [Florida Statutes] section 542.335, with an employee living and working in Florida, could potentially be precluded from enforcing that contract in Florida, by the decision of a Georgia state or federal court having no prior connection to the employer, the employee, or the contract.

What should Florida courts do when faced with enforcing a non-compete agreement executed in another state that contains provisions that violate Florida’s public policy? In Cerniglia v. C. & D. Farms, Inc., the Supreme Court of Florida directly confronted the question of whether a non-compete agreement, contrary to Florida public policy, is unenforceable only in Florida or in its entirety. The Court concluded that “Florida’s public policy and statutes cannot be applied to a foreign contract to void its operation elsewhere. If performance, in Florida, of a foreign made contract is repugnant to our public policy it is unenforceable here, but not necessarily void or unenforceable in other jurisdictions.” Finally, in Harris v. Gonzalez, the Fourth District Court of Appeal ruled, “Although . . . Florida cannot apply its public policy and statutes to a foreign contract to void its operation

---

194. See e.g. Cerniglia v. C. & D. Farms, Inc., 203 So. 2d 1, 2 (Fla. 1967) (per curiam); Harris v. Gonzalez, 789 So. 2d 405, 409 (Fla. 4th Dist. Ct. App. 2001).
195. 404 F.3d 1297 (11th Cir. 2005).
196. See id. at 1309.
198. 203 So. 2d 1 (Fla. 1967) (per curiam).
199. Id. at 2.
200. Id.
201. 789 So. 2d 405 (Fla. 4th Dist. Ct. App. 2001).
elsewhere, it can hold such a contract void or unenforceable here if said contract is repugnant to the public policy of this state."\(^{202}\)

### e. Injunction Bond

Section 542.335(1)(j) of the Florida Statutes makes clear that no temporary injunction shall be entered unless the employer posts a bond and the court will not enforce "any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond."\(^{203}\) In *Supinski v. Omni Healthcare, P.A.*\(^{204}\), the Fifth District Court of Appeal remanded the case to the trial court, ordering it to conduct an evidentiary hearing regarding the amount of the injunction bond.\(^{205}\) Similarly, in *Lotenfoe v. Pahk*,\(^{206}\) the Second District Court of Appeal ruled that the lower court erred in issuing a temporary injunction without conducting an evidentiary hearing to determine the amount of the bond.\(^{207}\) When no evidentiary hearing is held, the defendant’s damages for being wrongfully enjoined are not limited to the amount of the posted bond.\(^{208}\)

2. Modifying Overbroad, Overlong, or Unreasonable Terms in the Non-Compete Agreement: Section 542.335(1)(c)

Some critics urge courts not to modify unreasonable restrictive covenants and to refuse to enforce them.\(^{209}\) For example, in *Valley Medical Specialists*, the Supreme Court of Arizona noted, “Although we will tolerate ignoring severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite provisions.”\(^{210}\) A court cannot “rewrite and create a restrictive covenant significantly different from that created by the parties.”\(^{211}\)

By contrast, section 542.335(1)(c) of the Florida Statutes, expressly authorizes courts to modify overbroad, overlong, and unreasonable terms in a

\(^{202}\) *Id.* at 409; *see also* Fl. Stat. § 542.335(1)(i) (2010).

\(^{203}\) Fl. Stat. § 542.335(1)(j).

\(^{204}\) 853 So. 2d 526 (Fla. 5th Dist. Ct. App. 2003).

\(^{205}\) *Id.* at 532.

\(^{206}\) 747 So. 2d 422 (Fla. 2d Dist. Ct. App. 1999).

\(^{207}\) *See id.* at 426.

\(^{208}\) *Id.*

\(^{209}\) *See, e.g.*, Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672, 674 (2008) (urging courts not to use the blue pencil unreasonable restrictive covenants).


\(^{211}\) *Id.*

https://nsuworks.nova.edu/nlr/vol35/iss1/1
non-compete agreement. Common sense dictates that if an employer provides a particular product or service that is commonly available, a statewide restriction is likely unreasonable. But, if a product or service is unique, arguably a statewide, even a multi-state regional restriction, may be enforceable. But the most commonly enforced geographic restriction would be barring an employee from competing within the same county where her former employer is located. In one case, Proudfoot Consulting Co., the Eleventh Circuit upheld a geographic restriction that extended beyond the United States to include Canada and even Europe.

Litwinczuk illustrates the typical way a court may modify an overbroad restrictive covenant in a non-compete agreement. In this case, the Fourth District Court of Appeal noted that the trial court properly reduced the geographic area subject to the restrictive covenant from the entire Palm Beach County to an area “from the southernmost boundaries of the City of West Palm Beach north to the Martin County line.” Similarly, in Open Magnetic Imaging, Inc. v. Nieves-Garcia, even though the non-compete agreement barred the former employee from competing in three counties, the court narrowed the geographic limitation to the only county the former employee ever worked in.

While Florida’s non-compete statute makes it clear that a court has the power to modify overbroad, overlong or unreasonable terms in a non-compete agreement, courts have interpreted this language to include the court’s power to add terms. For example, even if a non-compete agreement omits altogether the geographic area subject to the restrictive covenant, a court can insert what it regards as a reasonable geographic limitation. “Whether a non-compete covenant is reasonable or overly broad is a question of fact for the trial court.”

212. FLA. STAT. § 542.335(1)(c) (2010).
216. Id.
217. 826 So. 2d 415 (Fla. 3d Dist. Ct. App. 2002) (per curiam).
218. See id. at 418.
220. See id. at 343 (discussing that a restrictive covenant is not invalid because it fails to contain a geographic limitation).
3. Damages

a. Liquidated Damages

Liquidated damages represent the best efforts of the parties to a contract to agree upon a fixed amount of money recoverable by the non-breaching party in the event of breach of contract. Liquidated damages clauses, courts ask two questions: (1) whether at contract formation it was all but impossible to estimate what damages would be in the event of breach, and (2) despite this uncertainty, the amount in the clause reflects the best estimate of what those damages would be in the event of breach. Any liquidated damages clause deemed a penalty is unenforceable. While liquidated damages clauses are generally disfavored in the law, on the ground that often they result in forfeiture, those passing the two-part test are enforceable, rendering unnecessary plaintiff’s usual burden of proving actual damages. While some courts apply the single-look doctrine, under which the reasonableness of the amount contained in the liquidated damages clause is measured only at the time of contract formation; other courts apply the second look doctrine, in which reasonableness is measured both at contract formation and at breach, thus, invalidating more liquidated damages clauses than the single-look doctrine.

Humana Medical Plan, Inc. v. Jacobson, though decided under the 1990 non-compete statute, illustrates how Florida courts handle liquidated damages clauses in non-compete agreements and how courts applying the 1990 statute were far more wary of enforcing such restrictive covenants. Ultimately, the Third District Court of Appeal, applying the single-look doctrine, threw out the liquidated damages clause on the ground that actual damages were readily ascertainable at contract formation. Invoking the Florida Statutes recognizing the importance of patients making an informed choice when selecting a physician, the Third District Court concluded, “Liquidated

222. Lefemine v. Baron, 573 So. 2d 326, 328 (Fla. 1991).
223. Id.
224. See id.
228. Id. at 522.
229. See id.
damages clauses . . . seriously impair patients’ choice of a physician, by discouraging doctors from continuing existing doctor/patient relationships. Moreover, “public policy . . . is violated when the business relationship an HMO has with its affiliated doctors interferes with . . . the doctor/patient relationship.”

b. Actual Damages

Under section 542.12, Florida’s original non-compete statute, courts issued injunctions if the alternative was only nominal damages because the employer was unable to prove actual damages.

In Proudfoot Consulting Co., the Eleventh Circuit addressed the question of damages under Florida’s non-compete statute. The Eleventh Circuit began its discussion of damages by saying, “‘An award of damages for breach of contract is intended to place the injured party in the position he or she would have been in had the breach not occurred.’” The employer “bears the burden to prove both that it sustained a loss and that ‘its lost profits were a direct result of’” the employee’s breaches of the non-compete agreement. While “uncertainty as to the precise amount of the lost profits will not defeat recovery, so long as there is a reasonable yardstick by which to estimate the damages,’ causation must be ‘proved with reasonable certainty.’” “Damages for breach of a non-compete [agreement] are intended to make the prior employer whole, not to punish employees.”

The Eleventh Circuit did suggest, however, that lost profits might be recoverable in an action for unjust enrichment.

234. Proudfoot Consulting Co., 576 F.3d at 1242 (alteration in original) (quoting Memonics, Inc. v. Max Davis Assocs., Inc., 808 So. 2d 1278, 1280 (Fla. 5th Dist. Ct. App. 2002)).
235. Id. at 1243 (quoting Whitby v. Infinity Radio, Inc., 951 So. 2d 890, 898 (Fla. 4th Dist. Ct. App. 2007)).
236. Id. (quoting Nebula Glass Int’l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1217 (11th Cir. 2006)).
237. Id.
238. Id. at 1245.
239. Proudfoot Consulting Co., 576 F.3d at 1245–46 n.27.
c. Attorney’s Fees

Grant and Steele point out, as yet another defect of Florida’s 1990 non-compete statute, that section 542.33 contained no provision authorizing attorney’s fees to prevailing parties. In support of adding section 542.335(1)(k) in 1996, authorizing the awarding of such fees, Grant and Steele claim, “Unless the contract itself had such a provision, the parties [bore] their own litigation expenses. . . . [T]his deficiency encouraged abusive litigation strategies and tactics.”

Now, however, that Florida’s non-compete statute so soundly stacks the deck in favor of enforcing such restrictive covenants, the possibility that insult will add to injury in the form of attorney’s fees, if a former employee challenges enforcement of such non-compete agreements further chills such individuals’ efforts to maintain their livelihoods.

There is a district court split over whether section 542.335(1)(k) applies to a non-party to a written restrictive covenant. For example, when a rival employer is a named defendant in an action to enforce a non-compete agreement, but is a non-party to the restrictive covenant, can attorney’s fees be assessed against him as well if the former employer prevails in its action? In Sun Group Enterprises, Inc. v. DeWitte, the trial court awarded attorney’s fees to the defendants—including the subsequent employer, a non-party to the restrictive covenant between the former employer and the former employees—because they had “successfully challenged the enforceability of a restrictive covenant.” By contrast, the Fourth District Court of Appeal in Bauer v. DILIB, Inc., concluded that the attorney’s fee provision in the current non-compete statute did not authorize the former employer to recover its attorney’s fees from the non-party, the former employees’ subsequent employer.

240. Grant & Steele, supra note 8, at 54.
241. Id.
244. 890 So. 2d 410 (Fla. 5th Dist. Ct. App. 2004).
245. Id. at 412.
246. 16 So. 3d 318 (Fla. 4th Dist. Ct. App. 2009).
247. Id. at 319.
4. Other Remedies

In Making Noncompete Agreements Work for Employers, Robert B. Gordon suggests:

[U]nilateral employer action (such as . . . cancellation of stock options or restricted equity, termination of severance payments, and the like) . . . are remedies that employers can implement on their own initiative, at no cost, and with only a modest risk that an employee might elect to initiate a lawsuit to challenge the clawback.

V. CONCLUSION

Like most states, Florida enforces physician non-compete agreements in employment. Also, like most states, Florida strictly construes non-compete agreements among lawyers, in law firms, on grounds of public policy. Logically, there is no basis for treating the physician-patient relationship any less sympathetically than the lawyer-client relationship. For this reason, physician non-compete agreements should be as narrowly construed, as lawyer non-compete agreements are, under Florida law and for analogous public policy reasons.

249. Id. at 2.
CRIMINAL LAW: 2007–2010 SURVEY OF FLORIDA LAW

PEARL GOLDMAN*

I. INTRODUCTION ................................................................................. 95
II. ASSAULT AND BATTERY ............................................................. 96
III. HOMICIDE ...................................................................................... 98
   A. Manslaughter by Act ............................................................. 98
   B. Felony Murder ...................................................................... 101
   C. Second-Degree Depraved Mind Murder .............................. 103
   D. Lesser Included Homicide Offense ....................................... 104
IV. DEFENSES ....................................................................................... 106
   A. Florida’s “Stand Your Ground” Law ................................. 106
   B. The Forcible Felony Exception to a Claim of Self-Defense ......... 110
   C. Imperfect Self-Defense .......................................................... 112
   D. Statute of Limitations ............................................................ 112
V. CONSTITUTIONAL CLAIMS ............................................................. 112
   A. Cruel and Unusual Punishment ............................................ 112
   B. Double Jeopardy .................................................................. 115
   C. Due Process ........................................................................ 122
      1. Entrapment ..................................................................... 122
      2. Vagueness ...................................................................... 124
      3. Lack of Specificity in the Charging Document ............... 126
      4. Nonexistent Crimes ......................................................... 127
   D. Ex Post Facto Laws .............................................................. 127
   E. Federal Preemption ............................................................... 130
   F. Separation of Powers ........................................................... 131
VI. STATUTORY INTERPRETATION ..................................................... 131
VII. MISCELLANEOUS ............................................................................ 134
VIII. CONCLUSION .................................................................................. 135

I. INTRODUCTION

This article surveys selected criminal law decisions of the Supreme Court of Florida and the Florida District Courts of Appeal published between July 31, 2007 and July 31, 2010. The survey covers cases of first impression, decisions involving or identifying conflicts between the Florida District

* Professor of Law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida.
Courts of Appeal, questions certified to the Supreme Court of Florida as being of great public importance and cases that clarify or expand upon existing principles of law. It also summarizes an important decision of the Supreme Court of the United States concerning the punishment of juvenile, non-homicide offenders in Florida.\(^1\) Cases discussing procedural and evidentiary issues, the death penalty, and Florida’s sentencing guidelines are beyond the scope of this article, which focuses on substantive principles of criminal law.

II. ASSAULT AND BATTERY

Under section 784.045(1)(a)(2) of the Florida Statutes, aggravated battery occurs when a deadly weapon is used in committing a battery.\(^2\) In \textit{Severance v. State},\(^3\) the issue was whether the aggravated battery statute requires the defendant to touch the victim with the deadly weapon.\(^4\) In this case, the defendant had choked and hit the victim, threatened to kill her with a knife, but never touched her with the knife.\(^5\) On appeal of his conviction, he contended that, under \textit{Munoz-Perez v. State},\(^6\) “the [jury] instruction improperly allowed the jury to convict him of aggravated battery if it found that he, while committing the battery, used a knife without touching the victim.”\(^7\) The Fourth District Court of Appeal disagreed.\(^8\) Receding from \textit{Munoz-Perez}, the panel held that “the plain meaning of the aggravated battery statute is that in committing the battery, the defendant used a deadly weapon, which includes holding a deadly weapon without actually touching the victim with the weapon.”\(^9\) In other words, if a deadly weapon is used in any manner, the battery is aggravated.\(^10\) Affirming the conviction, the court noted that the absence of any limitations on the manner or method of use of the deadly weapon means instead that the legislature intended that it cover all uses.\(^11\)

The Florida District Courts of Appeal also reviewed what constitutes a deadly weapon under both the aggravated battery and aggravated assault

---

2. FLA. STAT. § 784.045(1)(a)(2) (2010).
3. 972 So. 2d 931 (Fla. 4th Dist. Ct. App. 2007) (en banc).
4. \textit{id.} at 933.
5. \textit{id.} at 932.
6. 942 So. 2d 1025 (Fla. 4th Dist. Ct. App. 2006).
7. \textit{Severance}, 972 So. 2d at 933.
8. \textit{id.}
9. \textit{id.} at 934.
10. \textit{id.}
11. \textit{id.} at 933–34.
In *State v. Williams,* after the defendant hit the victim on her temple with a firearm, the victim sustained a bleeding gash, fainted, and suffered from migraines and memory loss. Over the State’s objection, “the trial court reduced the aggravated battery to simple battery and offered the defendant a plea, which he accepted.” The basis for the court’s action was its finding that, on the facts of the case, “the firearm was not a deadly weapon as a matter of law” because it had not been “used or threatened to be used in a manner likely to cause great bodily injury,” nor had it been discharged or used to put the victim in fear. On appeal by the State, the Third District Court of Appeal examined the aggravated battery statute, the definition of “deadly weapon” in the corresponding jury instruction, and the definition of “firearm” under section 790.001(6). The court concluded that “[a] firearm is, by definition, a deadly weapon because it is designed to expel a projectile by the action of an explosive which is likely to cause death or great bodily injury.” If it is discharged or “used to put the victim in fear” of an aggravated assault or a robbery, then “it is a deadly weapon as a matter of law. . . regardless of whether the firearm is loaded or capable of being fired.” The court ordered the trial court to allow Williams to withdraw his guilty plea as to simple battery and to reinstate the aggravated battery charge.

The issue in *Cambell v. State* was whether Florida case law imposes an additional element on the State in proving aggravated assault with a deadly weapon, requiring the State to prove a defendant’s intent “to do physical

---

12. See *Cambell v. State,* 37 So. 3d 948, 950 (Fla. 5th Dist. Ct. App. 2010); *State v. Williams,* 10 So. 3d 1172, 1174 (Fla. 3d Dist. Ct. App. 2009).
13. 10 So. 3d 1172 (Fla. 3d Dist. Ct. App. 2009).
14. Id. at 1174.
15. Id.
16. Id. at 1173–74.
17. Id. at 1174; FLA. STAT. § 784.045(1)(a)(2) (2007).
18. *Williams,* 10 So. 3d at 1174; FLA. STD. JURY INSTR. (CRIM.) 8.4 (2009).
20. *Williams,* 10 So. 3d at 1174.
21. Id. In other cases, the Florida District Courts of Appeal found that bleach was a deadly weapon within the meaning of the aggravated battery statute, when it was thrown into the victim’s face, *Smith v. State,* 969 So. 2d 452, 453 (Fla. 1st Dist. Ct. App. 2007), and that a bicycle thrown by a juvenile at his mother during an argument was not a deadly weapon under the aggravated assault statute, *D.B.B. v. State,* 997 So. 2d 484, 485–86 (Fla. 2d Dist. Ct. App. 2008).
22. *Williams,* 10 So. 3d at 1175.
23. 37 So. 3d 948 (Fla. 5th Dist. Ct. App. 2010).
24. Id. at 949; FLA. STAT. § 784.021(1) (2008).
harm to the victim."25 Here, a police officer had testified he was afraid when Mr. Cambell pointed a firearm at him in a threatening manner.26 In affirming Cambell's conviction, the Fifth District Court of Appeal wrote to express its opinion on "some confusion... with respect to the elements of the crime of aggravated assault with a deadly weapon."27 The court examined dicta in two recent appellate cases,28 which suggested that the State is required to prove the defendant's intent to harm the victim physically.29 The court concluded, however, that "[t]he only intent inherent in the statutes is the intention to make a threat to do violence," and pointed out that courts generally lack the authority to extend or modify the express elements of a statutory crime.30

III. HOMICIDE

A. Manslaughter by Act

During the survey period, the Florida courts struggled with the jury instruction for the offense of manslaughter by act under section 782.07(1) of the Florida Statutes. The jury instruction, which required the State to prove that the defendant intentionally caused the death of the victim,31 was at odds with the statutory definition of manslaughter, which required only an intent to commit an act that was not justified or excusable.32 In State v. Montgomery,33 the Supreme Court of Florida endeavored to put the matter to rest.34

In Montgomery's trial for first-degree murder, the trial court instructed the jury on second-degree murder and manslaughter by act as lesser-included offenses of the charged crime.35 The problematic instruction provided, in relevant part, that the State was required to prove that the defendant "intentionally caused the death of the victim" but that it was "not necessary for the State to prove that the defendant had a premeditated intent to cause death."36

25. Cambell, 37 So. 3d at 949.
26. Id.
27. Id.
28. Id. at 950; see Denard v. State, 30 So. 3d 595, 596 (Fla. 5th Dist. Ct. App. 2010); Swift v. State, 973 So. 2d 1196, 1199 (Fla. 2d Dist. Ct. App. 2008).
29. Cambell, 37 So. 3d 948, 950 (citing Denard, 30 So. 3d at 596; Swift, 973 So. 2d at 1199).
30. Id. at 950.
33. 39 So. 3d 252 (Fla. 2010).
34. See id. at 254.
35. Id.
36. Id. at 257 (quoting Fla. Std. Jury Instr. (Crim.) 7.7 (2006)).
The jury found Montgomery guilty of second-degree murder, and he appealed.\footnote{Id. at 254.} The First District Court of Appeal reversed his conviction and remanded for a new trial, holding that the trial court fundamentally erred in giving this jury instruction because “manslaughter by act does not require an intent to kill.”\footnote{Montgomery, 39 So. 3d at 254.} The court certified conflict with the decision of the Fifth District Court of Appeal in \textit{Barton v. State}\footnote{507 So. 2d 638 (Fla. 5th Dist. Ct. App. 1987) (en banc) (per curiam).} and certified the following question of great public importance: “Is the State required to prove that the defendant intended to kill the victim in order to establish the crime of manslaughter by act?”\footnote{Montgomery, 39 So. 3d at 254. The Supreme Court of Florida did not reach the certified conflict, given its resolution of the certified question. See id.}

The Supreme Court of Florida agreed that the standard jury instruction for manslaughter by act was fundamentally erroneous because it required the State to prove that the defendant “intentionally caused the death of the victim,” even though intent to kill was not an element of the offense.\footnote{Id. at 257.} In other words, this instruction “impose[d] a more stringent finding of intent upon manslaughter than upon second-degree murder.”\footnote{Id. at 256.} The Court further held that the offense of manslaughter by act requires only “the intent to commit an act that was not justified or excusable, which caused the death of the victim.”\footnote{Id. at 260.} The Court answered the certified question in the negative and concluded that the trial court’s use of the standard manslaughter instruction constituted fundamental error and necessitated a new trial.\footnote{Montgomery, 39 So. 3d at 260. The manslaughter jury instruction has been amended twice since the Montgomery trial. Williams v. State, 40 So. 3d 72, 74 (Fla. 4th Dist. Ct. App. 2010). “The [December] 2008 amendment added a clause . . . emphasizing [that] the intent requirement [is] related to the commission of an act which caused death.” \textit{Id.; see also In re Standard Jury Instructions in Criminal Cases—Report No. 2007-10, 997 So. 2d 403, 403 (2008) (per curiam). “The [April] 2010 amendment [authorized, on an interim basis,] deletion [of] the word ‘intentionally’ before the phrase ‘caused the death.’” Williams, 40 So. 3d at 74; see \textit{In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7}}, 41 So. 3d 853, 854 (Apr. 8, 2010) (per curiam).

Nevertheless, the Florida District Courts of Appeal wasted no time interpreting \textit{Montgomery}. First, the case was distinguished in \textit{Singh v. State}, where the defendant was charged with first-degree murder.\footnote{36 So. 3d 848 (Fla. 4th Dist. Ct. App. 2010).} The standard jury instruction on the lesser included offense of manslaughter required the
jury to find that the defendant caused the death either “intentionally” or by “culpable negligence.” 47 The defendant was convicted of second-degree murder, which necessarily included a finding that he had not intended to kill his victim.48 The Fourth District Court of Appeal refused to find fundamental error, however, because the culpable negligence option allowed the jury to return a manslaughter verdict without finding an intent to kill.49 The instant case was therefore distinguishable from Montgomery, where the absence of an instruction on culpable negligence required a verdict of second-degree murder upon finding an absence of intent to kill.50

Second, in Rushing v. State,51 the First District Court of Appeal applied Montgomery to the standard jury instruction for attempted manslaughter by act, holding that the instruction improperly includes an intent-to-kill element.52 In this case, Rushing appealed his conviction for attempted second-degree murder based on the trial court’s use of the standard jury instruction on the lesser included offense of attempted voluntary manslaughter. 53 The appellate court held that the use of this jury instruction constituted fundamental error because it may have led the jury to believe Rushing could not be convicted of attempted voluntary manslaughter unless the jury first found the element of intent to kill.54 If so, then the jury would have felt compelled to convict him of “attempted second-degree murder, which has no such element of intent.”55 Thus, according to the court, the jury instruction for attempted manslaughter by act “suffers from the very same infirmities as the instruction in Montgomery.”56 The First District reversed Rushing’s conviction and remanded the case for new trial.57

This decision comported with the First District’s earlier decision in Lamb v. State.58 There, the court held that giving the standard jury instruction for attempted manslaughter by act constituted fundamental error because that instruction improperly requires “that the defendant ‘committed an act

47. Id. at 849–50.
48. See id. at 849.
49. Id.
50. Singh, 36 So. 3d at 851. The Third District Court of Appeal used the same reasoning to affirm a defendant’s conviction for second-degree murder based on similar jury instructions in Cubelo v. State, 41 So. 3d 263, 267–68 (Fla. 3d Dist. Ct. App. 2010).
52. Id. at D1377.
53. Id. at D1376.
54. Id. at D1376.
55. Id.
56. Rushing, 35 Fla. L. Weekly at D1377.
57. Id.
58. 18 So. 3d 734 (Fla. 1st Dist. Ct. App. 2009) (per curiam).
intended to cause the death of the victim when attempted manslaughter by act requires only an intentional unlawful act.”

As a result of the First District’s reasoning in Lamb, the Fourth District Court of Appeal certified conflict in Williams v. State. In Williams, the defendant appealed his conviction for attempted second-degree murder. Williams argued that the Supreme Court of Florida’s decision in Montgomery prohibited this instruction. The Fourth District disagreed and affirmed his conviction on the ground that the instant case concerned an inchoate crime not at issue in Montgomery. In other words, the error that occurred in Montgomery, where the jury was instructed that “an intent to kill is an element of manslaughter,” does not exist when the jury is instructed that attempted voluntary manslaughter requires “an act which was intended to cause the death of the victim.” Furthermore, the attempted second-degree murder conviction meant that the jury necessarily found that he had intended to commit an unlawful act that would have resulted in the victim’s death. Affirming the conviction, the Fourth District Court of Appeal certified conflict with the First District Court of Appeal’s contrary decision in Lamb and certified two questions of great public importance: “(1) Does the standard jury instruction on attempted manslaughter constitute fundamental error? (2) Is attempted manslaughter a viable offense in light of State v. Montgomery?”

B. Felony Murder

The state appellate courts have revisited Brooks v. State, in which the Supreme Court of Florida found that the underlying felony of aggravated child abuse could not serve as the predicate felony crime in a first-degree felony murder charge if only a single act led to the child’s death. In that situation, the Brooks court held, the felony would merge into the homicide. In Lewis v. State, however, where the defendant was convicted of first-
degree felony murder and the predicate felony of aggravated child abuse in the drowning death of her seven-year-old daughter, the First District Court of Appeal held that the merger doctrine did not apply even if the death was caused by a single act of abuse.\(^{71}\)

The *Lewis* court articulated three reasons for this conclusion.\(^{72}\) First, because the felony murder conviction was ultimately affirmed in *Brooks*, the Supreme Court of Florida’s statement about the merger doctrine was dictum.\(^{73}\) Second, aggravated child abuse is expressly named in the felony murder statute as a predicate offense for felony murder, demonstrating that “the legislature intended that a defendant who kills a child during the perpetration of the crime of aggravated child abuse may be charged and convicted of both aggravated child abuse and felony murder, regardless of the number of acts of abuse which caused the child’s death.”\(^{74}\) Finally, the defendant’s actions in holding her daughter under water “long enough to produce unconsciousness and then death, cannot be considered a single act [of abuse].”\(^{75}\) Nevertheless, in affirming the defendant’s felony murder conviction, the First District Court certified the following question as one of great public importance: “Whether *Brooks v. State* holds that aggravated child abuse cannot serve as the underlying felony in a felony murder charge if only a single act of abuse led to the child’s death.”\(^{76}\)

Likewise, in *Rosa v. State*,\(^{77}\) the defendant relied on *Brooks* in his appeal of a conviction for first-degree felony murder of a thirteen-year-old strangulation victim based on the predicate felony of aggravated child abuse.\(^{78}\) The Second District Court of Appeal refused to set aside his conviction, finding that the merger doctrine did not preclude using aggravated child abuse as the underlying felony where the victim suffered multiple injuries in addition to the strangulation that caused her death.\(^{79}\) Moreover, the court was inclined not to view the strangulation as a single act of abuse.\(^{80}\) Agreeing in part with the opinion in *Lewis*, the court observed that because the language in *Brooks* does not refer to the felony murder statute and seems to conflict with the plain language of section 782.04, it cannot be reconciled

---

71. Id. at 184.
72. See id. at 186–87.
73. Id. at 186.
74. Id. at 186–87.
75. Lewis, 34 So. 3d at 187.
76. Id. (citation omitted).
78. Id. at D1361.
79. Id.
80. Id.
with that statute. The Rosa court also certified the issue as a question of great public importance.

C. Second-Degree Depraved Mind Murder

Under section 782.04(2), second-degree, depraved mind murder is "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." To prove that an act is imminently dangerous and demonstrates a depraved mind, one of the conditions that the State must prove is that "a person of ordinary judgment would know [it] is reasonably certain to kill or do serious bodily injury to another."

The issue that arose in Billie v. State was whether courts should use a subjective or objective standard to assess this condition. In this case, Kirk Douglas Billie was convicted of second-degree murder after a jury found that he had sunk his former girlfriend's truck into a canal, killing two of their children. On appeal, Billie argued that the trial court erred in refusing to modify the standard jury instruction to include a subjective intent element. The added language would have instructed the jury that to prove the Billie guilty of second-degree murder, the State was required to prove that he had actual knowledge that his two children were asleep in the back of the truck before he let it slip into the canal.

The Third District Court of Appeal held, however, that the standard instruction adequately captured Billie's theory of defense. First, by requiring the defendant's act to be directed toward another person, the standard instruction included victims and therefore, by definition, included the question of whether Billie knew his children were in the car. Second, by requiring the defendant's act to demonstrate ""a depraved mind without regard for human life,"" the instruction permits the jury to consider the particular circums-

81. Id.
82. Rosa, 35 Fla. L. Weekly at D1361.
83. FLA. STAT. § 782.04(2) (2010).
84. FLA. STD. JURY INSTR. (CRIM.) 7.4 (2006).
85. 963 So. 2d 837 (Fla. 3d Dist. Ct. App. 2007).
86. Id. at 841 & n.4.
87. Id. at 838–39.
88. Id. at 840.
89. Id.
90. Billie, 963 So. 2d at 841.
91. Id.
stances and context of the defendant's charged conduct."\textsuperscript{92} Finally, the court rejected Billie’s claim that a second-degree murder conviction requires the jury to find that he performed the act "with the subjective knowledge of its danger to another person."\textsuperscript{93} Instead, the court stated that the jury instruction sufficiently expresses the degree to which a defendant must know that his actions are "reasonably certain to kill . . . another."\textsuperscript{94} The court concluded that "[b]ecause the standard jury instruction adequately conveys the law of Florida and is neither confusing nor misleading, Billie [could not] 'overcome the presumption of its correctness.'"\textsuperscript{95}

D. \textit{Lesser Included Homicide Offense}

In \textit{Coicou v. State (Coicou II)},\textsuperscript{96} a case of first impression, the Supreme Court of Florida addressed the lesser-included offense of attempted first-degree felony murder.\textsuperscript{97} In this case, the defendant was convicted of attempted first-degree felony murder based on an attempted robbery with a firearm, with the jury specifically finding that he had committed a robbery and used a firearm.\textsuperscript{98} On appeal, Coicou argued, and the Third District Court of Appeal agreed, that Florida law prohibits using the same act—the shooting of the victim—to prove both the attempted felony murder and the underlying felony offense.\textsuperscript{99} Therefore, the State failed to prove the attempted felony murder charge.\textsuperscript{100} However, instead of reversing the conviction and discharging the defendant, the appellate court remanded with instructions to enter a verdict of attempted second-degree murder because the evidence contained in the record supported a conviction for that permissive lesser-included offense.\textsuperscript{101} The court certified the following question as one of great public importance: "May an appellate court direct the entry of a con-

\begin{itemize}
  \item \textsuperscript{92} \textit{Id.} (quoting \textsc{Fla. Std. Jury Instr. (Crim.)} 7.4 (2006)).
  \item \textsuperscript{93} \textit{Id.} at 841 n.4.
  \item \textsuperscript{94} \textit{Id.} at 841 (quoting \textsc{Fla. Std. Jury Instr. (Crim.)} 7.4)).
  \item \textsuperscript{95} \textit{Billie}, 963 So. 2d at 841 n.4 (quoting \textit{Sloss v. State}, 925 So. 2d 419, 424 (Fla. 5th Dist. Ct. App. 2006)).
  \item \textsuperscript{96} 39 So. 3d 237 (Fla. 2010).
  \item \textsuperscript{97} \textit{Id.} at 239.
  \item \textsuperscript{98} \textit{Id.}
  \item \textsuperscript{99} \textit{Coicou v. State (Coicou I)}, 867 So. 2d 409, 411 (Fla. 3d Dist. Ct. App. 2003), certifying \textit{question to 39 So. 3d 237} (Fla. 2010).
  \item \textsuperscript{100} \textit{Id.} at 412 ("The use of force, the shooting, was itself an essential element of the underlying robbery and was not an independent act as required by section 782.051(1).")
  \item \textsuperscript{101} \textit{Id.}
\end{itemize}
viction for attempted second-degree murder where the jury’s verdict does not reflect a finding that the defendant acted with a depraved mind?" 102

The certified question required the Supreme Court of Florida “to determine whether attempted second-degree murder is either a necessary or permissive lesser-included offense of attempted first-degree felony murder.” 103 The Court first concluded “that attempted second-degree murder is not a necessarily lesser-included offense of attempted first-degree felony murder” because the former “contains an element, a deprived mind, that is not an element of the greater offense.” 104 For the same reason, second-degree murder cannot be “a necessarily lesser-included offense of first-degree felony murder.” 105 Receding from Linehan v. State 106 and Scurry v. State, 107 the Court directed the Committee on Standard Jury Instructions in Criminal Cases to consider revising the Florida Standard Jury Instructions. 108

The Court next addressed permissive lesser-included offenses, stating that in order for attempted second-degree murder to be a permissive lesser-included offense of attempted first-degree felony murder, the latter offense must be charged in a manner demonstrating a deprived mind, “the required mental element of attempted second-degree murder.” 109 Concluding that a case-by-case determination is necessary when deciding this issue, the Supreme Court of Florida then reviewed the facts at hand in Coicou’s case. 110

Here, the charging document for attempted first-degree felony murder alleged only that “Coicou had intentionally committed an act that could have resulted, but did not result, in someone’s death.” However, it failed to allege “an act that was ‘imminently dangerous’ or that ‘demonstrated a depraved
mind without regard for human life."111 Because the allegations and the evidence did not support a finding that Coicou acted with a depraved mind, and the record did not indicate that the jury found the "depraved mind element," attempted second-degree murder was not a permissive lesser-included offense of attempted first-degree felony murder.112 Therefore, it was improper for the Third District Court of Appeal to direct entry of a conviction for that crime.113 The appropriate action would have been to "remand . . . for retrial on any lesser offenses contained in the charging instrument and instructed on at trial."114 Answering the certified question in the negative, the Supreme Court of Florida quashed the Third District's decision, and remanded the case for proceedings consistent with its opinion.115

IV. DEFENSES

A. Florida's "Stand Your Ground" Law

Florida's "Stand Your Ground" Law,116 which was signed into law on April 26, 2005, permits the use of deadly or non-deadly force, "without fear of prosecution or civil action,"117 against an individual who unlawfully and forcibly enters the dwelling, residence, or occupied vehicle of another person.118 The new statutory scheme eliminated the common law duty to retreat before using deadly or non-deadly force in self-defense or defense of others, so long as the person is being attacked in a place where he or she has a lawful right to be.119 Despite the controversy surrounding this law, in the five years since its enactment, there have been few appellate decisions interpreting its provisions.

The first issue that arose was whether the new law applied retroactively to cases pending at the time of its effective date on October 1, 2005.120 The

111. Coicou II, 39 So. 3d at 243 (quoting State v. Florida, 894 So. 2d 941, 945–46 (Fla. 2005) (per curiam), overruled in part by Valdes v. State, 3 So. 3d 1067, 1077 (Fla. 2009)).
112. Id.
113. Id.
114. Id. at 244 (quoting State v. Wilson, 680 So. 2d 411, 412 (Fla. 1996)).
115. Id. at 244.
118. FLA. STAT. § 776.013(1)(a) (2010).
119. Id. § 776.013(2)(a).
Supreme Court of Florida, in *Smiley v. State*, held that because Florida’s “Stand Your Ground” Law had effected a substantive change in the statutory law, rather than a procedural change, it did not apply retroactively to pending cases.

The second issue involved jury instructions in the case of an unarmed assailant. In *McWhorter v. State*, the defendant was convicted of battery on his unarmed attacker. Although the jury instructions no longer expressly refer to a “duty to retreat,” the trial judge included language stating that a defendant should endeavor to avoid the danger before employing force. The Fourth District Court of Appeal found that this language would cause the jury to believe, mistakenly, that McWhorter could not use force in self-defense unless he had first used “every reasonable means within his power to avoid the danger.” However, as the court noted, section 776.013(3) allows individuals who are attacked to stand their ground and meet force with force, as long as they are neither involved in unlawful activity nor present in a place where they did not have a right to be. In other words, they may use deadly force in this situation if they feel threatened with death or great bodily harm, even if other means of self-protective are available, and, in McWhorter’s case, even if the attacker is unarmed. Because the jury instructions misstated the law applicable to self-defense, the Fourth District Court of Appeal reversed the defendant’s battery conviction and remanded the case for a new trial.

The third issue under Florida’s “Stand Your Ground” Law involved the statutory immunity accorded to individuals who use force defending them-
selves or others. Section 776.032 states that when a person is justified in using force under the statutory scheme, he or she "is immune from [both] criminal prosecution and civil action for the use of such force." The preamble to the legislation declares that "it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action." Two appellate cases dealt with the applicability of this immunity when the victim is in retreat. In *Hair v. State*, the First District Court of Appeal held that the "Stand Your Ground" Law makes no exception from immunity when the victim is in retreat at the time defensive force is used. In *State v. Heckman*, however, the Second District Court of Appeal concluded that the statutory immunity did not apply because the victim was retreating from Heckman's garage when Heckman shot him. The difference between the cases appears to be that the victim in *Hair* "was still inside the vehicle when he was shot" and had not completed his retreat, whereas the victim in *Heckman* "had left the [defendant's] garage and was retreating to his truck." The remaining decisions demonstrate conflict as to the correct procedure to be used in statutory immunity cases. The issue is whether factual disputes should be resolved at a pretrial evidentiary hearing or at trial. In *Peterson v. State*, the defendant sought a writ of prohibition to review the denial of his motion to dismiss attempted first-degree murder charges. After a pretrial evidentiary hearing, the trial court denied the motion on the ground "that immunity had not been established as

132. *Id.*
136. *Id.* at 806. Because the trial court should have granted the motion to dismiss, the appellate court issued a writ of prohibition. *Id.*
137. 993 So. 2d 1004 (Fla. 2d Dist. Ct. App. 2007).
138. *Id.* at 1006. The appellate court reversed the trial court’s order granting defendant’s motion to dismiss the information that charged him with aggravated battery. *Id.*
139. *Hair*, 17 So. 3d at 806; *Heckman*, 993 So. 2d at 1005.
140. *See* Peterson v. State, 983 So. 2d 27, 28 (Fla. 1st Dist. Ct. App. 2008). This issue is the central procedural issue facing the Florida courts and will be examined in case discussions to follow. *See* *Id.* at 29.
141. 983 So. 2d 27 (Fla. 1st Dist. Ct. App. 2008).
142. *Id.* at 28.
Finding that the trial court had applied the correct standard, the First District Court of Appeal stated that the statute does not establish an affirmative defense but rather a true immunity. The immunity claim should be resolved by the trial court after a pretrial evidentiary hearing at which the defendant has the burden of proof by a preponderance of the evidence. In other words, the standard in Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure, which provides for a dismissal when "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant," is inappropriate for a motion or petition to determine immunity under section 776.032. According to the First District, the trial court may not deny a motion to dismiss simply because factual disputes exist.

Although the Second, Third and Fifth District Courts of Appeal have followed the Peterson decision, the Fourth District Court of Appeal has disagreed and certified conflict in Velasquez v. State. In Velasquez, the court ruled that the proper device for testing this statutory immunity is a sworn motion to dismiss under Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure and that whenever the State traverses and properly disputes the facts contained in the defense motion, the motion must be denied and the issue determined at trial. More recently, in Wonder v. State, the Fourth District certified conflict again and certified the following question as one of great public importance:

144. Id.
145. Id. at 29.
146. Peterson, 983 So. 2d at 29.
147. FLA. R. CRIM. P. 3.190(c)(4); see FLA. STAT. § 776.032 (2010).
148. Peterson, 983 So. 2d at 29.
149. McDaniel v. State, 24 So. 3d 654, 656–57 (Fla. 2d Dist. Ct. App. 2009); Horn v. State, 17 So. 3d 836, 839 (Fla. 2d Dist. Ct. App. 2009); see also Montanez v. State, 24 So. 3d 799, 801 n.2 (Fla. 2d Dist. Ct. App 2010) (noting that a homicide defendant whose motion for immunity was denied could still “present self-defense as an affirmative defense at trial”).
153. See Velasquez, 9 So. 3d at 24; FLA. R. CRIM. P. 3.190(c)(4).
Whether section 776.032, Florida Statutes, (2009) (the "Stand Your Ground" Law), requires a trial court, upon motion to dismiss, to hold an evidentiary hearing prior to trial and resolve disputed factual issues to determine whether a defendant has established by a preponderance of the evidence his/her entitlement to statutory immunity from prosecution.155

B. The Forcible Felony Exception to a Claim of Self-Defense

The defense of justified use of force in self-defense "is not available to a person who: (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or (2) Initially provokes the use of force."156 While this defense seems simple enough in concept, Florida's courts have struggled with the accompanying jury instruction.157 The confusion centers on whether a trial court commits a fundamental error by erroneously reading the forcible felony instruction when a defendant has not committed an independent forcible felony.158 The Supreme Court of Florida addressed this issue in Martinez v. State.159 In that case, after stabbing his girlfriend multiple times, Martinez was charged with attempted premeditated murder and aggravated battery with a deadly weapon.160 He claimed self-defense.161 The trial court instructed the jury, without objection, that they could not find that Martinez acted in self-defense if he "was attempting to commit, committing, or escaping after the commission of an Attempted Murder and/or Aggravated Battery."162 The court also instructed the jury on the initial aggressor exception to self-defense in section 776.041(2) of the Florida Statutes.163 Martinez was convicted, and he appealed.164 The Third District Court of Appeal affirmed on the ground that, although the instruction was erroneous because Martinez was not charged with an independent forcible felony, the error did not rise to the level of fundamental error.165

The Supreme Court of Florida accepted review based upon express and direct conflict with several cases in which district courts have held that a trial

155. Id. (citations and emphasis omitted).
157. See Fla. Std. Jury Instr. (Crim) 3.6(f), (g) (2010).
159. 981 So. 2d 449, 450–51 (Fla. 2008) (per curiam).
160. Id. at 450.
161. Id.
162. Id. at 450 (quoting Martinez v. State (Martinez I), 933 So. 2d 1155, 1157 (Fla. 3d Dist. Ct. App. 2006), aff'd on other grounds, 981 So. 2d 449 (Fla. 2008).
163. Id. at 453.
164. Martinez II, 981 So. 2d at 450.
165. Martinez I, 933 So. 2d at 1158.
court commits fundamental error by “giv[ing] the forcible-felony instruction when the defendant has committed only one forcible act.” The Court agreed that the instruction was erroneous because the defendant’s self-defense claim rested upon the same act that formed the basis of the charges against him. In other words, the forcible-felony instruction is appropriate only when the defendant is charged with a forcible felony separate and apart from the act for which he or she claims self-defense. Any other result, the Court reasoned, would render the initial aggressor exception in section 776.041(2) of the Florida Statutes superfluous and negate a claim of justifiable use of deadly force. The effect in this case was that, even if the jury had concluded that Martinez acted in self-defense when he committed aggravated battery or attempted murder, a finding of self-defense was precluded if the jury found that he committed attempted murder or aggravated battery. This “circular logic” would be equivalent to directing a verdict on the affirmative defense. Thus, the Court agreed with Martinez that the trial court erred in giving the forcible felony instruction to the jury. The analysis did not end there, however.

The Court then pointed out that, in the absence of an objection at trial, this instructional error could not be raised on appeal unless fundamental error occurred. When, as here, an affirmative defense is involved, fundamental error does not occur unless the instruction is so deficient that it deprives the defendant of a fair trial. In the instant case, however, the Court found no fundamental error and identified two reasons for this conclusion. First, because the defendant had pursued other strategies besides self-defense, the error “did not deprive Martinez of his sole, or even his primary, defense strategy.” Second, his “claim of self-defense was extremely weak.” The Court disapproved of those district court decisions holding that “an erroneous reading of the forcible-felony instruction always constitutes funda-

166. Martinez II, 981 So. 2d at 451.
167. Id. at 453.
168. Id.
169. Id.
170. Id.
171. Martinez II, 981 So. 2d at 453.
172. Id. at 454.
173. See id.
174. Id. at 455 (citing State v. Delva, 575 So. 2d 643, 644 (Fla. 1991) (per curiam)).
175. Id. (citing Smith v. State, 521 So. 2d 106, 108 (Fla. 1988)).
176. Martinez II, 981 So. 2d at 456.
177. Id.
178. Id.
mental error" and expressly deferred rendering a decision as to whether the error “could constitute fundamental error in some circumstances.”

C. Imperfect Self-Defense

In Hill v. State, the Third District Court of Appeal held that Florida does not recognize imperfect self-defense. The appellate court concluded that the requested jury instruction, defining imperfect self-defense as “[a]n honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury,” is contrary to the self-defense statute, “which requires a reasonable belief in the necessity to use deadly force.”

D. Statute of Limitations

In State v. Suarez, a case of first impression, the Third District Court of Appeal held that the statute of limitations on charges for third-degree grand theft and burglary of an unoccupied dwelling was not tolled while the defendant was incarcerated in federal prison within the State of Florida. Because the statute of limitations refers to geographic location, not the state’s jurisdiction over the defendant, the court found that the defendant had satisfied the requirement that he be physically located within the state. The limitations period had expired before the arrest warrant was served, and so the trial court had properly dismissed the charges.

V. CONSTITUTIONAL CLAIMS

A. Cruel and Unusual Punishment

In Graham v. Florida, the Supreme Court of the United States held, in a five-to-four decision, that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits the imposition of a life-without-parole sentence

179. Id. at 457.
180. 979 So. 2d 1134 (Fla. 3d Dist. Ct. App. 2008) (per curiam).
181. Id. at 1135.
182. Id. at 1135 n.2.
183. Id. at 1135 (citing Fla. Stat. § 776.012 (2000)).
184. 13 So. 3d 72 (Fla. 3d Dist. Ct. App. 2009).
185. Id. at 73.
186. Id. (citing Fla. Stat §§ 775.15(5), 812.035(10) (2001)).
187. Id. at 74.
188. 130 S. Ct. 2011 (2010).
on a juvenile offender for a non-homicide offense.\footnote{Graham, 130 S. Ct. at 2020.} Graham committed armed burglary when he was sixteen.\footnote{Id. at 2018.} Under a plea agreement, the Florida trial court sentenced him to probation, with the first year to be served in jail, and withheld adjudication of guilt.\footnote{Id. at 2019.} Following his release from jail, Graham committed additional crimes, which the trial court found to have violated the terms of his probation.\footnote{Id. at 2019.} Consequently, Graham was found guilty of the original charges and sentenced to life imprisonment for the armed burglary.\footnote{Graham, 130 S. Ct. at 2020.} Because parole has been abolished in Florida, Graham’s life sentence meant that he would never be eligible for release without executive clemency.\footnote{Id. at 2020.} After Graham’s Eighth Amendment challenge to his sentence was rejected by the trial court and the First District Court of Appeal, the Supreme Court of Florida denied review.\footnote{Id.} The Supreme Court of the United States granted certiorari.\footnote{Id.}

Writing for the Court, Justice Kennedy noted that Eighth Amendment challenges “addressing the proportionality of sentences fall within two general classifications. The first [concerns] challenges to the length of term-of-years sentences . . .”\footnote{See id. at 2021.} In these cases, the Court employs a case-specific analysis.\footnote{Id. at 2022.} The second “use[s] categorical rules to define Eighth Amendment standards,” generally in capital cases.\footnote{Id. at 2022.} Graham, however, presented a novel issue in that it entailed “a categorical challenge to a term-of-years sentence.”\footnote{Graham, 130 S. Ct. at 2022.} Because the case involved “a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes,” Justice Kennedy concluded that it should be analyzed as a categorical challenge under the second category, borrowing from the Court’s approach in capital cases.\footnote{Id. at 2022–23.}

Applying this categorical analysis, Justice Kennedy first determined that both a national and global consensus existed against imposing life-
without-parole sentences for juvenile non-homicide offenders.\textsuperscript{202} Second, he concluded penological theory is inadequate to justify this type of sentence for this type of offender.\textsuperscript{203} Because of their "lack of maturity and an underdeveloped sense of responsibility," juvenile offenders are less culpable and less deserving of the most severe punishments than an adult offender.\textsuperscript{204} In light of these developmental factors and the severity of the sentence, the Court held that the Eighth Amendment prohibits states from making the judgment that a juvenile offender is irredeemably depraved and from depriving that offender "of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."\textsuperscript{205} While the "[s]tate is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," [it] must provide . . . "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."\textsuperscript{206}

Justice Stevens filed a brief concurring opinion in which Justices Ginsburg and Sotomayor joined.\textsuperscript{207} Chief Justice Roberts concurred in the judgment and filed an opinion asserting that, while he agreed the sentence in the present case violated the Eighth Amendment, he saw "no need to invent a new constitutional rule of dubious provenance in reaching that conclusion."\textsuperscript{208}

Justice Thomas filed a dissenting opinion in which Justice Scalia joined and Justice Alito joined in part.\textsuperscript{209} Justice Thomas wrote that the ultimate question was not whether the punishment fits the offense or the offender "but to whom the Constitution assigns that decision."\textsuperscript{210} In his view, that the majority had rejected the judgments of legislatures, judges, and juries regarding the appropriateness of the sentence under consideration "simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives."\textsuperscript{211}

In a separate dissenting opinion, Justice Alito pointed out that the Court's opinion does not affect "the imposition of a sentence to a term of years without the possibility of parole."\textsuperscript{212}

\begin{itemize}
  \item \textsuperscript{202} \textit{Id.} at 2023.
  \item \textsuperscript{203} \textit{Id.} at 2030.
  \item \textsuperscript{204} \textit{Graham}, 130 S. Ct. at 2038 (Roberts, C.J., concurring).
  \item \textsuperscript{205} \textit{Id.} at 2030–32.
  \item \textsuperscript{206} \textit{Id.} at 2057 (Thomas, J., dissenting).
  \item \textsuperscript{207} \textit{Id.} at 2036 (Stevens, J., concurring).
  \item \textsuperscript{208} \textit{Id.} (Roberts, C.J., concurring).
  \item \textsuperscript{209} \textit{Graham}, 130 S. Ct. at 2043 (Thomas, J., dissenting).
  \item \textsuperscript{210} \textit{Id.} at 2058 (Thomas, J., dissenting).
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} \textit{Id.} (Alito, J., dissenting).
\end{itemize}
B. Double Jeopardy

Although the rule of double jeopardy "prohibits subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense . . . no constitutional prohibition [exists] against multiple punishments for [separate] offenses arising out of the same criminal transaction, [provided] the Legislature intends to authorize separate punishments." Absent clear legislative intent, however, courts utilize section 775.021(4)(b) of the Florida Statutes to determine whether separate offenses exist. Section 775.021(4)(b) sets out three exceptions to the general rule that the Legislature intends "to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent." The second exception precludes multiple convictions for offenses that are "degrees of the same offense as provided by statute." In the past, the Supreme Court of Florida has required a two-step inquiry to construe this provision. The first step was to determine "whether the crimes constitute separate offenses under Blockburger v. United States," as codified in section 775.021(4)(a). The second step was to determine "whether the crimes are 'degree variants' or aggravated forms of the same core offense." This second step involved the "primary evil" test, which focused on whether the offenses are designed to combat the same evil. More recently, however, in Valdes v. State, the Supreme Court of Florida acknowledged that the district courts have struggled to apply the primary evil test and that the Court itself has strained "to craft a consistent

213. Valdes v. State, 3 So. 3d 1067, 1069 (Fla. 2009).
214. Hayes v. State 803 So. 2d 695, 700 (Fla. 2001). Section 775.021(4)(b) prohibits multiple convictions and punishments for "(1) Offenses which require identical elements of proof, (2) Offenses which are degrees of the same offense as provided by statute, [and] (3) [o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." FLA. STAT. § 775.021(4)(b)(1)-(3) (2010).
215. Valdes, 3 So. 3d at 1072; FLA. STAT. § 775.021(4)(b).
216. FLA. STAT. § 775.021(4)(b)(2).
217. Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001) (per curiam), overruled in part by Valdes, 3 So. 3d at 1077 (Fla. 2009).
220. Id.
221. Id. at 23 (citing Carawan v. State, 515 So. 2d 161, 173 (Fla. 1987) (Shaw, J., dissenting), superseded by statute, Act effective July 1, 1988, ch. 88-131, § 7, 1988 Fla. Laws 709, as recognized in Valdes v. State, 3 So. 3d 1067, 1072 (Fla. 2009)).
222. 3 So. 3d 1067 (Fla. 2009).
interpretation that would provide guidance to trial and district courts." 223 The Court, therefore, abandoned the test in favor of a simpler approach. 224 According to the new test, section 775.021(4)(b) includes only those offenses that are included in the same charging statute and are explicitly provided by that statute to be degrees of the same offense. 225 In other words, separate punishments for crimes arising from the same criminal transaction are prohibited only when the statute itself provides for multiple degrees of the same offense. 226 Applying this test, the Court held that the rule against double jeopardy was not violated by the defendant’s dual convictions for discharging a firearm from a vehicle within 1000 feet of another person and shooting into an occupied vehicle because “the two offenses are found in separate statutory provisions; neither offense is an aggravated form of the other; and they are clearly not degree variants of the same offense.” 227

Shortly after Valdes was decided, the Fourth District Court of Appeal issued a two sentence opinion in Shazer v. State, 228 holding that “dual convictions for robbery with a deadly weapon and grand theft violate double jeopardy rights because the same property formed the basis for both convictions.” 229 Shazer’s conviction for grand theft was reversed and the case was remanded with directions to the trial court to vacate his conviction and sentence. 230 However, in McKinney v. State, 231 the Fifth District Court of Appeal disagreed, holding that section 775.021(4)(b)(2) did not bar dual convictions for “grand theft and robbery with a firearm [arising out of] a single taking of cash and a cell phone at gunpoint.” 232 Reasoning that “robbery is not a degree of theft nor is theft a degree of robbery,” the court upheld McKinney’s convictions and certified express and direct conflict with Shazer v. State. 233

Two Florida District Courts of Appeal found that Valdes, which addressed degrees of the same offense, did not apply to dual convictions for resisting an officer with and without violence. 234 In both cases, the appellate

---

223. Id. at 1075.
224. See id. at 1077.
225. Id.
226. Id. at 1075–76.
227. Valdes, 3 So. 3d at 1077.
228. 3 So. 3d 453 (Fla. 4th Dist. Ct. App. 2009) (per curiam).
229. Id. at 454.
230. Id.
231. 24 So. 3d 682 (Fla. 5th Dist. Ct. App. 2009).
232. Id. at 683.
233. Id. at 684; see Shazer, 3 So. 3d at 454.
234. See Brown v. State, 36 So. 3d 826, 828 (Fla. 5th Dist. Ct. App. 2010); Ruiz-Alegria v. State, 14 So. 3d 1276, 1277 (Fla. 2d Dist. Ct. App. 2009).
courts found that the convictions violated double jeopardy. In Brown v. State, the Fifth District Court of Appeal held that Valdes does not apply to "lesser offenses," such as resisting without violence, "that are subsumed by a greater offense," such as resisting with violence. In Ruiz-Alegria v. State, the Second District Court of Appeal found that Valdes does not apply to the situation that occurs when conduct begins as resisting without violence and then evolves into resisting with violence, provided that the conduct occurs in a single criminal episode.

When a defendant commits two or more distinct criminal acts, however, multiple convictions and punishments are not proscribed by the rule against double jeopardy. Florida's sexual battery laws are especially susceptible to the distinct acts exception because the statutes may be violated in myriad ways. In State v. Meshell (Meshell II), the defendant was convicted of two counts of lewd and lascivious battery pursuant to section 800.04(4), one count by vaginal penetration, and one count by oral penetration. The Fifth District Court of Appeal concluded that the dual convictions violated double jeopardy because the record did not demonstrate a "temporal break" sufficient for the defendant to have formed a new criminal intent. Because there was a split among the Florida appellate courts, however, the court certified the following question to the Supreme Court of Florida as one of great public importance: "Are the sex acts proscribed by sections 794.011 and 800.04(4), Florida Statutes, properly viewed as 'distinct criminal acts' for double jeopardy purposes, so that a defendant can be separately convicted for each distinct act committed during a single criminal episode?"

The Supreme Court of Florida limited review of this certified question to section 800.04(4), which was the only section at issue before the appellate

235. Id.
236. 36 So. 3d 826 (Fla. 5th Dist. Ct. App. 2010).
237. Id. at 832.
238. 14 So. 3d 1276 (Fla. 2d Dist. Ct. App. 2009).
239. See id. at 1277.
242. 2 So. 3d 132 (Fla. 2009), cert. denied, 130 S. Ct. 110 (2009).
243. Id. at 133; see FLA. STAT. § 800.04(4) (2006) (amended 2008).
244. Meshell v. State (Meshell I), 980 So. 2d 1169, 1171 (Fla. 5th Dist. Ct. App. 2008), certifying question to 2 So. 3d 132 (Fla. 2009).
245. Id. at 1175 (citations omitted); see FLA. STAT. §§ 794.011, 800.04(4) (2006) (amended 2008).
court, and answered the certified question affirmatively. Finding that vaginal and oral penetration were two distinct acts "of a separate character and type requiring different elements of proof," the Court concluded that the Florida Legislature intended multiple punishments. To arrive at this conclusion, the Court first compared the lewd and lascivious battery statute, under which Meshell was charged, to the sexual battery statute, noting that the same sexual acts were proscribed under both statutes. Accordingly, the Court determined that the double jeopardy analysis applicable to the sexual battery statute should apply to the lewd and lascivious battery statute. Under the sexual battery analysis, no temporal break is required, and double jeopardy considerations do not prohibit separate convictions for distinct acts of sexual battery that are committed in the course of a single episode. Applying this analysis to the case at hand, the Court held that the oral and vaginal acts of penetration with which Meshell was charged under section 800.04(4) were distinct criminal acts "of a separate character and type requiring different elements of proof." Therefore, the rule against double jeopardy was not violated by punishments for these distinct acts. Quashing the Fifth District's decision in Meshell I, the Court remanded the case with directions to reinstate the original convictions and sentences.

In Meshell II, the Supreme Court of Florida expressly limited its review of the double jeopardy issue to the lewd and lascivious battery statute, section 800.04(4). For this reason, in Brown v. State, the Second District Court of Appeal declined to apply the reasoning of Meshell II to a defendant's conviction of two counts of lewd and lascivious molestation pursuant to section 800.04(5)(a). After Brown's convictions were affirmed on appeal, he filed a petition alleging ineffective assistance of appellate counsel for failure to raise the double jeopardy issue. The Second District distinguished Meshell II on the ground that the acts of lewd and lascivious touching proscribed by section 800.04(5)(a) differ from those acts proscribed by

246. Meshell II, 2 So. 3d at 134; see Fla. Stat. § 800.04(4).
247. Meshell II, 2 So. 3d at 135–36.
248. Id. at 136 (comparing Fla. Stat. § 800.04(4) with Fla. Stat. § 794.011 (2006)).
249. Id.
250. Id. at 135–36.
252. Meshell II, 2 So. 3d at 136.
253. Id.
254. Id. at 134.
255. 25 So. 3d 78 (Fla. 2d Dist. Ct. App. 2009) (per curiam).
256. Id. at 80; see also Fla. Stat. § 800.04(5)(a) (defining "[l]ewd or [l]ascivious [m]olestation").
257. Brown, 25 So. 3d at 78.
the sexual battery statute. 258 "Because the supreme court has not addressed the double jeopardy issue in the context of section 800.04(5)(a)," the court ordered a new appeal on Brown’s double jeopardy claim. 259

Meshell II was also distinguished in J.M. v. State, 260 where the Fifth District Court of Appeal found that the lewd or lascivious touching by the defendant did not involve "sexual activity." 261 In fact, the court observed that "[w]ith only one exception, not relevant to this appeal, lewd or lascivious conduct only requires the intentional touching of someone under age 16 in a lewd and lascivious manner without regard to where the victim is touched." 262 Both touching incidents in this case involved the same victim and occurred sequentially on the school bus with "no meaningful spatial or temporal break during which J.M. could pause, reflect and form a new criminal intent." 263 Therefore, the Fifth District held that J.M.'s convictions for two counts of lewd or lascivious conduct under section 800.04(6)(c) violated double jeopardy. 264

In Partch v. State, 265 the First District Court of Appeal held that defendant’s dual convictions under sections 794.011(4) and 794.011(5) of the Florida Statutes, for sexual battery by vaginal penetration and attempted sexual battery on a person helpless to resist, violated principles of double jeopardy. 266 The court declined to follow Meshell II because ambiguities in the charging document and the jury verdict made it impossible to determine whether Partch had been convicted for two distinct acts of sexual battery or one act. 267 Instead, the court’s decision was based on a statutory trigger in section 794.011(6) that "would render the two offenses degrees of one another" under Valdes. 268 The court reversed the conviction for attempted sexual battery on a person helpless to resist and remanded for resentencing on the sexual battery charge. 269

258.  Id. at 80. Compare Fla. Stat. § 800.04(5)(a), with Fla. Stat. § 800.04(4).
259.  Brown, 25 So. 3d at 80.
260.  4 So. 3d 703 (Fla. 5th Dist. Ct. App. 2009).
261.  Id. at 704 n.1.
262.  Id.
263.  Id. at 704.
264.  Id. However, the Fifth District Court of Appeal followed Meshell II in State v. Gonzalez, 24 So. 3d 595 (Fla. 5th Dist. Ct. App. 2009) (per curiam), in holding that the defendant’s dual convictions for lewd and lascivious battery did not violate double jeopardy. Gonzalez, 24 So. 3d at 595.
265.  43 So. 3d 758 (Fla. 1st Dist. Ct. App. 2010).
266.  Id. at 759; see Fla. Stat. § 794.011(4)–(5) (2008).
267.  Partch, 43 So. 3d at 762.
268.  Id. at 764.
269.  Id.
The issue facing the First District Court of Appeal in *Roberts v. State*\(^{270}\) was whether double jeopardy principles were violated by the defendant's convictions for two counts of sexual battery of a person less than twelve years of age and two counts of lewd or lascivious molestation of a victim less than twelve years of age.\(^{271}\) The victim's testimony established that Roberts had committed lewd or lascivious molestation twice during the sexual battery episode: once by vaginal penetration and once by oral penetration.\(^{272}\) Applying *Meshell II*, the court held that the defendant's dual convictions for sexual battery and lewd or lascivious molestation did not violate principles of double jeopardy because they were based on discrete criminal acts committed during a single criminal episode.\(^{273}\)

The meaning of criminal punishment in the context of Florida's chemical castration statute was considered by the Fourth District Court of Appeal in *Tran v. State*.\(^{274}\) At the defendant's sentencing hearing for a second sexual battery conviction, the trial court ordered administration of medroxyprogesterone acetate (MPA) injections but reserved ruling on the duration of treatment pending determination by a psychiatrist as to whether the defendant was an appropriate candidate for chemical castration.\(^{275}\) Four months after Tran began serving his prison sentence, the trial court ordered that he receive MPA treatment for a period of five years after his release from prison.\(^{276}\) Because section 794.0235(2)(a) of the *Florida Statutes* requires that the court's sentencing order specify the duration of treatment, the appellate court found that this delayed order "amounted to a more onerous punishment."\(^{277}\) As such, it violated double jeopardy principles and was not a valid portion of the defendant's original sentence.\(^{278}\) Rejecting the State's contention that the MPA statute is intended for remedial treatment purposes, the appellate court noted that the statute is located within Florida's criminal code.

\(^{270}\) 39 So. 3d 372 (Fla. 1st Dist. Ct. App. 2010).
\(^{272}\) Roberts, 39 So. 3d at 373.
\(^{273}\) Id. at 374. The court's opinion appears to refer to Justice Canady's concurring opinion in *Meshell II*, where he noted that the decision did not deny that "separate instances of the same type of criminal sex act in a single episode may be punishable as separate offenses." See *Meshell II*, 2 So. 3d 132, 137 (Fla. 2009) (Canady, J., concurring), *cert. denied*, 130 S. Ct. 110 (2009).
\(^{274}\) 965 So. 2d 226, 229 (Fla. 4th Dist. Ct. App. 2007); *see* Fl. Stat. § 794.0235 (2006).
\(^{275}\) Tran, 965 So. 2d at 228.
\(^{276}\) Id.
\(^{277}\) Id. at 229.
\(^{278}\) Id. at 230.
and not within its public health code. Moreover, "[t]he language of the entire statute speaks of MPA in terms of a sentence and a penalty" and "the administration of MPA is imposed as part of a criminal sentence." Thus, the Fourth District held that a sentence to administration of MPA injections constitutes criminal punishment for purposes of double jeopardy.

The Florida District Courts of Appeal also considered double jeopardy claims when charges were based on a single item of property or on its component parts. In *Dyson v. State*, where the defendant stole a motorcycle, the Fifth District Court of Appeal held that double jeopardy was violated by defendant's convictions for both robbery and carjacking of the same item. Because carjacking is a subset of robbery, and the convictions were based on "identical elements of proof," the appellate court ordered the robbery conviction to be vacated.

In other decisions, the courts considered whether double jeopardy was violated when multiple charges were based on the component parts of a single item of property. In *Boyd v. State*, for example, the Fourth District Court of Appeal held that double jeopardy was violated by dual convictions for possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, even though the firearm was not loaded with the ammunition. The decision turned on the wording in section 790.23, which provides, in relevant part, that it is unlawful for a convicted felon "to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device." The court found "that because the word 'any' precedes the list of contraband items, double jeopardy precludes multiple convictions where, during a single episode, the defendant possessed more than one item in that list. The Fifth District Court of Appeal followed *Boyd* in *Francis v. State*, which also involved dual convictions.

---

279. *Id.* at 229.
280. *Tran,* 965 So. 2d at 229.
281. *Id.* at 228.
283. 10 So. 3d 650 (Fla. 5th Dist. Ct. App. 2009).
284. *Id.* at 651.
285. *Id.*
287. 17 So. 3d 812 (Fla. 4th Dist. Ct. App. 2009).
288. *Id.* at 818.
290. *Boyd,* 17 So. 3d at 818.
291. 41 So. 3d 975 (Fla. 5th Dist. Ct. App. 2010).
for possession of a firearm and ammunition by a convicted felon. In Francis, however, the ammunition was fully encased within the firearm. Similarly, in Hanfield v. State, the defendant was convicted of armed robbery of the keys to the car for which she was also convicted of carjacking. Holding that the taking of the car keys cannot be considered as a separate property item to warrant conviction for armed robbery, the Fourth District Court of Appeal directed the trial court to vacate that conviction.

C. Due Process

1. Entrapment

The Fifth District Court of Appeal held that an objective entrapment test should have been used to determine whether the defendant’s due process rights had been violated by government misconduct in Hernandez v. State. Hernandez, a cocaine addict, testified that he had only agreed to locate a seller for a cocaine purchase because the confidential informant who approached him “promised him a portion of the product.” He also testified that the informant knew of his addiction and had sold him cocaine in the past. The seller and Hernandez were arrested when they met to complete the sale, and Hernandez was charged with trafficking in cocaine. In a motion to dismiss, defense counsel argued that, under the objective entrapment test, Hernandez’s due process rights had been violated by the informant’s improper conduct in enticing Hernandez, a known addict, by the promise of payment in drugs. Applying what appeared to be a subjective test, the trial court denied the motion to dismiss, holding that no entrapment had occurred because “the testimony suggest[ed] a propensity to commit a sale and delivery of cocaine.”

On appeal of the denial of his motion to dismiss, the Third District Court of Appeal noted that, although the trial court may have properly decided that the defendant was not entitled to relief under section 777.201,
Florida’s entrapment statute, Hernandez had not sought relief under that statute.\textsuperscript{303} The trial court had therefore failed to address the issue raised by the defendant’s motion to dismiss.\textsuperscript{304} Although it is not “a per se due process violation for a government informant to offer illegal drugs to a known drug addict as an inducement to enter into an illegal activity,” the appellate court stated that the trial court must nevertheless “evaluate all relevant circumstances and then determine whether the government conduct ‘so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction.’”\textsuperscript{305} Therefore, on remand, the trial court was directed to apply an objective entrapment test to determine whether the alleged governmental misconduct violated the defendant’s due process rights.\textsuperscript{306}

The Fifth District Court of Appeal addressed a similar claim in \textit{Bist v. State}.\textsuperscript{307} In this case, a police department enlisted the help of an independent nonprofit organization, Perverted Justice, which provided decoys for a pedophile sting operation to be filmed for a network television program, \textit{To Catch a Predator}.\textsuperscript{308} Here, Bist initiated an online conversation with “Jenna,” a Perverted Justice decoy, believing her to be a thirteen-year-old girl.\textsuperscript{309} After engaging in graphic sexual conversations online, he traveled to meet Jennah for a tryst.\textsuperscript{310} Once at the designated location, however, he found himself being filmed.\textsuperscript{311} When he tried to leave, he was arrested and charged with attempted lewd and lascivious battery, computer pornography, and child exploitation.\textsuperscript{312} In his motion to dismiss, Bist argued that law enforcement’s conduct was so egregious that it amounted to objective entrapment in violation of his due process rights.\textsuperscript{313} After his motion was denied, Bist pled no contest, reserving his right to appeal the trial court’s ruling.\textsuperscript{314}

The Fifth District Court of Appeal held that law enforcement’s methods were not “so outrageous that due process considerations would bar prosecution.”\textsuperscript{315} In support of this conclusion, the court noted first that Bist had not

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{303} \textit{Id.}; \textit{Fla. Stat.} § 777.201 (2007).
\item\textsuperscript{304} \textit{Hernandez}, 17 So. 3d at 750.
\item\textsuperscript{305} \textit{Id.} at 751 (quoting \textit{State v. Blanco}, 896 So. 2d 900, 901 (Fla. 4th Dist. Ct. App. 2005) (en banc) (citing \textit{Campbell v. State}, 935 So. 2d 614, 619 (Fla. 3d Dist. Ct. App. 2006))).
\item\textsuperscript{306} \textit{Id.}
\item\textsuperscript{307} 35 So. 3d 936, 938 (Fla. 5th Dist. Ct. App. 2010).
\item\textsuperscript{308} \textit{Id.}
\item\textsuperscript{309} \textit{Id.}
\item\textsuperscript{310} \textit{Id.} at 939.
\item\textsuperscript{311} \textit{Id.}
\item\textsuperscript{312} \textit{Bist}, 35 So. 3d at 939.
\item\textsuperscript{313} \textit{Id.}
\item\textsuperscript{314} \textit{Id.}
\item\textsuperscript{315} \textit{Id.} at 941.
\end{enumerate}
\end{footnotesize}
been “solicited, induced, or otherwise lured into seeking a sexual liaison with a Perverted Justice decoy.”\textsuperscript{316} To the contrary, he had contacted the decoy on his own initiative.\textsuperscript{317} Additionally, the electronic recording and storage of all communications between the defendant and the decoy allayed any concern that Perverted Justice had a financial “incentive to manufacture crime or commit perjury.”\textsuperscript{318} It also insured the integrity of a process that, in spite of being unsupervised and unmonitored, did not result in unscrupulous conduct.\textsuperscript{319} For these reasons, the appellate court rejected Bist’s objective entrapment defense and held that due process considerations did not bar prosecution.\textsuperscript{320}

2. Vagueness

The statute prohibiting racing on highways\textsuperscript{321} was subject to constitutional challenge in two cases.\textsuperscript{322} In the first case, \textit{State v. Wells},\textsuperscript{323} the Fourth District Court of Appeal held that the statute was unconstitutionally vague, both on its face and as applied to the defendant.\textsuperscript{324} In this case, after Wells was charged with racing on the highway, he filed a motion to dismiss challenging the constitutionality of the statute.\textsuperscript{325} The trial court granted the motion on the ground that section 316.191 was unconstitutionally vague and overbroad, and the State appealed.\textsuperscript{326}

The language in question involved the statutory definition of racing, which includes “the use of one or more motor vehicles in an attempt to outgain or outdistance another motor vehicle.”\textsuperscript{327} Because this part of the definition does not include an element of competition, the appellate court in \textit{Wells} noted that it “could encompass passing, accelerating from a stop,” and

\begin{itemize}
  \item \textsuperscript{316} \textit{Id.} at 940.
  \item \textsuperscript{317} \textit{Bist}, 35 So. 3d at 940.
  \item \textsuperscript{318} \textit{Id.}
  \item \textsuperscript{319} \textit{Id.} at 941.
  \item \textsuperscript{320} \textit{Id.} The court also held that Bist’s entrance into what he thought was a thirteen-year-old girl’s home, in possession of “flowers, chocolate, lubricant and condoms,” constituted an overt act “sufficient to prove a prima facie case of attempted lewd and lascivious battery.” \textit{Id.} at 942.
  \item \textsuperscript{321} \textit{FLA. STAT.} § 316.191 (2010).
  \item \textsuperscript{322} \textit{See} \textit{Reaves v. State}, 979 So. 2d 1066, 1068 (Fla. 1st Dist. Ct. App. 2008) (per curiam); \textit{State v. Wells}, 965 So. 2d 834, 836 (Fla. 4th Dist. Ct. App. 2007) (per curiam).
  \item \textsuperscript{323} 965 So. 2d 834 (Fla. 4th Dist. Ct. App. 2007) (per curiam).
  \item \textsuperscript{324} \textit{Id.} at 837.
  \item \textsuperscript{325} \textit{Id.} at 836.
  \item \textsuperscript{326} \textit{Id.}
  \item \textsuperscript{327} \textit{FLA. STAT.} § 316.191(1)(c) (2005), \textit{invalidated by Wells}, 965 So. 2d at 834 (amended 2009).
\end{itemize}
myriad otherwise legal and even illegal maneuvers that drivers routinely employ.  328  Furthermore, the statute was vague as applied because it did not clearly prohibit the defendant’s alleged conduct and it was unclear whether Wells was trying to “outgain or outdistance” the other driver or merely exceeding the speed limit.  329  The statute was not unconstitutional for over-breadth, however, because it did not affect a fundamental right.  330  The Fourth District concluded that the trial court properly found section 316.191 to be unconstitutionally vague both facially and as applied.  331  The court reversed the conviction and “remanded in part for the trial court to strike the overbreadth findings . . . from its order.”  332

In the second case, Reaves v. State,  333  the First District Court of Appeal disagreed with the Fourth District’s conclusion that the statute was vague because the definition of “racing” lacked an element of competition.  334  Instead, the court reasoned that the definition should be read together with related statutory provisions, which in turn provide the element of competition.  335  For example, section 316.191(2)(a)(1) expressly prohibits the conduct of engaging in “any race, speed competition or contest, drag race or acceleration contest” on a public road against another vehicle.  336  Section 316.191(1)(b) in turn defines “drag race” as the operation of two vehicles engaged “‘in a competitive attempt to outdistance each other.’ ”  337  The court concluded that, when these provisions are read together as a coherent whole, the statute could be applied only when vehicles are competing with each other.  338  Thus, the First District found section 316.191 facially constitutional and affirmed the defendant’s conviction for racing on a highway.  339

328. Wells, 965 So. 2d at 839.
329. Id.
330. Id.
331. Id.
332. Id.
334. Id. at 1072.
335. Id.
336. Id. (quoting Fla. Stat. § 316.191(2)(a)(1) (2005), invalidated by Wells, 965 So. 2d at 834 (amended 2009)).
337. Id. (quoting Fla. Stat. § 316.191(1)(b) (2005), invalidated by Wells, 965 So. 2d at 834 (amended 2009)).
338. Reaves, 979 So. 2d at 1072.
339. Id. Reaves also sought to withdraw his plea of guilty to vehicular homicide, arguing that the other racer, Street, was the sole proximate cause of the victim’s death. Id. at 1069. The trial court denied the motion, and Reaves appealed. Id. The First District Court of Appeal found no abuse of discretion in the trial court’s denial of Reaves’ motion to withdraw his guilty plea. Id. at 1070. This part of the decision is discussed infra, Section VII.

https://nsuworks.nova.edu/nlr/vol35/iss1/1
3. Lack of Specificity in the Charging Document

In a case of first impression, the First District Court of Appeal addressed the question of whether a fundamental error amounting to a denial of due process occurs when a charging document omits both: (1) The essential elements of the offense allegedly committed by an accessory after the fact or the principal, and (2) Any “reference to the statute that proscribes that offense.” In *Baker v. State*, the defendant’s failure to preserve the issue at trial meant that he could raise the error for the first time on appeal “only if it constitutes ‘fundamental error.’” However, the court identified a conflict between the fundamental error exception to the contemporaneous objection rule and the district courts’ practice of following dictum from the Supreme Court of Florida in *State v. Gray*. That dictum states that when a charging document “completely fails to charge a crime,” the ensuing conviction violates due process, “a defect that can be raised at any time—before trial, after trial, on appeal, or by habeas corpus.” After reviewing the record, the appellate court found that *Gray* and its progeny did not apply here, because the charging document adequately alleged the accessory’s offense. Moreover, because Baker not only “fully understood the charge against him, [but also] was able to mount a defense to that charge... the information was not fundamentally defective,” and due process was not denied. Nevertheless, “because a broad reading of the dicta in *Gray* might be determined to lead to the opposite result,” the court certified the following question as one of great public importance:

When charging the offense of accessory after the fact, does fundamental error occur if, although the indictment or information alleges the elements of the offense as set out in section 777.03 and identifies the offense allegedly committed by the principal or accessory before the fact, it fails also either to allege the elements of the offense allegedly committed by the principal or accessory before the fact, or to cite the statute that proscribes that offense?

341. 4 So. 3d 758 (Fla. 1st Dist. Ct. App. 2009).
342. *Id.* at 760 (citing *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008)).
343. *Id.* at 760–61; *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983).
344. *Gray*, 435 So. 2d at 818.
345. *Baker*, 4 So. 3d at 761.
346. *Id.*
347. *Id.*
4. Nonexistent Crimes

Two district courts rendered decisions that reversed convictions for nonexistent crimes on the ground of fundamental error.\(^\text{348}\) In *James v. State*,\(^\text{349}\) where the defendant was charged with "carrying a concealed weapon by a convicted felon," the Fourth District Court of Appeal held that it was fundamental error for the trial court to instruct the jury on the nonexistent offense of "possession of a concealed weapon by a convicted felon."\(^\text{350}\) The court's definitions for actual and constructive possession compounded that error because those definitions were irrelevant to the offense charged.\(^\text{351}\) The Fourth District reversed the conviction and sentence and "remand[ed] for a new trial on the charged crime of carrying a concealed weapon by a convicted felon."\(^\text{352}\) Similarly, in *Mathis v. State*,\(^\text{353}\) the Third District Court of Appeal held that it was fundamental error for the trial court to omit a necessary element from the jury instruction.\(^\text{354}\) In this case, Mathis was charged with "possession with intent to sell cocaine within 1000 feet of a child care facility."\(^\text{355}\) The jury instructions omitted the requirement that possession be "with the intent to sell" the contraband, resulting in Mathis's conviction of "simple possession of contraband within 1000 feet of a child care facility."\(^\text{356}\) As this was a nonexistent crime, the appellate court found fundamental error and reduced the conviction to simple possession.\(^\text{357}\) Because the sentence imposed by the trial court fell within the sentencing guidelines for simple possession, no new trial was necessary.\(^\text{358}\)

D. Ex Post Facto Laws

During the survey period, the Supreme Court of Florida decided two cases involving ex post facto challenges.\(^\text{359}\) In *Griffin v. State*,\(^\text{360}\) the Court


\(^{349}\) 16 So. 3d 322 (Fla. 4th Dist. Ct. App. 2009).

\(^{350}\) Id. at 325.

\(^{351}\) Id. at 326.

\(^{352}\) Id. at 327.

\(^{353}\) 21 So. 3d 865 (Fla. 3d Dist. Ct. App. 2009).

\(^{354}\) Id. at 866.

\(^{355}\) Id.

\(^{356}\) Id.

\(^{357}\) Id.

\(^{358}\) *Mathis*, 21 So. 3d at 866.

\(^{359}\) See *Griffin v. State*, 980 So. 2d 1035, 1037 (Fla. 2008) (per curiam); *Lescher v. Fla. Dep't of Highway Safety & Motor Vehicles*, 985 So. 2d 1078, 1086 (Fla. 2008).

\(^{360}\) 980 So. 2d 1035 (Fla. 2008) (per curiam).
held that the prohibition against ex post facto laws was not violated by the
retroactive application of section 939.185 of the Florida Statutes, which
authorized costs to be assessed against a defendant whose conviction occurred
before the statute's enactment. On appeal from the trial court's order, the
Second District Court of Appeal reversed the imposition of costs and certi
fied conflict with Ridgeway v. State, a First District Court of Appeal case.
However, the Supreme Court of Florida agreed with the decision in
Ridgeway and adopted that opinion as its own. In doing so, the Court
applied a two-prong test to determine whether a measure constitutes a criminal
penalty, stating that a law violates the ex post facto clause if (1) it is retros
pective in effect, and (2) it "alters the definition of criminal conduct or in
creases the penalty" imposed for the offense. The Court found that section
939.185 meets the first prong because it applies to offenses committed before
the statute's effective date. However, the statute fails to meet the second
prong because the imposition of costs "neither alters the definition of the
criminal conduct nor increases" the penalty for the crime. As such, section
939.185 does not constitute a criminal penalty and thus does not violate the
prohibition against ex post facto laws. Accordingly, the Court quashed
Griffin in part, approved Ridgeway, and remanded to the district court.

In Lescher v. Florida Department of Highway Safety & Motor Veh
icles, the Supreme Court of Florida addressed the question of whether the
prohibition against ex post facto laws was violated by a statutory amendment
eliminating hardship licenses for drivers whose licenses had been permanen
tly revoked. In this case, after his fourth DUI conviction in 2000, Lescher's license was revoked pursuant to section 322.28(2)(e) of the Florida Statutes.
At the time of this revocation he could have applied for a hardship

361. Id. at 1037.
362. 892 So. 2d 538, 539–40 (Fla. 1st Dist. Ct. App. 2005) (holding that the retroactive
application of section 939.185 did not violate the prohibition against ex post facto laws where
the defendant pled nolo contendere on the same day that the statute became effective).
363. Griffin, 980 So. 2d at 1036.
364. Id.
365. Id.
366. Id. at 1037; see Fla. Stat. § 939.185 (2004).
367. Griffin, 980 So. 2d at 1037.
368. Id.
369. Id., followed by Love v. State, 992 So. 2d 823, 824 (Fla. 2d Dist. Ct. App. 2008),
370. 985 So. 2d 1078 (Fla. 2008).
371. Id. at 1079.
license, under former section 322.271(4), but did not do so until 2005. The application was denied, and the denial was upheld by the circuit court. The Fourth District Court of Appeal then denied his petition for certiorari and certified the following question to the Supreme Court of Florida as one of great public importance: “Does the amendment to section 322.271(4), Florida Statutes, which eliminated hardship driver’s licenses effective July 1, 2003, violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment became effective?”

The Supreme Court of Florida answered the certified question in the negative and approved the Fourth District Court of Appeal’s decision. The Court determined that the amendment eliminating hardship licenses imposed a civil penalty, not criminal punishment. The first step in this analysis was to ascertain legislative intent, which the Court concluded was “to protect the public through a regulatory regime governing driver’s licenses.” The second step was to determine the civil or criminal effect of the statute under a seven-factor test. Applying these factors, the Court concluded that Lescher had failed to show that the provisions in question were so punitive that they negated the legislature’s intent of imposing a civil sanction. As a

---

373. Lescher, 985 So. 2d at 1079–80; see Fla. Stat. § 322.271(4) (1997). The language from that section permitting reinstatement after four DUI convictions had been eliminated by chapter 98-223, section 9, Florida Laws, which later was held unconstitutional for violating the single subject requirement in Article III, section 6 of the Florida Constitution. Fla. Dep’t of Highway Safety & Motor Vehicles v. Critchfield, 842 So. 2d 782, 783 (Fla. 2003) (per curiam); see Fla. Const. art. III, § 6. The legislature cured the constitutional defect by reenacting the provision as an amendment to section 322.271(4), effective July 1, 2003. Critchfield, 842 So. 2d at 785. Thus, there was a window during which Lescher could have, but did not, request a hardship license; but that period closed when the amendment was reenacted. See Lescher, 985 So. 2d at 1080.
374. Lescher, 985 So. 2d at 1080.
375. See id. at 1080–81.
376. Id. at 1086.
377. Id.; see also Bolware v. State, 995 So. 2d 268, 275 (Fla. 2008) (per curiam). In Bolware, resolving a conflict among intermediate appellate courts, the Supreme Court of Florida held that although the revocation of a driver’s license is a personal hardship, it does not constitute “punishment.” Bolware, 995 So. 2d at 275. Therefore, it is not a direct consequence of a guilty plea and there is no requirement that defendant be informed in order for the plea to be voluntary. Id. However, the Court also found that the suspension or revocation of a driver’s license constitutes such a serious consequence that a defendant should be informed of it during a plea colloquy. Id. at 276. The Court therefore directed that Florida Rule of Criminal Procedure 3.172(c) be amended accordingly. Id.; see Fla. R. Crim. P. 3.172(c).
378. Lescher, 985 So. 2d at 1081–82.
379. Id. at 1082.
380. Id. at 1086.
civil remedy, the elimination of the availability of hardship licenses from section 322.271(4) for drivers with four DUI convictions did not constitute an ex post facto law.  

E. Federal Preemption

The Fifth District Court of Appeal decided a claim of federal preemption in Menefee v. State. This was an appeal from a judgment and sentence for the offense of misdemeanor stalking in violation of section 784.048(3). The defendant was accused of using his ham radio to make repeated threats over the radio airwaves to kill the victim. In a pretrial motion to dismiss, Menefee argued that the State was preempted from prosecuting him because the federal government regulates ham radio broadcasts. After the trial court denied the motion, a jury found Menefee guilty of misdemeanor stalking.

On appeal of the denial of his motion to dismiss, Menefee argued that licenced amateur radio communications were governed exclusively by federal law and that the State was therefore precluded by the Supremacy Clause of the United States Constitution from regulating such matters. The Fifth District Court of Appeal rejected this argument on the ground that, in prosecuting Menefee, the State sought to punish him for criminal conduct, not “to regulate the airwaves.” The court could find no statutory language expressly or impliedly preempting the states from punishing individuals who use the radio airways to harass a victim criminally. Moreover, the court determined that the stalking statute was not enacted to regulate ham radio operators but rather “to protect victims from intentional threatening conduct that causes substantial emotional distress in the form of a reasonable fear for one's safety.” Because the prosecution was not federally preempted, the appellate court affirmed the judgment and sentence.

382. 980 So. 2d 569, 570 (Fla. 5th Dist. Ct. App. 2008).
383. Id. at 570–71; see Fla. Stat. § 784.048(3) (2004).
384. Menefee, 980 So. 2d at 570–71.
385. Id. at 571.
386. Id.
387. U.S. CONST. art. VI, cl. 2.
388. Menefee, 980 So. 2d at 571.
389. Id.
390. Id. at 574.
391. Id.
392. Id. at 574–75.
F. Separation of Powers

The First District Court of Appeal addressed an issue involving invalid rulemaking by the legislature. Formerly, Rule 3.250 of the Florida Rules of Criminal Procedure permitted a defendant to make the concluding argument to the jury if the only testimony offered by the defendant in his or her behalf was the defendant’s own. Section 918.19 of the Florida Statutes repealed that part of Rule 3.250 relating to closing arguments and substituted a different procedure that allowed the prosecutor to make the concluding argument. However, in Grice v. State, the First District Court of Appeal found section 918.19 to be constitutionally infirm because its adoption of a new procedural rule constituted invalid rulemaking by the legislature. As the repeal itself was constitutionally valid, the court examined the common law to determine the proper procedure. The common law rule provided that the State was entitled to conduct initial and concluding closing arguments because the State carried the burden of proof. Because the trial court's decision was correct but for the wrong reason, the appellate court affirmed under the "tipsy coachman" rule.

VI. STATUTORY INTERPRETATION

In Kasischke v. State, the Supreme Court of Florida was called upon to resolve a district split regarding interpretation of a statute prohibiting sexual offenders from possessing pornography. The statute in question provided that sexual offenders sentenced to probation or community control would be prohibited from "viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that

---

394. Id. at 959.
396. 967 So. 2d 957 (Fla. 1st Dist. Ct. App. 2007).
397. Id. at 961 (discussing FLA. STAT. § 918.19 (2006)).
398. Grice, 967 So. 2d at 961.
399. Id.
400. Id. at 961-62 (citing Robertson v. State, 829 So. 2d 901, 906-07 (Fla. 2002)). In Robertson v. State, the Supreme Court of Florida explained the "tipsy coachman" doctrine as "allow[ing] an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" Robertson, 829 So. 2d at 906.
401. 991 So. 2d 803 (Fla. 2008).
402. Id. at 805.
are relevant to the offender's deviant behavior pattern." The issue was whether this section enacted a complete ban against all pornographic material or only those materials that are "relevant to the offender's deviant behavior." The Court agreed with the district court in that the plain language of the statute was ambiguous because it was "susceptible to multiple and irreconcilable interpretations" as to which prohibited materials had to be relevant to the defendant's deviant conduct. After examining several rules of statutory construction, the Court applied the rule of lenity and held that the qualifying language relating to relevance qualifies each of the prohibitions in the statute. Thus, an offender does not violate the statute unless the "obscene, pornographic, or sexually stimulating material" at issue is "relevant to 'deviant behavior pattern'."

In a case of first impression, the Second District Court of Appeal considered whether the language "willfully and unlawfully cage a child," as contained in the aggravated child abuse statute, encompassed the defendant's "act of chaining his sixteen-year-old stepson at [his] place of work and in the stepson's bedroom." In Blow v. State, the court held that the plain meaning of the statutory language limits its application to confinement "in some type of wire or bar boxlike structure or a small restrictive enclosure." In support of this conclusion, the court noted, "The noun 'cage' is defined as . . . 'a box or enclosure having some openwork, (as of wires or bars), especially for confining or carrying birds or animals,' [while] the verb 'cage' is defined as . . . 'confine, shut in, keep in or as if in a cage' and 'enclose in or with a strong structure to prevent escape.'" Because "[t]he plain meaning of the term 'cage' does not include the act of chaining or handcuffing," the court found that the State had not presented a prima facie case of aggravated child abuse by caging.

403. Id. at 805–06 (quoting Fla. Stat. § 948.03(5)(a)7 (1999) (amended 2000).
404. Kasischke, 991 So. 2d at 807.
405. Id. at 815.
406. Id.
407. Id.
410. Id. at 541.
411. Id. (quoting Webber's Third New International Dictionary Unabridged 313 (1986)).
412. Id. at 542.
In *Duan v. State*, the defendant appealed his conviction for extortion on the ground that the victim’s mental injury failed to satisfy the elements of that offense. Duan’s conviction rested on his threat to testify falsely in order to extort money from the victim. The extortion statute prohibits communication that “maliciously threatens an injury to the person, property or reputation of another” for the purpose of compelling that person to act or to refrain from acting “against his or her will.” The issue on appeal was whether the trial court erred in instructing the jury that the extortion statute encompassed threats to a person’s mental well-being and did not require physical injury. Affirming Duan’s conviction, the First District Court of Appeal found that the language of the statute itself suggests the Legislature intended to criminalize threats to mental or emotional well-being. For example, section 836.05 expressly prohibits threats to reveal private secrets, or divulge information that “would damage the victim’s reputation, or . . . expose the victim to disgrace.” Such threats, if carried out, could “cause the victim mental or emotional stress.” Moreover, because “the phrase ‘injury to the person’ is not further modified as a ‘bodily injury’ or ‘physical injury,’” it includes “both physical and mental injuries.” Thus, the appellate court held that, as a matter of apparent first impression in Florida, the extortion statute prohibits threats to cause mental or psychological injuries.

The question facing the Fifth District Court of Appeal in *Beam v. State* was whether an uncle by marriage could be convicted of incest involving a niece whom he had adopted. In support of this conclusion, the court examined the plain language of the incest statutes, holding that it limits the legal definition of incest to persons who are related by consanguinity. Because the definition did not include relationships of affinity and adoption, and because Beam did not have the requisite biological relationship with his victim, the court reversed in part,
remanded, and directed the trial court to vacate Beam's conviction for incest.427

VII. MISCELLANEOUS

The issue of parental kidnapping was the subject of the Third District Court of Appeal's decision in Davila v. State.428 The defendant was convicted of three counts of kidnapping, among other charges.429 Davila appealed the denial of his motion for post conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure.430 He argued that the three counts of kidnapping should be vacated because, as the victim's parent, it was impossible for him to kidnap his own child.431 The Third District Court of Appeal rejected this argument.432 The court recognized the general rule that "a parent cannot be convicted of kidnapping his own child" when there is no court order awarding custody to the parent from whom the child was taken.433 However, the court relied on its own judicial exception to the statutory rule.434 Under this exception, a parent can be convicted of kidnapping when the defendant "does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself."435 Denying the requested relief, the court acknowledged that this exception was at variance with the Second District Court of Appeal's holding in Muniz v. State436 and certified conflict.437

The First District Court of Appeal resolved a question of causation in a drag-racing case.438 In Reaves v. State,439 the defendant sought to withdraw...
his plea of guilty to vehicular homicide. In support of his argument that he had not caused the victim’s death, he proferred two alternate theories. First, he suggested that the victim, a passenger in the other car, had caused her own death because she participated voluntarily in the race. Second, he claimed that the other racer, Street, was the sole proximate cause of the passenger’s death because he refused to decelerate and merge upon approaching the median.

On appeal, the First District Court of Appeal found no abuse of discretion in the trial court’s denial of Reaves’ motion to withdraw his guilty plea. The court rejected his first theory based on the rule that “[c]ases where the decedent is held responsible involve circumstances where the deceased’s conduct alone led to his or her death.” In this case, there was no evidence that the passenger had “played an active role in the race, or . . . even acquiesced to Street’s decision to participate in the race.” Without evidence that the passenger’s conduct was the singular cause of the accident the court held that she was not the proximate cause of her own death. The court also rejected the second theory of causation on the ground that it was natural and foreseeable that Street would accelerate and attempt to pass Reaves. Moreover, the evidence showed that Reaves refused to allow the other vehicle to merge as both cars approached the median. Thus, both drivers were the proximate cause of the victim’s death.

VIII. CONCLUSION

During the survey period, the Supreme Court of the United States rendered an important decision in *Graham*, concerning the punishment of juvenile, non-homicide offenders in Florida. At the same time, the Supreme Court of Florida settled several conflicts among Florida’s District Courts of Appeal and interpreted a number of statutes, defenses, common

440. Id. at 1069.
441. Id.
442. Id.
443. Id.
444. *Reaves*, 979 So. 2d at 1070.
445. Id. at 1069.
446. Id. at 1070.
447. Id.
448. Id.
449. *Reaves*, 979 So. 2d at 1070.
450. See id.
law doctrines, and constitutional principles.\textsuperscript{452} Some of these decisions, including \textit{Montgomery},\textsuperscript{453} concerning the element of intent in the offense of manslaughter by act, raised as many issues as they resolved. Florida’s District Courts of Appeal were active as well, certifying several conflicts and questions of great public importance to the Supreme Court of Florida.\textsuperscript{454}

\textsuperscript{452} See, e.g., Kasischke v. State, 991 So. 2d 803 (Fla. 2008); Lescher v. Fla. Dep’t of Highway Safety & Motor Vehicles, 985 So. 2d 1078 (Fla. 2008); Griffin v. State, 980 So. 2d 1035 (Fla. 2008) (per curiam).

\textsuperscript{453} State v. Montgomery, 39 So. 3d 252 (Fla. 2010).

2010 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

I. INTRODUCTION

The Supreme Court of Florida only decided three cases directly related to children's issues in the past years: two in the delinquency area and one governing termination of parental rights. The intermediate appellate courts again remained active—particularly in the termination of parental rights field. On the other hand, in the juvenile delinquency area, most of the decisions dealt with generic issues of criminal procedure that are not unique to the juvenile delinquency field, and thus are not covered in this article. Several changes in Chapters 39 and 985 require brief review.

II. DEPENDENCY

Incarceration can constitute grounds for a finding of dependency in the form of abandonment.1 In the termination of parental rights context, the test for termination based upon incarceration is different and requires that the period of incarceration be a substantial portion of the time before the child reaches the age of eighteen.2 However, the incarceration alone cannot rise to the level of abandonment unless there is also a showing that the parent has not provided for support and has not established or maintained a substantial relationship with the child.3 “Marginal efforts and incidental or token visits

---

* Professor of Law, Nova Southeastern University Shepard Broad Law Center. This Survey covers cases decided during the period from July 1, 2009 through June 30, 2010. This article marks Professor Dale's twentieth Nova Law Review juvenile law survey.

1. FLA. STAT. § 39.01(1) (2010).
2. Id. § 39.806(1)(d)(1).
3. See id.; id. § 39.01(1).
or communications" are insufficient under the statute. In B.T. v. Department of Children & Families, a father appealed a final order of dependency on grounds of abandonment due to his incarceration. The father had "numerous convictions for drug and firearm offenses and ha[d] been incarcerated since" the child's birth. At the time of the adjudicatory hearing, he was serving ninety-six months in prison. Recognizing that incarceration is a factor in abandonment but may not be the sole standard, the appellate court found that the father had testified that he failed to make financial payments because of incarceration and received photographs of his child. Although the Department of Children and Families (DCF) offered no other evidence, the appellate court affirmed, yet remanded for the court to make findings in accordance with the opinion that the father failed to make adequate efforts to see and support his child.

When the child is taken from the home, the initial proceeding, known as a shelter hearing in Florida, involves notification to the parents, appointment of a guardian ad litem, informing the parents of their right to counsel, and establishment of "probable cause that reasonable grounds for removal exist," shown by DCF. In L.M.B. v. Department of Children & Families, a mother filed a petition for a writ of certiorari in an effort to "quash the trial court's shelter order which sheltered her three-year-old child in the father's home." The trial court conducted a shelter hearing prior to entering the order, but refused to allow the mother to present evidence regarding whether the child should be removed. The trial court held that by reviewing the probable cause for removal question it could make its determination from the "four corners of the verified shelter petition." When the mother subsequently consented to the adjudication of dependency, the appellate court nonetheless ruled on the issue, as it was "important and capable of repetition, yet evading review." Relying on decisions from other Florida District Courts of Appeal, the court held that a parent has a statutory right to be heard and present

4. Id. § 39.01(1).
5. 16 So. 3d 940 (Fla. 5th Dist. Ct. App. 2009).
6. Id. at 941.
7. Id.
8. Id.
9. Id. at 941–42.
10. B.T., 16 So. 3d at 941–42.
11. 28 So. 3d 217 (Fla. 4th Dist. Ct. App. 2010) (per curiam).
12. Id. at 218.
13. Id. (citing Fla. Stat. § 39.402(2) (2009)).
14. Id.
15. Id. (citing L.M.C. v. Dep't of Children & Families, 935 So. 2d 47, 47 (Fla. 5th Dist. Ct. App. 2006)).
evidence at a shelter hearing. In so ruling, the court held that affidavits from the parties may be an adequate substitute for live testimony.

An interesting issue involving the application of section 57.105 deals with an award of attorney's fees in a case where party and counsel knew or should have known that the claim was not supported by facts or an application of then-existing law arose this survey year in the dependency context. In Department of Children & Families v. S.E., DCF appealed from a trial court's fee award in favor of the mother pursuant to section 57.105. The trial court granted the mother's motion to dismiss the dependency proceeding based upon a letter from the statewide medical director of the child protection teams of the Department although two physicians had concluded that the child was the victim of Munchausen Syndrome by proxy. DCF decided to proceed, however, on the ground that the mother still posed a threat of harm despite the director's letter. The parent filed a renewed motion to dismiss on the grounds that the "amended petition failed to specifically set forth the acts or omissions upon which the petition was based." The trial court granted the motion to dismiss and subsequently held a hearing on the mother's entitlement to fees. Applying an abuse of discretion standard, the appellate court reversed the finding of an entitlement to fees, holding that at the time of the filing, DCF quite properly relied upon the opinions of medical professionals and thus was "always supported by the necessary material facts to overcome an award" under section 57.105.

III. TERMINATION OF PARENTAL RIGHTS

Florida law provides that it is possible for a parent to impliedly consent to termination of parental rights based upon the parent's failure to personally appear at the adjudicatory hearing. The appellate courts regularly deal with cases involving termination of parental rights based upon a parent's failure to appear. The specific question before the Supreme Court in Florida De-
partment of Children & Family Services v. P.E., 27 was "whether, when consent to termination of parental rights has been entered . . . upon the parent's failure personally to appear at the adjudicatory hearing, the trial court must nevertheless receive evidence of the grounds for termination alleged in the petition for termination of parental rights." 28 The case was before the Supreme Court because of a conflict in opinions by the intermediate appellate courts. 29 The Supreme Court held that when an order terminating parental rights on the basis of implied consent occurs, the parent's failure to appear constitutes a form of consent to the adjudication, and "the parent may not challenge the basis for the termination of parental rights." 30 The parents' failure to appear constitutes a form of default. 31 The Supreme Court did recognize that a parent may vacate the judgment by meeting a three part test showing: due diligence, excusable neglect, and the existence of a meritorious defense to the proceeding. 32 Finally, the Supreme Court found in the case before it that the trial court concluded that the mother's testimony was not credible and that she did not offer any evidence of the third prong; thus, it affirmed the ruling of the Second District Court of Appeal. 33

A second case involving termination of parental rights (TPR) based upon a parent's failure to appear is A.H. v. Department of Children & Families. 34 In that case, a month before the TPR trial, the father emailed his attorney to say that he could not appear because he lacked the financial resources to fly in for the hearing from New York where he lived. 35 The court had previously advised the father that he had to appear at trial. 36 At a status conference, where the father appeared telephonically, he explained that he could

27. 14 So. 3d 228 (Fla. 2009).
28. Id. at 234.
29. See id.; P.E. v. Dep't of Children & Family Servs. (In re H.E.), 3 So. 3d 341 (Fla. 2d Dist. Ct. App. 2009), approved by 14 So. 3d 228 (Fla. 2009); S.S. v. State Dep't of Children & Family Servs., 976 So. 2d 41 (Fla. 3d Dist. Ct. App. 2008), overruled in part by Fla. Dep't of Children & Family Servs. v. P.E., 14 So. 3d 228 (Fla. 2009); R.H. v. Dep't of Children & Family Servs., 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003), overruled in part by Fla. Dep't of Children & Family Servs. v. P.E., 14 So. 3d 228 (Fla. 2009); Dep't of Children & Families v. A.S., 927 So. 2d 204 (Fla 5th Dist. Ct. App. 2006).
31. P.E., 14 So. 3d at 230.
32. Id. at 236 (citing E.S. v. Dep't of Children & Family Servs., 878 So. 2d 493, 496 (Fla. 3d Dist. Ct. App. 2004); Fla. R. Civ. P. 1.540(b)(1)).
33. Id. at 237.
34. Id. at 236.
35. Id. at 802.
36. Id.
not attend the trial, and the court stated, "Okay. Well, your attorney will be here." 37 When the father failed to appear three days later for the TPR hearing, DCF asked the court to enter a consent to termination judgment. 38 The father's lawyer objected for the record without further elaboration. 39 The appellate court reversed, finding that the court's statement to the appellant intimated that the appellant's attorney could appear for the father. 40 The court further noted that the appellant's "attorney failed to request a continuance, made a half-hearted objection to the request for default and sought to be discharged at the first available opportunity." 41 Although the appellate court did not comment in other respects upon the attorney's conduct, 42 the court reversed, finding that the trial court abused its discretion. 43

An important evidentiary issue that arises regularly in Florida as well as in other jurisdictions is the question of hearsay statements by children in child protection cases. 44 In T.O. v. Department of Children & Families, 45 a mother and father appealed from termination of their parental rights to four children. 46 Although it affirmed, the appellate court, nonetheless, discussed the hearsay statements of the two children in which a number of witnesses testified that the children described violence between their parents and between the father and an older brother. 47 The children were allowed to testify in camera, although one of the children answered several questions but declined to answer questions about her parents. 48 The Florida Rules of Evidence contain an exception to hearsay for the admission of child victim statements. 49 However, prior to the admission of such statements, the trial court is obligated to conduct a hearing and make a preliminary determination that the hearsay statements come from a trustworthy source and are reliable. 50

37. Id.
38. Id.
39. A.H., 22 So. 3d at 802.
40. Id.
41. Id.
43. A.H., 22 So. 3d at 803.
44. See 2 Michael J. Dale, Representing the Child Client, § 7.07 (2010) [hereinafter Dale, Child Client].
45. 21 So. 3d 173 (Fla. 4th Dist. Ct. App. 2009).
46. Id. at 174.
47. Id. at 175.
48. Id.
50. Id.
Furthermore, the child must then either testify at trial or be declared unavailable.\textsuperscript{51} If the child is unavailable, the hearsay statements may still be admissible, but only after the court determines that there is corroborating evidence verifying the abuse or neglect.\textsuperscript{52} The appellate court held that the child was unavailable under the Florida Rules of Evidence because she persisted in refusing to testify concerning the subject matter of her statement.\textsuperscript{53} Thus, the appellate court concluded, the child was unavailable to testify, and the child's hearsay statements were admissible because "there was sufficient corroborating evidence of the sexual abuse."\textsuperscript{54}

Complicated procedural issues can arise when an appellate court reverses the termination of parental rights as to one parent but affirms as to the other. Such was the problem in \textit{Interest of I.R. v. Department of Children & Family Services & Guardian Ad Litem Program}.\textsuperscript{55} The difficulty in this situation is that only certain grounds apply under Florida law whereby termination of parental rights may occur as to one parent and not as to the other.\textsuperscript{56} In the context of a case where termination of parental rights is sought against both parents, the surviving ground allowing termination of the rights of one parent must be one of those grounds permissible in a one parent termination.\textsuperscript{57} Only then is affirrmance proper. However, where there is a reversal of the order terminating one parent's parental rights and the remaining ground does not allow for single parent termination, the entire case must be remanded for further proceedings.\textsuperscript{58}

A second appellate opinion involving the issue of single parent termination of parental rights under Florida law is \textit{J.S. v. Department of Children & Families}.\textsuperscript{59} In that case, the trial court terminated the rights of the mother and declined to terminate the rights of the father.\textsuperscript{60} The mother appealed the order terminating her parental rights, and the Guardian Ad Litem Program and DCF appealed the order declining to terminate the father's parental rights.\textsuperscript{61} The appellate court reversed as to both trial court judgments.\textsuperscript{62} The mother argued on appeal that the trial court was in error in finding grounds

\begin{align*}
\textsuperscript{51}. & \quad \text{Id.} \ S 90.803(23)(a)(2). \\
\textsuperscript{52}. & \quad \text{Id.} \\
\textsuperscript{53}. & \quad \text{T.O.,} 21 \text{So. 3d at 178 (citing FLA. STAT. § 90.804(1)(b)).} \\
\textsuperscript{54}. & \quad \text{Id.} \\
\textsuperscript{55}. & \quad 18 \text{So. 3d 26, 27 (Fla. 2d Dist. Ct. App. 2009).} \\
\textsuperscript{56}. & \quad \text{See FLA. STAT. § 39.811(6)(e).} \\
\textsuperscript{57}. & \quad \text{Id.} \\
\textsuperscript{58}. & \quad \text{In re R.R.,} 18 \text{So. 3d at 27.} \\
\textsuperscript{59}. & \quad 18 \text{So. 3d 1170, 1171 (Fla. 1st Dist. Ct. App. 2009).} \\
\textsuperscript{60}. & \quad \text{Id.} \\
\textsuperscript{61}. & \quad \text{Id.} \\
\textsuperscript{62}. & \quad \text{Id. at 1179.}
\end{align*}
for a single parent termination under the Florida Statute. The appellate
court agreed with the mother that the trial court did err in finding grounds for
a single parent termination because the trial court must consider additional
factors pursuant to Florida law when terminating one parent's parental rights
without terminating the parental rights of the other. Reviewing the facts of
the case, findings set out in the trial court's order, and the ultimate disposition
of the case, the appellate court concluded that the trial court abused its
discretion because the appellate court could not find evidence supporting the
specific additional factors necessary for a single parent termination.

Questions occasionally come up concerning treating sibling differently
in dependency and termination of parental rights cases. In W.P.R. v. Department of Children & Family Services & Guardian Ad Litem Program, a
father appealed the termination of parental rights to his son, although the
father did reunify with three older children who also had been the subject of
the original dependency petition. The appellate court explained that the
father had received additional case plans for all four children and that his
actions with regard to each were identical. According to the appellate
court, there had been no factual showing of different action toward the children or differences in the case plan but rather simply "disparate treatment of
the children." DCF conceded error, and the appellate court reversed and
remanded. However, in dicta, the appellate court recognized that it is possible to treat siblings differently in TPR proceedings but not where the sole
reason for treating the children differently is the adoptability of an individual child.

Under Florida law, termination of parental rights requires DCF to prove
three elements: 1) grounds for termination, 2) termination as "the least re-
strictive means of protecting the child from serious harm," and 3) "termination is in the child's best interest." In R.A. v. Department of Children &

63. Id. at 1174.
64. J.S., 18 So. 3d at 1174; see Fla. Stat. § 39.811(6) (2010)).
65. Id. at 1175–76.
66. 17 So. 3d 851 (Fla. 2d Dist. Ct. App. 2009).
67. Id. at 852.
68. Id.
69. Id.
70. Id. at 853 (citing B.B. v. Dep't of Children & Families, 793 So. 2d 988 (Fla. 2d Dist.
   Ct. App. 2001)).
71. In re R.R., 17 So. 3d at 853.
72. Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 568–69 (Fla.
   1991); E.D. v. Dep't of Children & Family Servs. (In re E.D.), 884 So. 2d 291, 295 n.3 (Fla.
Families,73 the Fifth District reversed the trial court order terminating a father’s parental rights after conducting an ordered analysis of the tri-part test.74 As to the least restrictive means of protecting the child, the appellate court found that the evidence of prospective harm was speculative, at best.75 It then further held that the trial court’s conclusion that proof of statutory grounds was enough to terminate parental rights simply ignored the statutory requirement that termination be in the manifest best interest of the child.76

While most child protection cases involve petitions filed by DCF, it is possible for private parties, including parents, to file both petitions for dependency and for termination of parental rights. In H.D. v. J.L.D.,77 a mother of an eleven-year-old child appealed the denial of a petition for termination of the parental rights of the child’s adoptive father.78 Apparently, the trial court did so without holding a hearing. In her petition, the mother had stated that the “adoptive father voluntarily executed an affidavit of surrender of . . . parental rights” and that it was in the child’s best interest to terminate them.79 Without holding a hearing, the trial court found that “terminating [the adoptive father’s] parental rights would not serve ‘the manifest best interests’ of the minor child,” in that it would terminate the child’s right to support.80 The appellate court recognized that, on the one hand, Chapter 39 does allow certain shortcuts to termination when there is a “‘voluntary surrender of parental rights.’”81 However, an adjudicatory hearing is nonetheless required in voluntary termination cases, and the trial court does have the power to deny a petition for termination where to do so may terminate the responsibility of the respondent parent to provide substantial support.82 However, the appellate court concluded, to deny the mother the right to a hearing constitutes a denial of due process rights to present evidence that termination is in the child’s best interest.83

73. 30 So. 3d 722 (Fla. 5th Dist. Ct. App. 2010).
74. Id. at 724.
75. Id.
76. Id.
77. 16 So. 3d 334 (Fla. 4th Dist. Ct. App. 2009).
78. Id. at 334.
79. Id. at 335.
80. Id. The appellate court quoted the trial’s court’s opinion.
81. Id. (quoting L.O. v. Fla. Dep’t of Children & Family Servs., 807 So. 2d 810, 812 (Fla. 4th Dist. Ct. App. 2002)).
82. H.D., 16 So. 3d at 335 (citing Rathburn v. Dep’t of Children & Family Servs., 826 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 2002)).
83. Id.
Case plans are an essential part of dependency proceedings in Florida as elsewhere. E.C. v. Department of Children & Family Services & Guardian Ad Litem (In re E.C.) involved the question of the impact of the failure to file a case plan which was “approved by the court and relied upon by the parties throughout the proceedings.” The crucial fact in the case was that a case plan addendum was never entered in the court file nor included as part of the trial court record until the appendency of the appeal. The majority held that the technical failure to file and the unique facts of the case were such that the error did not go to “the foundation or the merits” of the matter and thus was not fundamental error. However, there was a lengthy dissent by Judge Wallace. Although the dissent also would have reversed on other grounds as to the failure to file an addendum to the case plan, the dissent concluded that the request for “termination . . . was fatally flawed from its inception.” In other words, the termination was unauthorized by state law.

The second case involving appellate review of the trial court’s ruling on termination of parental rights for noncompliance with a case plan is S.F. v. Department of Children & Family Services. In that case, the parents appealed from an order terminating parental rights to three children, and among the issues was whether the parents failed to comply with the requirement of their case plan under Florida law. The appellate court found that the trial court did not distinguish its findings amongst the three children, two of whom were parties to the original case plan, and a third child who had been adjudicated dependent only seven months before the termination. The problem was that in Florida parents were entitled to a twelve month period to comply with a case plan. In the case at bar, the youngest child was only

84. See 1 Michael J. Dale, Representing the Child Client, ¶ 407(2) (Matthew Bender 3d ed. 2010).
85. 33 So. 3d 710 (Fla. 2d Dist. Ct. App. 2010).
86. Id. at 711.
87. Id. at 712 n.1.
88. Id. at 715.
89. See id. at 715–24(Wallace, J., dissenting).
90. In re E.C., 33 So. 3d at 722 ( quoting Y.F. v. Dep’t Children & Family Servs., 893 So. 2d 641, 642 (Fla. 2d Dist. Ct. App. 2005) (per curiam)).
91. Id. at 721.
92. 22 So. 3d 650 (Fla. 2d Dist. Ct. App. 2009).
93. Id. at 654; see FLA. STAT. § 39.806(1)(e)(2) (2010).
94. In re S.F., 22 So. 3d at 654.
95. See FLA. STAT. § 39.806(1)(e)(1).
nine months old at the time of the termination, and thus, the twelfth month had not passed since that child was removed from the father’s custody. 96

The Florida appellate courts recently decided the question of the obligation of the Justice Administrative Commission to pay attorney’s fees to lawyers appointed to represent indigent parents in two terminations of parental rights cases. In Justice Administration Commission v. Goettel 97 and Justice Administrative Commission v. Harp, 98 the question was whether a lawyer who was appointed to represent a parent who had voluntarily executed a written surrender of parental rights was entitled to attorney’s fees in the termination proceeding to be paid by the state commission. 99 In both cases, the court held that the attorney would not receive fees from the state agency because once the parent had executed a written surrender, the parent no longer had a right to appointed counsel in the termination proceeding. 100 Put in other words, the lawyer was “improperly appointed for the termination proceeding.” 101 In Harp, the court explained that nothing in the Chapter 39 provision governing termination of parental rights authorizes the court to appoint a lawyer to a parent who executed a voluntary surrender. 102 The language of the statute was plain and unambiguous. 103

IV. JUVENILE DELINQUENCY

Rules concerning a speedy trial apply in juvenile delinquency cases. A technical question concerning speedy trial requirements was before the Supreme Court of Florida in State v. Nelson. 104 In that case, a juvenile was arrested for armed burglary and carrying a concealed weapon. 105 “Both the ninety-day juvenile and 175-day adult speedy trial periods began to run from the date of arrest,” and before the expiration of either, the State filed a petition for delinquency. 106 However, the case was not scheduled for an adjudicatory hearing prior to the expiration of the juvenile speedy trial period. 107 At a hearing within days after the expiration of that period, the defense re-
quested a continuance to participate in discovery.\textsuperscript{108} "[A] few days after the adult speedy trial period expired, the State direct-filed an information in felony court."\textsuperscript{109} The question before the Supreme Court was the effect of a post-expiration defense continuance on the procedural provisions of the speedy trial rule.\textsuperscript{110} The Court noted that, while under both the state and federal Constitution, a criminal defendant has the right to a speedy and public trial, a defendant, including a juvenile, may waive the right to a speedy hearing.\textsuperscript{111} After a detailed review of the complexities of the issue, the Court held that the State is entitled to a "recapture period" under Florida law.\textsuperscript{112} A continuance chargeable to the defense which is made after expiration of the speedy trial period but prior to a defendant filing a notice of expiration, waives the defendant's speedy trial right under the default period of Florida law.\textsuperscript{113}

Among the various dispositional alternatives available in a delinquency case in Florida is revocation of a juvenile's driver license. Interpretation of this type of disposition alternative was before the Second District Court of Appeal in \textit{State v. K.R.G.}\textsuperscript{114} In that case, the juvenile committed the act of possession of marijuana.\textsuperscript{115} The juvenile court withheld adjudication and placed the child on probation and declined to comply with certain mandatory provisions which required it to revoke the child's driver's license for the delinquent act of marijuana possession.\textsuperscript{116} However, because the provision is mandatory, the appellate court reversed.\textsuperscript{117}

Although a juvenile is entitled to counsel free of charge if indigent, under Florida law, the legislature has provided for assessment of attorney's fees against the child who has been found to have committed an act of delinquency.\textsuperscript{118} The question before the Fifth District Court of Appeal in \textit{W.Z. v. State}\textsuperscript{119} was whether it was appropriate to enter an order requiring the child and his parents to pay attorney's fees of fifty dollars for the work of the public defender and for his parents to further pay the cost of two mental competency exams which had been ordered as a result of motions filed by the pub-

\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Nelson, 26 So. 3d at 572.}
\textsuperscript{110} \textit{Id. at 571–72.}
\textsuperscript{111} \textit{Id. at 576.}
\textsuperscript{112} \textit{Id. at 580.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} 12 So. 3d 1269 (Fla. 2d Dist. Ct. App. 2009).
\textsuperscript{115} \textit{Id. at 1269.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id. at 1269–70.}
\textsuperscript{118} See \textsc{FLA. STAT. }§ 985.033(1) (2010).
\textsuperscript{119} 35 So. 3d 51 (Fla. 5th Dist. Ct. App. 2010).
lic defender. After affirming the award of attorney’s fee, the appellate court reversed as to the cost of the mental competence evaluations because there is no provision in state law authorizing such assessment. The court could not find anything in statute or case law to support the proposition that the child or the child’s parents were obligated to pay these costs. The court thus reversed as to the latter charge.

The waiver of counsel in delinquency cases comes up regularly in Florida. Of course, the right to counsel is predicated upon the 1967 Supreme Court of the United States opinion in In re Gault. The right to counsel is so important that Florida has established detailed rules of juvenile procedure governing the waiver process. In N.S. v. State, the trial court advised the child at the disposition hearing that the child had a right to have counsel appointed during which the State presented evidence regarding restitution. However, the trial court did not obtain the required written waiver. Furthermore, the record in the case did not show that an attorney discussed the pros and cons of the waiver with the child. The Florida Rules of Juvenile Procedure provide that waiver of counsel may only happen “after the child has had a meaningful opportunity to confer with counsel” regarding the consequences of waiver and other relevant factors. Furthermore, also pursuant to the Florida Rules of Juvenile Procedure, the child’s “mother did not verify in writing that she had discussed waiving counsel” with the child or that waiver appeared to the mother to be knowing and voluntary. While the court would normally remand for resentencing, because the child was placed on probation and an order was ultimately entered terminating supervision, reversal was not necessary.

In another technical case involving waiver of counsel, in A.M.E. v. State, the child appeared at a hearing with her mother but with no counsel. At that time the child “waived her right to counsel, signed a written

120. Id. at 51.
121. Id. at 51–52.
122. Id. at 52.
123. Id. at 53.
125. 27 So. 3d 793 (Fla. 1st Dist. Ct. App. 2010).
126. Id. at 794.
127. Id.
128. Id.
129. See FLA. R. JUV. P. § 8.165(a).
130. N.S., 27 So. 3d at 794.
131. Id.
132. 18 So. 3d 1251 (Fla. 2d Dist. Ct. App. 2009).
133. Id. at 1251.
waiver of counsel, and entered a guilty plea.134 In addition, the mother signed the written waiver.135 When the child later appeared for a dispositional hearing, the trial court did not renew the offer of counsel before adjudicating the child delinquent and ordering placement.136 The appellate court held that neither the trial court’s inquiry of the child nor the waiver form fully complied with the Florida Rules of Juvenile Procedure.137 The State properly conceded error.138 However, because the child turned nineteen, the State also raised the issue of whether the child was any longer “under the jurisdiction of the juvenile division of the trial court for purposes of remand.”139 The appellate court held that it could remand although it did not decide whether other issues that might be raised once the case was remanded would be within the jurisdiction of the trial court.140

Waiver of counsel is also relevant in delinquency cases involving revocation of probation. In L.D.S.J. v. State,141 a child challenged the revocation of probation in which he entered a plea without the assistance of counsel.142 The argument on appeal was that the trial court did not determine whether the child intelligently and knowingly waived the right to counsel nor whether the court also failed to conduct a thorough inquiry into the child’s voluntariness of the waiver.143 The appellate court agreed with the appellant.144 Regrettably, as the appellate court explained, “The record is devoid of any discussion regarding whether Appellant had an opportunity and whether that opportunity was meaningful, to confer with an attorney regarding his right to counsel.”145 The appellate court also explained that the “trial court failed to inquire about the child’s comprehension of the offer” or his capacity to make the choice or even the existence of any unusual circumstances that would preclude the child “from exercising the right of self-representation.”146 The court rejected the argument that the child and his mother signed a written waiver of rights form as being adequate.147 However, even in that situation,
there was no showing that anyone discussed with the child "the decision to waive his right to counsel" or that the child "made a knowing and voluntary decision to waive" it.\textsuperscript{148} While it did not comment on the variety of ways that the trial court failed to comply with the proper procedures for waiver, the appellate court reversed and remanded.\textsuperscript{149}

The Supreme Court of Florida recently addressed the issue of juvenile restitution, an issue that had come up regularly before the intermediate appellate courts over a number of years.\textsuperscript{150} The matter came before the Court in \textit{J.A.B. v. State}\textsuperscript{151} on the basis of a conflict between the First and Second District Courts of Appeal.\textsuperscript{152} The issue was whether the trial court may set the amount of restitution and payment in a reasonable amount upon evidence showing the earnings that the juvenile may reasonably be expected to make and may also establish a commencement date for payment so long as the court provides the juvenile with a reasonable amount of time to obtain employment.\textsuperscript{153} The Supreme Court first ruled that restitution is a creature of statute and thus was obligated to analyze the language of the Florida law and legislative intent.\textsuperscript{154} The Court concluded that given the language of the statute and the policies underlining it as well as the wide discretion given judges in awarding restitution, "a hard and fast rule" prohibiting a judge from establishing the commencement date for payment of restitution and requiring that the payments only be ordered contingent upon the juvenile actually getting employment is inappropriate.\textsuperscript{155} However, the Court then added the caveat that when the State seeks enforcement of an order of restitution based upon nonpayment, the issue before the court would be whether the "juvenile has the ability to pay the amount" and that the "juvenile's inability to find employment despite reasonable efforts" would also be relevant.\textsuperscript{156}

A second restitution case is \textit{J.P. v. State}.\textsuperscript{157} In a brief case involving a theft of projectors from a Miami high school in which the appellant was

\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} Waiver of the right to counsel is an important and basic matter with which the courts should be familiar. \textit{See} Michael J. Dale, 2005-2006 Survey of Florida Juvenile Law, 31 \textit{NOVA L. REV.} 577, 579–82 (2007) [hereinafter Dale, 2005-2006 Survey].
\textsuperscript{150} \textit{See} Dale, 2009 Survey, \textit{supra} note 30, at 216–17.
\textsuperscript{151} 25 So. 3d 554 (Fla. 2010).
\textsuperscript{153} \textit{J.A.B.}, 25 So. 3d at 555.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 560.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} 35 So. 3d 180 (Fla. 3d Dist. Ct. App. 2010).
charged with grand theft, the question was whether the principal’s testimony was adequate to establish the value of the two projectors at the time of the theft. The appellate court noted the principal’s testimony of the projectors’ purchase price, the projectors were brand new when installed, and the theft occurred two months after installation of the projectors. Further, the court found that it would cost a specific amount to replace each one, which was adequate to establish the fair market value of the property at the time the theft occurred.

The proper influence of Miranda warnings to juveniles also comes up regularly in the Florida courts. In D.B. v. State, a juvenile appealed from a “denial of a motion to suppress after entering a no contest plea to the charges of burglary of a dwelling, grand theft and criminal mischief.” The child argued that he was not given Miranda warnings. The court applied the totality of the circumstances test to conclude that a reasonable eleven-year-old would not feel free to leave the police interrogation room. Since the court also found that the child was in custody, Miranda warnings were required. The appellate court described the location as a small room, under camera surveillance, without the presence of the juvenile’s mother. The court further found that the purpose of the interview was to obtain incriminating evidence because the child was placed in the five-by-five interrogation room, left alone with the door closed for sixteen minutes, and when the police officer entered the room, he advised the child that the child’s mother wanted him to tell the truth.

Search and seizure issues can also come up in the context of juvenile delinquency cases in Florida. This was the issue in L.C. v. State. The child appealed, claiming a Fourth Amendment violation when a police officer performed a weapons search without first performing a pat-down on a fifteen-year old truant before placing her in the back of a police car to execute a statutory obligation to take the child to school. The police officer

158. Id. at 181.
159. Id. at 181.
161. 34 So. 3d 224 (Fla. 4th Dist. Ct. App. 2010).
162. Id. at 225.
163. Id.
164. Id. at 227.
165. Id.
166. D.B., 34 So. 3d at 227.
167. Id. at 226.
168. 23 So. 3d 1215 (Fla. 3d Dist. Ct. App. 2009).
169. Id. at 1216.
had no basis to suspect the child of possessing any weapons. The police officer searched all of her pockets and found a small bag of marijuana. The case turned on a technicality—the failure of the police officer to conduct a pat down prior to directly searching the child's pockets. Also significant to the court's analysis was the fact that the context in which the police officer took the child into custody was a truancy matter which, under Florida law, is not a crime. Thus, in the absence of reasonable suspicion, the police officer was not justified in proceeding to a direct search of the child just because he felt uneasy for his safety. A pat-down was required first. The court thus reversed and remanded.

V. SCHOOL MATTERS

A detailed discussion of school discipline is beyond the purview of this survey. In A.B.E. v. School Board of Brevard County, a child appealed from a final administrative order of the School Board of Brevard County expelling her. The middle school student was expelled from school after drinking alcohol and for activities which substantially disrupted the orderly conduct of the school. The appellate court held that the school records did not contain competent substantial evidence to support the Board's finding that the child was subject to expulsion. Specifically, the appellate court said that, under Florida law, the School Board's power to punish the student's conduct is limited to conduct that occurs on school premises or during transportation to and from the school premises. In the case at bar, the child's actions in drinking alcohol occurred at home in the morning prior to going to school. Thus, "the School Board could not punish her for con-

170. Id. at 1217.
171. Id.
172. Id. at 1219.
173. L.C., 23 So. 3d at 1218 (citing C.G. v. State, 689 So. 2d 1246, 1247 (Fla. 4th Dist. Ct. App. 1997)).
174. Id. at 1220.
175. Id..
176. Id.
177. See 1 Michael J. Dale, Representing the Child Client, ¶ 6, 10 (Matthew Bender 3d ed. 2010).
178. 33 So. 3d 795 (Fla. 5th Dist. Ct. App. 2010).
179. Id. at 796.
180. Id. at 797.
181. Id. at 799.
182. Id. at 798.
183. A.B.E., 33 So. 3d at 798.
suming the alcohol at home." The School Board could, however, punish her for being under the influence of alcohol while at school. There was no evidence that the child was under the influence of alcohol because the evidence showed that she had taken only two sips of alcohol at home and then became sick at school. Apparently, there was also no evidence that the child's actions at school disrupted the school's learning environment. For these reasons, the appellate court reversed the expulsion.

VI. RIGHTS OF PUTATIVE FATHERS

The Supreme Court of Florida held in 2007, in *Heart of Adoptions, Inc. v. J.A.*, that unmarried fathers were entitled, as a matter of due process, to notice of the obligations to file with Florida's Putative Father Registry. In a recent case, *K.D. v. Gift of Life Adoptions, Inc.*, an adoption agency provided some notice to an unmarried father who was in jail in another state. The adoption agency filed the petition for termination of rights pending adoption prior to the time it served the putative father with notice of the termination petition. The putative father appealed from the trial court order granting summary judgment and terminating the father's natural parental rights. The appellate court reversed, finding that because the father was not provided with notice until after the petition was filed and was not served with notice of the intended adoption plan at any time, the procedure violated the father's right to timely notice and opportunity to comply with obligations under Florida Putative Father Registry Law.

In a second case involving the rights of a putative father, a biological father sought rights to his child under circumstances where the child was born to a couple who was married. In *Schuler v. Guardian Ad Litem Program*, the putative father and DCF appealed from a trial court order dismissing the putative father's paternity action and placing the child with DCF for adop-

184. *Id.* at 799.
185. *Id.*
186. *Id.*
187. *Id.*
188. *A.B.E.*, 33 So. 3d at 799.
189. 963 So. 2d 189 (Fla. 2007).
190. *Id.* at 191.
192. *Id.* at 1244.
193. *Id.*
194. *Id.* at 1246.
195. *Id.* at 1248; see *Fla. Stat.* §§ 63.054(1), .062(2) (2010).
196. 17 So. 3d 333 (Fla. 5th Dist. Ct. App. 2009) (per curiam).
tion. On appeal, the court affirmed on the ground that when a child becomes adoptable after the parent’s parental rights are terminated, the child cannot become unadoptable when a third party, albeit the child’s biological father, seeks to intervene. Under Florida law, a biological father of a child born during the course of his mother’s intact marriage is not the father of the child. Rather, it is the mother’s husband. It is only through a Privette hearing that the biological father successfully can intervene and obtain rights as against the biological parents. And when the biological parent seeks to do so, it must be shown that doing so is in the best interest of the child, and the burden rests heavily upon the putative parent.

VII. STATUTORY CHANGES

There were only a few significant statutory changes regarding dependency, TPR, and delinquency matters during the survey year. A provision in Chapter 39 dealing with confidential material such as medical, mental health, substance abuse, child welfare, education, and financial records among others held by a guardian ad litem were subject to the Open Government Sunset Review Act. However, that statute was changed by deleting the reference so as to increase the confidentiality of such records. Chapter 39 was also amended to obligate indigent parents to pay their application fee together with reasonable attorney’s fees in dependency and TPR cases as occurs in other types of proceedings as governed by Chapter 57. A pilot program for attorneys ad litem, which had been fiscally terminated years earlier, was effectively repealed June 29, 2002.

In the delinquency area, a significant change in Chapter 985 dealt with gender-specific programming, terminating the obligation of the Office of Program Policy Analysis and Government Accountability (OPPAGA) to conduct an analysis of programs for young females within the Department of Juvenile Justice. Statutory changes eliminating programs included the deletion of the pilot program concerned with the cost of supervision and

197. Id. at 335.
198. Id. at 336.
199. Id. at 335.
200. Id.
201. See Dep’t of Health & Rehabilitative Servs. v. Privette, 617 So. 2d 305, 307 (Fla. 1993).
202. Id. at 308.
204. See id. § 39.0134(1)
206. FLA. STAT. § 985.02(8)(a)–(b) (2010).
The goal of deleting the Task Force Development was to prevent children from becoming habitual juvenile offenders and the removal of the Department of Juvenile Justice’s obligation to present an annual report on the performance of all assessment and treatment of serious and habitual offenders to various governmental officials.

VIII. CONCLUSION

The Supreme Court of Florida decided just three juvenile law cases this survey year. The intermediate appellate courts, however, decided a substantial number of cases with a particular focus on termination and depth of analysis regarding parental rights matters.

207. FLA. STAT. § 985.0395.
208. See id. § 985.047.
209. See id.
THE ILLUSORY IMPUTATION OF INCOME IN MARITAL SETTLEMENT AGREEMENTS: "THE FUTURE AIN'T WHAT IT USED TO BE"

TIMOTHY ARCARO*
LAURA MILLER CANCILLA**

I. INTRODUCTION

Can a Florida trial court lawfully enforce a provision in a marital settlement agreement that imputes future income to one of the spouses for purposes of calculating child support? Consider the following hypothetical: husband and wife were married for three years during which the wife remained out of the workforce to give birth to the parties’ two children. At the time of divorce, the parties entered into a marital settlement agreement,¹ which provided the wife with rehabilitative alimony for a three-year period post divorce. The parties further agreed that at the end of the rehabilitative alimony period, a minimum of $50,000 income would be imputed to the wife, based on her last date of employment, for the purpose of calculating child support. The imputation would take effect upon the termination of the wife’s rehabilitative alimony—nearly three years after the entry of the final judgment of dissolution and, more significantly, nearly six years since the wife’s last date of employment. In that same period of time, the wife

¹ Marital Settlement Agreements will be referred to as MSAs for purpose of this article. MSAs are generally referred to as settlement agreements entered into by divorcing spouses at the time of divorce and frequently include complete resolution of all claims arising from the marriage.
changed careers and remained involuntarily unemployed due to unforeseeable economic conditions.

The key issue in the case is the validity of the provision of the MSA that purports to impute income to the wife three years post divorce and six years after her last date of employment. If, at the end of her rehabilitative alimony period, the wife files a Supplemental Petition for Modification of Child Support based upon her involuntary unemployment, will the court enforce the parties’ agreement? Is the wife stuck with a “bad fiscal bargain” resulting from the imputation of income as set forth in the parties’ marital settlement agreement? Is the imputation a bad but, in the husband’s view, nonetheless valid and enforceable provision of the MSA? Or, does the executory imputation of income that is now currently unavailable to the wife due to prevailing economic conditions function as a partial waiver of child support in contravention of Florida’s strong public policy against such waivers? 2

The following analysis will demonstrate that it is improper—and therefore reversible error—for a Florida court to apply principles of pure contract law to enforce an MSA provision that imputes future income to a spouse for purposes of calculating child support. Even where the trial court has ratified an MSA that imputes future income for purposes of calculating child support, the agreed-upon imputation is unenforceable as a matter of public policy and law. Florida trial courts must make findings of fact as to a party’s current income or as to that party’s underemployment or unemployment in order to impute income pursuant Florida’s child support law. 3 Using the above hypothetical, Part I of this article will discuss the enforceability of pre and postnuptial agreements presented in divorce proceedings in Florida. Part II of the article will briefly discuss the evolution of child support guidelines in Florida and the influence of federal law in this area. Part III will discuss relevant case law addressing the substantive and procedural considerations to properly impute income for purposes of calculating child support in Florida. Part IV will conclude that agreements as to the future imputation of income for the purpose of calculating child support are not binding, valid or enforceable on the parties because Florida courts retain jurisdiction to review and modify such agreements consistent with the child’s best interests and the fair application of the child support guidelines. 4

3. See FLA. STAT. § 61.29 (2010). Florida Statutes section 61.29 establishes the principles for creating public policy regarding child support guidelines within the State of Florida.
4. See id. § 61.29(3).
II. Florida’s Approach to Financial Settlement Agreements in Dissolution Proceedings

The desire for private ordering of one’s own financial affairs is commonplace in domestic relations cases. The value of personal autonomy when dealing with unique, personal, and sensitive subjects like raising children and ensuring financial stability cannot be understated. A divorcing couple electing to resolve their legal disputes by agreement may generally do so with few obstacles imposed by law. There are three significant areas in dissolution of marriage proceedings where a party’s economic interests are directly implicated: equitable distribution, alimony, and child support. Although each interest is not presented in every case, these interests can individually and collectively provide compelling justifications to motivate and inspire settlement.

In Florida, those settlements may manifest in a variety of circumstances, but they are generally categorized by the timing of the agreement—pre or postmarital. Section 61.079 of the Florida Statutes, also known as the Uniform Premarital Agreement Act (UPAA), governs premarital agreements entered into on or after October 1, 2007. This statute expressly states that “[t]he right of a child to support may not be adversely affected by a premarital agreement.” The adverse effects cautioned against include a waiver of a party’s duty to provide financial support to his or her minor children. Such waivers are void and will not be enforced by Florida courts. The standard for setting aside a premarital agreement is also laid out in the UPAA. A party may petition the court to set aside or refuse to enforce a premarital agreement if the party proves procedural unfairness related to the

5. See Sedell v. Sedell, 100 So. 2d 639, 642 (Fla. 1st Dist. Ct. App. 1958). This article will focus on post-nuptial agreements to impute future income to a spouse post-divorce for purposes of calculating child support at a future date. Agreements to impute future income to a party for purposes of calculating child support at a future date outside the context of divorce proceedings are treated similarly even though the parties were never married.

6. See id.

7. Prenuptial agreements are also referred to as “antenuptial” agreements. See Conlan v. Conlan, 43 So. 3d 931 (Fla. 4th Dist. Ct. App. 2010). Antenuptial and prenuptials are agreements entered into prior to the date of the marriage while postnuptial agreements are entered into subsequent to the date of the marriage.


9. Id. § 61.079(4)(b).


11. Id. at 800.

execution of the agreement. Additionally, the agreement may be set aside where it was unconscionable at the time of execution and there was insufficient disclosure of a party's financial position. Finally, there are circumstances where a specific provision found within the agreement is not enforceable as a matter of law even though the agreement as a whole is valid.

By contrast, postnuptial agreements and MSAs are not codified in the Florida Statutes per se. However, the Florida Statutes contemplate—and indeed presume—that such agreements will be entered into regarding marital assets and liabilities, alimony and child-related issues. Case law is unequivocal that MSAs are to be interpreted and enforced like other contracts. As such, the trial court generally lacks discretion to refuse to enforce the provisions of an MSA.

The Supreme Court of Florida made clear in its decision in Casto v. Casto that:

13. Id. § 61.079(7)(a)(2) (providing that the agreement shall be unenforceable where "[t]he agreement was the product of fraud, duress, coercion, or overreaching").
14. Id. § 61.079(7)(a)(3) (providing that the agreement shall be unenforceable where it was unconscionable at the time of execution, and "a. [The party] was not provided a fair and reasonable disclosure of the [other party's financial assets and liabilities]; b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.").
16. For a discussion of equitable distribution, see FLA. STAT. § 61.075(3) (2010). "In any contested dissolution action wherein a stipulation and agreement has not been entered and filed, any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence . . . ." Id. (emphasis added). For a discussion of mediation of contested issues, see id. § 61.183(2). "If an agreement is reached by the parties on the contested issues, a consent order incorporating the agreement shall be prepared by the mediator and submitted to the parties and their attorneys for review." Id. See also Griffith, 860 So. 2d at 1073 (holding that marital settlement agreements are highly favored in the law).
17. Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987); Griffith, 860 So. 2d at 1073; Maas v. Maas, 440 So. 2d 494, 495–96 (Fla. 2d Dist. Ct. App. 1983). The difficulty in reconciling the two differing interests in marital settlement agreements is not a new one, as the Second District Court of Appeal acknowledged. Maas, 440 So. 2d at 495–96 ("We run headlong into some troublesome precedents, however, in trying to reconcile the statutory obligation of the trial judge 'to do equity and justice between the parties' that is supported by case law, and the principle that property settlement agreements between husband and wife, made in contemplation of dissolution proceedings, should be construed and interpreted as other contracts."). Perhaps the court, in its focus on fairness between the parties and in contemplation that inadequate support for minor children would provide grounds to invalidate an MSA notwithstanding the voluntary nature of the agreement, resolves this tension by implicitly considering minor or dependent children as unwilling parties to the MSA.
18. Griffith, 860 So. 2d at 1073.
19. 508 So. 2d 330 (Fla. 1987).
[The fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement. . . . A bad fiscal bargain that appears unreasonable can be knowingly entered into for reasons other than insufficient knowledge of assets and income. There may be a desire to leave the marriage for reasons unrelated to the parties’ fiscal position. If an agreement that is unreasonable is freely entered into, it is enforceable.]

As a result, Florida courts are not empowered to second-guess the wisdom or fairness of a party’s MSA when the agreement is centered upon financial issues such as alimony, equitable distribution of marital assets, and liabilities and the payment of attorneys’ fees.

Although stipulations entered into by the parties “are generally binding on the parties and the court,” Florida law is well established that any child-related provisions of a marital agreement, be it pre or postmarital in timing, are always reviewable by the trial court. The trial court is duty-bound to consider, above all else, the best interests of the child in determining whether the provisions of a marital agreement are enforceable. Thus, a dichotomy arises when provisions of a marital agreement regarding collateral issues have a significant impact on child-related issues, particularly child support. Florida law is clear regarding the right of a child to receive financial support from a parent. That right may not be adversely affected by an agreement of the parents.

20. Id. at 334. Although the parties in Casto did not have children and consequently no child-related provisions were at issue, the case remains instructive legal authority on the validity and enforcement of MSAs.

21. Sedell v. Sedell, 100 So. 2d 639, 642 (Fla. 1st Dist. Ct. App. 1958). Sedell set precedent in Florida when the First District Court of Appeal found pre-marital agreements to “be respected by the courts . . . when such agreements are fairly entered into and are not tainted by fraud, overreaching or concealment.” Id.

22. Griffith, 860 So. 2d at 1073.


24. See, e.g., FLA. STAT. § 61.13(2)(c) (2010) (“The court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child. . . .”); see also id. § 61.13(3) (“For purposes of establishing or modifying parental responsibility and creating, developing, approving, or modifying a parenting plan, including a time-sharing schedule, which governs each parent’s relationship with his or her minor child and the relationship between each parent with regard to his or her minor child, the best interest of the child shall be the primary consideration.”).

25. See, e.g., id. § 61.079(4)(b) (“The right of a child to support may not be adversely affected by a premarital agreement.”). Although the statute specifically references premarital
Arguably, any financial provision of an MSA may be construed to have an impact on the parties’ minor children, including provisions concerning ostensibly unrelated issues such as equitable distribution and the payment of each party’s attorney’s fees and costs. Although such provisions are enforceable as a matter of contract law, these provisions also directly impact the financial resources available to each party, which indirectly impacts the parties’ available net resources that could otherwise be spent on the support of the minor children.26 In sum, the Florida Statutes have only codified premarital agreements, and specifically provide for judicial review of child-related provisions under the best interests standard.27 Although postmarital agreements have not been codified by statute, they also require judicial review of child-related provisions under the best interest standard.28

III. FLORIDA’S CHILD SUPPORT GUIDELINES

Florida’s approach to child support has been directly influenced by the encroachment of federal law into an area of concern that historically had been left to state discretion. Federal law regarding the support of minor children has evolved from the Child Support Enforcement Act of 1974,29 the Child Support Enforcement Amendments of 1984,30 and the Family Support Act of 1988,31 before resulting in the current statutory framework.32 The Family Support Act of 1988 addressed a number of objectives, among which the most important were to enhance the adequacy of child support orders, to improve the equity of such orders by assuring more comparable treatment for cases with similar circumstances, to increase compliance as a result of the perceived new fairness, and finally, to improve the efficiency of adjudicating child support orders.33

States currently receive federal funds for the support of children through two related provisions of Title IV of the Social Security Act.34 A state is eligible to receive federal block grants under Part A so long as the state has agreements, Florida law is consistent in this prohibition whether the agreement was entered into pre- or post-nuptial.

26. See generally id. § 61.13.
27. See Kennedy, 583 So. 2d at 416.
28. See id.

https://nsuworks.nova.edu/nlr/vol35/iss1/1

162
adopted measures for the establishment and enforcement of child support in compliance with the provisions of Part D, also known as the Child Support Enforcement Act. 35 Under Part D, each state must establish child support guidelines that take into consideration all earnings of the obligor parent and the reasonable needs of the child. 36 Federal law provides a rebuttable presumption that the amount of support calculated by the guidelines is correct, while simultaneously allowing for deviations from the guideline amount based on individual circumstances where the strict application of the guidelines would result in an inappropriate level of support. 37 Any such deviation must be based on written findings of fact and consider the best interests of the child. 38 Although guidelines need not be binding, "properly developed guidelines can have substantial benefits if parents, attorneys and agencies know . . . [they] will be applied in each case, except when [a] court . . . determines that exceptional circumstances warrant deviation." 39

Florida child support law has evolved in conjunction with federal law. The child support guidelines found in section 61.30 of the Florida Statutes are based on the combined net incomes of both parents, representing the total monthly net income available to support the parties' children subject to this order. 40 Chapter 61 provides the statutory approach for the imputation of income to a parent that is voluntarily unemployed or underemployed. 41 As required by federal law, the statute provides a rebuttable presumption that the amount of support calculated per the guidelines is the proper and necessary amount. 42 The resulting support obligation is divided between the parents

35. Id. § 602(a). Part A is not relevant to this discussion other than as the carrot with which the federal government coerces state implementation of the provisions of part D; therefore, the remainder of this section will focus on Part D.

36. 45 C.F.R. § 302.56(c) (2009).

37. Id. § 302.56(f)-(g).

38. Id. § 302.56(g).


40. FLA. STAT § 61.30(5) (2010); "This" order takes into consideration that the parties may in fact have other children not subject to a current calculation. Florida law provides for prioritizing child support obligations so that net income spent by an obligor on a preexisting child support order reduces the obligor's net income available to support subsequent born children. See id. § 61.30(12)(a)-(c).

41. Id. § 61.30(2)(a)(14)(b).

42. Id. § 61.14(1)(a). Section 61.14 provides the mechanism by which a party may petition the court to enforce or modify child support orders as follows:

When a party is required by court order to make any [support] payments, and the circumstances or the financial ability of either party changes . . . either party may apply . . . for an order decreasing or increasing the amount of support . . . and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability
according to each parent’s proportionate share of the combined net incomes. Deviation from the guidelines is permissible upon factual findings by the trial court to support such a deviation, including an analysis of factors related to the reasonable needs of the child.

Florida child support law is found in three separate statutes of Chapter 61: the first addresses establishment of a child support order, the second addresses modification of such orders, and the third addresses the amount of such orders. In a dissolution of marriage proceeding, "the court may at any time order either or both parents who owe a duty of support to a child to pay support . . . in accordance with the child support guidelines . . . in section 61.30." The court shall have continuing jurisdiction to modify the amount and terms and conditions of the child support payments when the modification is found necessary by the court in the best interests of the child or when there is a substantial change in the circumstances of the parties.

Florida law provides for the imputation of income to an unemployed or underemployed parent for the purpose of calculating child support. The statute, effective until January 1, 2011, requires the trial court to impute income to the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the order.

43. FLA. STAT. § 61.30(10).
44. Id. § 61.30(1)(a), (11)(a). Section 61.30(1)(a) of the Florida Statutes (1)(a) states: The trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent. The trier of fact may order payment of child support in an amount which varies more than 5 percent from such guideline amount only upon a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate.

45. FLA. STAT. § 61.13.
46. Id. § 61.14.
47. FLA. STAT. § 61.30.
48. Id. § 61.13(1)(a); Section 742.031(1) of the Florida Statutes also requires that the child support guidelines in section 61.30 be utilized when court orders for child support arise out of a hearing for a determination of parentage. Id. § 742.031(1)(a). Chapter 61 is also to be used to calculate a child support order if the support order arises from Chapter 39 regarding judicial proceedings that relate to “the care, safety and protection of children.” Id. § 39.001(1)(a), (16).
49. Id. § 61.14(1)(a). Section 61.14 provides the mechanism by which a party may petition the court to enforce or modify child support orders as follows: When a party is required by court order to make any [support] payments, and the circumstances or the financial ability of either party changes . . . either party may apply . . . for an order decreasing or increasing the amount of support . . . and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the . . . order.

50. See id. § 61.30(2)(b).
come to a parent who is unemployed or underemployed when "such unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control."\textsuperscript{51} In order for the trial court to impute income the court must make a finding of fact "that the parent is not currently using his or her best efforts to obtain employment."\textsuperscript{52} Incorporated into this concept is the finding that the party not only has chosen to earn less money, but also has the ability to remedy his or her situation by obtaining employment at a higher rate of pay.\textsuperscript{53} Following such a determination, the trial court must examine "the employment potential and probable earnings level of the parent . . . based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community."\textsuperscript{54}

As previously noted, the Florida Legislature has crafted a new child support statute which takes effect January 1, 2011 and codifies much of Florida's recent common law regarding the methodology of imputing income.\textsuperscript{55} The statute further provides a rebuttable presumption that the appropriate level of income to impute is the "income equivalent to the median income of year-round full-time workers."\textsuperscript{56} Arguably, the most significant statutory change impacts the use of stale employment records and unreasonable assumptions regarding employment opportunities. Florida courts are now prohibited from imputing income based upon:

\begin{quote}
[i]ncome records that are more than [five] years old at the time of the hearing or trial at which imputation is sought; or [i]ncome at a level that a party has never earned in the past, unless recently degree, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the parties' existing time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.\textsuperscript{57}
\end{quote}

\begin{itemize}
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Wendel v. Wendel, 852 So. 2d 277, 283 (Fla. 2d Dist. Ct. App. 2003); Desilets v. Desilets, 377 So. 2d 761, 764 (Fla. 2d Dist. Ct. App. 1979).
\item \textsuperscript{53} Greene v. Greene, 547 So. 2d 1302, 1303 (Fla. 2d Dist. Ct. App. 1989).
\item \textsuperscript{54} FLA. STAT. § 61.30(2)(b).
\item \textsuperscript{55} Act effective Jan. 1, 2011, ch. 2010-199, 2010 Fla. Laws 2405.
\item \textsuperscript{56} Id. at ch. 2010-199, § 5(2)(b), 2010 Fla. Laws 2405, 2410.
\item \textsuperscript{57} Id. at ch. 2010-199, § 5(2)(b)(2)(a.)–(b.), 2010 Fla. Laws 2405, 2411.
\end{itemize}
The trial court must support any order of income imputation with a finding of competent substantial evidence. The burden of proof is on the party arguing in favor of income imputation to present sufficient evidence at trial to provide a realistic basis for imputing income to the unemployed or underemployed parent. Likewise, the party arguing for the imputation of income must demonstrate that such employment is currently available to the other parent at that rate of pay, considering his or her age, work history, and other qualifications. Income cannot be imputed to a party at a level he or she has never earned. Importantly, the new statute also provides the trial court with authority to impute income to a parent who fails to provide adequate financial information in a child support proceeding. This approach creates incentives for full participation from both parents given the rebuttable presumption that the imputed income is available to the parent who is unemployed or underemployed. This legislative evolution reflects the trial court's important role as the primary authority in determining the propriety of imputing income to a party in child support proceedings.

58. See Sallaberry v. Sallaberry, 27 So. 3d 234, 236 (Fla. 4th Dist. Ct. App. 2010) (per curiam) ("The trial court's imputation of income must be supported by competent, substantial evidence.").

59. See Zarycki-Weig v. Weig, 25 So. 3d 573, 575 (Fla. 4th Dist. Ct. App. 2009) (per curiam) ("The spouse claiming that the other spouse is voluntarily unemployed bears the burden of proof.").

60. See, e.g., Heidisch v. Heidisch, 992 So. 2d 835, 837 (Fla. 4th Dist. Ct. App. 2008) ("[T]here must be some realistic basis in the evidence to support the concept that the former spouse can earn the sums imputed.").

61. Lee v. Lee, 751 So. 2d 741, 744 (Fla. 1st Dist. Ct. App. 2000) (per curiam) (reversing imputation of income where the former husband was terminated from his most recent job; although he was interviewing for new employment, his efforts had not resulted in new employment); Gildea v. Gildea, 593 So. 2d 1212, 1213 (Fla. 2d Dist. Ct. App. 1992) (per curiam); Ensley v. Ensley, 578 So. 2d 497, 498 (Fla. 5th Dist. Ct. App. 1991).

62. Stein v. Stein, 701 So. 2d 381, 381 (Fla. 4th Dist. Ct. App. 1997) ("[I]ncome may not be imputed at a level which the former spouse has never earned, absent special circumstances.").

63. FLA. STAT. § 61.30 (2)(b) (2010). "If the information concerning a parent's income is unavailable, a parent fails to participate in a child support proceeding or a parent fails to supply adequate financial information, . . . income shall be automatically imputed to the parent, and there is a rebuttable presumption that the parent has [the] income . . . ."

64. Id.

65. Id. §§ 61.29, .30.
The proper amount of income to impute is particularly difficult for the trial court when a parent has been out of the workforce for a long period of time in order to stay home to care for young children or when a parent has voluntarily left the workforce to obtain education or training for a different career.66 These cases are problematic, due to the parent’s absence from the workforce for extended periods of time.67 Although the trial court is required to assess the parent’s recent work history and occupational qualifications, the parent may not have any recent work history to assess.68 Alternatively, the parent’s occupational qualifications may be outdated due to circumstances beyond that parent’s control.69

Florida law requires that the child support order include a schedule of income “based on the record existing at the time of the order.”70 Because the statute requires the income used for calculating child support be factually supported by the trial record, it is reversible error for the court to impute income to a parent using outdated income figures.71 The statutory factors that the court must consider in imputing current income may change significantly over time.72 Therefore, any agreement imputing future income to a party must necessarily bow to the statutory dictates of section 61.16 and the court’s required consideration of the best interests of the child whose financial support is based on the imputed income.73 Supporting this rationale is Eaton v. Eaton,74 where the Fourth District Court of Appeal held that child support orders “are, by their very nature, impermanent in character and hence are res judicata of the issues only so long as the facts and circumstances of the parties remain the same as when the decree was rendered.”75

67. Stein, 701 So. 2d at 381–82.
68. Id. at 381.
69. See Schlagel, 973 So. 2d at 674.
70. FLA. STAT. § 61.13(1)(a)(1)(b).
71. See generally Wendel v. Wendel, 852 So. 2d 277 (Fla. 2d Dist. Ct. App. 2003); Mitchell v. Mitchell, 841 So. 2d 564 (Fla. 2d Dist. Ct. App. 2003); Hanley v. Hanley, 734 So. 2d 529 (Fla. 4th Dist. Ct. App. 1999); see also Cushman, 585 So. 2d at 486.
73. Id.
74. 238 So. 2d 166 (Fla. 4th Dist. Ct. App. 1970).
75. Id. at 168 (holding that a substantial change in circumstances, whether it be the needs of the child or the obligor’s ability to pay, is sufficient justification to modify a child support order regardless of the provisions of the MSA).
IV. IMPUTING INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT IN FLORIDA

Imputing future income to a parent is precisely what the parties agreed to in the hypothetical used in this article. The hypothetical MSA can be said to fairly reflect the parties’ intent and aspirations for the future income earning capacity of the wife. The parties endeavored to predict the future, but their prediction was wrong. Is it the wife’s error for which she must now bear the responsibility of her bad fiscal bargain? Must the husband now prove the wife’s current income earning capacity when the parties’ agreement clearly reflects the wife’s imputed earnings? Most importantly, must the children receive less child support because the parties’ prediction of the wife’s future income level was overstated?

Florida law requires child support orders be based upon a finding of present facts regarding current income earning capacity of the parties. Using a party’s outdated earnings records from past employment when such income levels are no longer available to the party violates the mandate that the imputed income be presently available. Florida appellate courts will reject a trial court’s findings as to imputed income when such findings are not supported by substantial competent evidence. While it may seem obvious that using employment records from eight years prior to the date of the child support hearing was impermissible, even employment records from one year prior to the date of the hearing may be outdated and unreliable. Courts must closely examine past employment records to ensure they are both probative of a party’s earning capacity and reliable in representing a party’s current employability. Imputation in every case will be fact specific and unique to the circumstances of those particular parties.

An evidentiary record supporting the court’s findings of fact must exist in order for a judicial imputation of income to withstand appellate court scrup. 

76. FLA. STAT. § 61.13(1)(a)(1)(b) (2010).
77. Wendel v. Wendel, 852 So. 2d 277, 285 (Fla. 2d Dist. Ct. App. 2003). In Wendel, it was reversible error for the court to impute income based on the former husband’s income from a period of time eight years prior to the child support hearing, even though the husband’s maximum income never again reached such a level. Id. at 283–84.
78. Id. at 285.
79. Id.
80. Mitchell v. Mitchell, 841 So. 2d 564, 570 (Fla. 2d Dist. Ct. App. 2003). In Mitchell, the trial court’s use of income data from just one year prior to the date of the child support hearing was reversible error where the party’s actual income was rising well above the income level utilized by the court. See id. at 569–71; see also Hanley v. Hanley, 734 So. 2d 529, 530 (Fla. 4th Dist. Ct. App. 1999).
81. See Mitchell, 841 So. 2d at 571.

https://nsuworks.nova.edu/nlr/vol35/iss1/1
tiny. For example, in Mitchell v. Mitchell, the Second District Court of Appeal noted that the trial court found the wife was capable of earning $40,000 per year, based on her recent training and work history. However, the court imputed only “the more likely figure” of $25,000 per year. The Second District reversed the trial court’s imputation of only $25,000 when the record showed the wife was capable of earning $40,000 per year due to the trial court’s failure to make appropriate findings of fact. The trial court’s findings of fact as to the parties’ incomes are necessary to ensure the proper application of the child support guideline calculations. A court’s failure to include such findings for purposes of child support calculations renders a final judgment facially erroneous.

In some cases, it is simply unrealistic to impute income that was earned in a former career. In Shafer v. Shafer, the wife had practiced as an attorney for six years before moving to Florida. However, when she moved to Florida, she failed to pass the bar exam and worked instead for her husband as a paralegal. This occupation lasted sixteen years, until the parties divorced. In calculating child support for the parties’ minor children, the trial court imputed income to the wife at a level earned by a practicing lawyer even though she had not passed the Florida Bar exam. On appeal, the Fourth District Court of Appeal found that no competent substantial evidence was presented regarding the wife’s ability to pass the bar exam and practice law. “[T]here must be some realistic basis in the evidence to support the concept that the former spouse can earn the sums imputed.” The court reasoned that it was unrealistic to expect the wife to pass the bar exam when she had been out of the profession for sixteen years. The wife’s limited abilities in the family law practice were not useful in this respect. However, the court held that the case presented special circumstances which justi-

82. 841 So. 2d 564 (Fla. 2d Dist. Ct. App. 2003).
83. Id. at 570.
84. Id. at 571.
85. Id.
86. Id.
87. See Mitchell, 841 So. 2d at 571.
88. 45 So. 3d 494 (Fla. 4th Dist. Ct. App. 2010).
89. Id. at 495.
90. Id. at 497.
91. Id.
92. Id. at 498.
93. Shafer, 45 So. 3d at 497.
94. Id. (emphasis omitted) (quoting Heidisch v. Heidisch, 992 So. 2d 835, 837 (Fla. 4th Dist. Ct. App. 2008)).
95. Id.
96. Id. at 498.
fied an imputation of income equal to that of equivalent occupations in the community and different from the previous income. The wife was not protected by the fact that she had accepted a below market salary in working with her husband.

Child support modification petitions are subject to the same basic analysis required for establishing support orders that impute income to one parent even though the parties agreed to an amount of child support in an MSA. The court must first determine the net income of each party; if one party is unemployed or underemployed, the court must then determine whether the reduction in earnings is voluntary in nature. It is not enough to simply plead that a parent’s substantial change in circumstances necessitates a modification of child support; rather, Florida courts require that such a change be involuntary. Voluntary changes that would result in reduced child support obligations will rarely satisfy the legal threshold for modification. Determining the “voluntariness” of a party’s actions has developed as a safeguard in part to ensure that the duty to furnish adequate child support is not deliberately avoided.

Settlement agreements that include provisions for automatic modifications of child support obligations based on future conditions are equally problematic. In Penkoski v. Patterson, the parent’s child support obligation increased automatically with the age of the child. The court first noted that such automatic changes are disfavored by the law. The increase in support occurred regardless of any external circumstances, in contravention of “the principle that support should be based upon need and ability to pay.” “[A]ny standard which could force a party to accept a decree based on clairvoyance of the trial judge would be [inferior to] one which enables the judge to make a decision based on present conditions.”

97. Id.
98. Shafer, 45 So. 3d at 498. The court reasoned is that it is impossible to make a finding of facts regarding child support based on evidence that is not available as of this date. Id.
100. Id. at 814.
101. Id.; see also Tietig v. Boggs, 602 So. 2d 1250, 1250–51 (Fla. 1992) (McDonald, J., specially concurring); Chastain v. Chastain, 73 So. 2d 66, 68 (Fla. 1954); Deatherage v. Deatherage, 395 So. 2d 1169, 1170 (Fla. 5th Dist. Ct. App. 1981), dismissed, 402 So. 2d 609 (Fla. 1981); In re Marriage of Johnson, 352 So. 2d 140, 141 (Fla. 1st Dist. Ct. App. 1977).
102. Overbey, 698 So. 2d at 814.
103. 440 So. 2d 45 (Fla. 1st Dist. Ct. App. 1983) (per curiam).
104. Id. at 46.
105. Id.
106. Id.
107. Id.
A corollary to the MSA child support imputation cases is when a court is called on to impute income to a parent who is incarcerated and unable to earn income at his or her previous level.108 The incarceration cases provide insight into the tension that exists when imputation of income is not supported by the factual reality of the parties’ situation. These cases generally arise when a party is seeking to modify an existing child support order.109 Florida trial courts have continuing jurisdiction to modify original child support orders as necessary in the best interests of the child or based on a party’s substantial change in circumstances.110

The Supreme Court of Florida, in *Department of Revenue v. Jackson*,111 recognized the conflict inherent in the statute:

The instant action requires that this Court consider and address a purported internal conceptual conflict between the provisions in section 61.13 that provide a basis for the trial court to modify a child support decree when it is necessary to the child's best interests, and those which allow modification when there is a substantial change in the parties' circumstances. It is abundantly clear that a substantial change in circumstances, such as the incarceration of an obligor, certainly may not produce a result that is in a child's best interests. Although the public policy considerations underpinning the arguments on either side have some compelling components, in the instant situation we believe that the child's interest in receiving his or her support monies must generally supersede the obligor parent's substantial change in circumstance resulting from incarceration. The full and timely remitting of child support payments is certainly in the best interests of the supported child. Therefore, any abatement or waiver of support payments owed to the child would certainly harm the interests of the child.112

The Court resolved this conflict by refusing to impute an income the incarcerated parent could not earn, while simultaneously refusing to eliminate the parent's support obligation.113 Instead, the trial court was instructed to reserve judgment on the petition for modification until the parent’s release from custody.114 At that time, the trial court should consider the petition for

---

108. See e.g., Dept’ of Revenue v. Jackson, 846 So. 2d 486 (Fla. 2003).
109. Id. at 488.
110. Fla. Stat. § 61.13(1)(a) (2010); see also Jackson, 846 So. 2d at 489.
111. 846 So. 2d 486 (Fla. 2003).
112. Id. at 490 (citing Imami v. Imami, 584 So. 2d 596, 598 (Fla. 1st Dist. Ct. App. 1991)).
113. See id. at 491.
114. Id.
modification “in light of the contemporary circumstances of all the parties involved and enter a judgment appropriate.”

Similarly, in McCall v. Martin, the trial court also declined to impute an income not earnable to an incarcerated parent for the purpose of calculating his child support obligation during his incarceration. However, the appellate court held that it was reversible error not to impute some income because the child’s best interests are served by imputing income and establishing a support obligation that will be paid upon the father’s release. The court noted that the income is imputed for the father’s current obligation and not for the purpose of establishing his future obligations. The court is duty-bound to make a determination of fact as to the present situation of the parties; executory finding of facts are forbidden.

Similar prohibitions exist in regards to predicting income levels at a future point in time for purposes of calculating alimony obligations. In Hamilton v. Hamilton, the court concluded that it was reversible error for the trial court to assign for alimony a future percentage of one party’s special bonuses. The court expressed the view that such a proposition was neither new, nor isolate. Above all, the court expressed the view that what was valid for alimony was clearly valid for child support as well:

The invalidity of this provision is further supported by this court’s statement in Penkoski v. Patterson, that “[i]judgments providing for automatic changes in support payments are generally disfavored as there is no evidentiary basis for the determination of future events, and there exists an adequate procedure for modification when changes in the circumstances of the parties do occur.

---

116. 34 So. 3d 121 (Fla. 4th Dist. Ct. App. 2010).
117. Id. at 122.
118. Id. at 123.
119. Id. (citing Jackson, 846 So. 2d at 493).
120. See id.; Jackson, 846 So. 2d at 493.
121. See e.g., Hamilton v. Hamilton, 552 So. 2d 929, 931 (Fla. 1st Dist. Ct. App. 1989).
122. 552 So. 2d 929 (Fla. 1st Dist. Ct. App. 1989).
123. Id. at 932.
124. Id. at 931; see also Davidson v. Davidson, 410 So. 2d 943, 944 (Fla. 4th Dist. Ct. App. 1982) (finding that “change or termination of permanent or periodic alimony based on the anticipated occurrence of an uncertain future event” is error).
125. Hamilton, 552 So. 2d at 931 (quoting Penkoski v. Patterson, 440 So. 2d 45, 46 (Fla. 1st Dist. Ct. App. 1983) (per curiam)).
V. CONCLUSION

It is clear that Florida law not only permits but also "encourage[s] fair and efficient settlement of support issues between parents and minimizes the need for litigation."\textsuperscript{126} However, Florida law is equally clear that the duty to support one's minor children is a legally imposed obligation that cannot be bargained away by the parties to an MSA.\textsuperscript{127} It is because of this juxtaposition that principles of pure contract law cannot apply to the enforcement of an MSA that infringes upon a child's guaranteed right to support.

Applying Florida law to our hypothetical MSA, the court would be required to set aside the provision imputing income in order to provide the necessary support for the minor children. At the time of execution of the MSA, the former wife agreed to an imputation of $50,000 to her, based upon her most recent earnings. If, however, she can earn only $25,000 with her best efforts, imputing the full $50,000 essentially waives the difference in the child support that would be calculated according to the guidelines based upon the combined incomes of the former husband and former wife. Such a waiver of support directly contravenes Florida's public policy against waivers of child support as found in the Uniform Premarital Agreement Act.\textsuperscript{128}

Finally, the court must make written findings of fact when calculating child support; the court's failure to do so is reversible error.\textsuperscript{129}

An agreement that imputes future income to a party for purposes of calculating child support is not enforceable through contract law in Florida. Pursuant to Chapter 61 of the \textit{Florida Statutes}, there are exceptions to basic contract law principles that exist so as to ensure the well-being of children and families.\textsuperscript{130} Florida law relieves a party from a bad fiscal bargain when that bargain is centered on the imputation of future income for purposes of calculating child support.

\textsuperscript{126.} \textit{FLA. STAT.} § 61.29 (2010).
\textsuperscript{128.} \textit{FLA. STAT.} § 61.079; see also \textit{Wilkes v. Wilkes}, 768 So. 2d 1150, 1151 (Fla. 2d Dist. Ct. App. 2000) (finding that the husband's false financial affidavit resulted in the children receiving a lower amount of financial support; although the wife's counsel failed to conduct any discovery, thereby acquiescing to the husband's financial misstatements, "[t]he wife simply could not 'contract' away an amount of the children's support.").
\textsuperscript{129.} \textit{MacRae-Billewicz v. Billewicz}, 35 Fla. L. Weekly D1898, 1899 (2d Dist. Ct. App. Aug. 20, 2010) (holding that such findings of fact are necessary for calculating child support pursuant to the guidelines). Implicit in this decision is the principle that parties cannot simply agree as to their incomes without presenting competent substantial evidence to the court in support of their assertions. \textit{Id.}
\textsuperscript{130.} See \textit{FLA. STAT.} § 61.30(2)(b); \textit{Nelson v. Nelson}, 651 So. 2d 1252, 1254 (Fla. 1st Dist. Ct. App. 1995).
HEALTH CARE REFORM: PRESUMPTIVELY REASONABLE RATES FOR NECESSARY MEDICAL SERVICES

DAVID STAHL*

I. INTRODUCTION ................................................................. 175

II. BACKGROUND ..................................................................... 177
   A. Private Insurance ........................................................... 177
      1. Health Maintenance Organizations .............................. 177
      2. Preferred Provider Organizations ............................... 178
   B. Personal Injury Protection .............................................. 179
   C. Uninsured ....................................................................... 180

III. USUAL, CUSTOMARY, AND REASONABLE (UCR) CHARGES .... 181
   A. What Is a “Charge”? ...................................................... 182
   B. What Is “Usual and Customary”? ................................. 183
      1. “Veil of Secrecy” ........................................................ 183
      2. Problems with Private Databases ............................... 185
      3. A New Hope? ............................................................. 187

IV. POTENTIAL SOURCES FOR ESTABLISHING REASONABLE CHARGES .. 187
   A. Medicare Fee Schedules .............................................. 188
   B. Workers’ Compensation ............................................... 189

V. JUDICIAL DETERMINATION OF UCR .................................. 190
   A. Lessons from Temple .................................................... 190
   B. New Jersey PIP Case ..................................................... 191
   C. Florida HMO Cases ...................................................... 194

VI. UCR AND HIGHER HEALTH CARE COSTS ......................... 199

VII. CONCLUSION .................................................................... 201

I. INTRODUCTION

A major medical emergency forces a person to seek care at the nearest hospital. Fortunately, or at least so the person believes, he or she has health insurance and will only have to pay a deductible and copay. But the insured may soon find out that he or she may be receiving bills from the medical

* David Stahl is a judicial clerk for the Honorable Cory J. Ciklin at Florida’s Fourth District Court of Appeal. He received his J.D. summa cum laude from Nova Southeastern University Shepard Broad Law Center in 2010, where he served as Editor-in-Chief of the Nova Law Review from 2009–2010. He also has a B.A in Biochemistry from Harvard University and an M.B.A from Florida Atlantic University. An earlier version of this article was written for Professor Kathy L. Cerminara’s Law and Medicine seminar, and he thanks her for her critical advice with this article.
providers far in excess of those amounts. The reason is not just that his or her insurance plan may require a higher copay and deductible when using out-of-network providers, but also because of a common provision in the insurance contract to only reimburse bills from out-of-network providers at a rate which the insurer deems to be "usual and customary." When a bill arrives a few months later, the insured will soon learn that there is a significant difference between what the insurer considers to be usual and customary and what the provider is charging the insured—sometimes the provider's charge will be more than twice what the insurer has determined to be usual and customary and the insured may be responsible for this difference. The practice by providers of charging the insured for this difference is known as balance billing. This article will examine ways that courts have dealt with disputes regarding "usual and customary" charges and explore ways that courts can help to make the determination more predictable for all of the interested parties—including the insured, the insurers, and the healthcare providers.

The difficulty in determining what is a "usual and customary" rate not only affects those whose insurance policies are limited to such coverage, but even those who have insurance which protects them from balance billing to the extent that this uncertainty is a contributing factor to the high premiums of their policies. State legislatures have in many cases left it to the courts to determine what the "usual and customary" rates for necessary medical services are, and this has inevitably led to litigation between insurers and providers. To resolve both the issue of balance-billing and inevitable disputes between providers and insurers, courts should establish a presumptive rate based on a measurable standard to ensure that patients, providers, and insurers all have reasonable expectations of what rates should be.

Part II of this article provides background information with regard to the types of situations where "usual, customary, and reasonable" charges remain uncertain. Part III explores the reasons courts have had difficulty in construing the meaning of "usual, and customary charges." Part IV discusses government insurance programs that limit reimbursement to maximum fee schedules as a potential reference point for courts in other contexts. Part V analyzes how courts have dealt with the uncertainty through a review of appellate cases. Finally, the article proposes that courts, unless prohibited by other statutory mandates, should recognize presumptively reasonable rates.


ideally based on a government-run database, or alternatively based on Medicare rates.

II. BACKGROUND

There are several different contexts in which a dispute is likely to arise over the amount due for healthcare services that a provider has rendered. The first situation is in the context of private health insurance where the insurer and provider have not pre-negotiated a rate in advance of treatment. The second circumstance arises where an individual seeks medical attention following an automobile accident and the automobile insurer is responsible to pay for a portion of the services that have been rendered. Another circumstance is where an uninsured person seeks medical treatment.

A. Private Insurance

Over half the country is covered by private health insurance. The majority of these people are covered by either a health maintenance organization or a preferred provider organization. This article will limit its analysis of usual and customary charges to these two types of health insurance products.

1. Health Maintenance Organizations

A health maintenance organization (HMO) is a type of managed care insurance where the insured is limited to a closed network of doctors. Usually, the insured must have a primary care physician and usually must obtain a referral from that physician prior to seeing a specialist or seeking non-emergency care in a hospital. The HMO usually has contractual discounts with all of its network providers. An HMO member will not be reimbursed for seeking treatment outside the network of doctors or if he or

---

4. Id.
7. See id.
she does not follow the procedural requirements.\textsuperscript{8} There are two instances where a member may have no choice but to go out of network. The first is when the insured goes to a non-network facility in an emergency—or is brought to such a facility if unconscious or severely injured at the time.\textsuperscript{9} The second is when the insured has gone to a network facility, but a hospital-based physician—such as an emergency room doctor, an anesthesiologist, pathologist, or radiologist—who treats the insured is not part of the HMO network.\textsuperscript{10} Many states have either express statutory restrictions on balance billing HMO members or have determined that it is unlawful to do so through judicial construction of a state’s statutes.\textsuperscript{11} Although the HMO member is protected, the issue of usual and customary charges still exists as the provider and insurer must settle between them what the insured should reimburse the provider for the treatment.\textsuperscript{12}

2. Preferred Provider Organizations

A preferred provider organization (PPO) is a type of managed care that also consists of a network of contracted providers, similar to an HMO.\textsuperscript{13} The insurance company will have usually contracted significant discounted rates with the providers in its network.\textsuperscript{14} The insurance contract, however, will usually not require any referrals to see specialists or for extensive procedures.\textsuperscript{15} Furthermore, the plan will often cover the insured even if he or she chooses to visit an out-of-network provider—that is, one that has not con-

\textsuperscript{9} See id.
\textsuperscript{10} See id. at 4–5 (“While radiologists, anesthesiologists, and pathologists are hospital-based physicians, they are almost never hospital employees and may or may not contract with the same [insurers] as the hospital.”); see, e.g., Joseph L. Riley Anesthesia Assocs. v. Stein, 27 So. 3d 140, 141–42 (Fla. 5th Dist. Ct. App. 2010) (holding that a hospital-based, but non-contracted, anesthesiologist could not balance bill HMO subscribers where the hospital had a contract with the insurer).
\textsuperscript{13} See Furrow et al., supra note 5, at 564.
\textsuperscript{14} See id.
\textsuperscript{15} See Lucas & Williams, supra note 6, at 135.
tracted with the insurance company. A plan may try to discourage members from visiting out-of-network providers by imposing higher out-of-pocket costs—via higher deductibles, copays, and out-of-pocket maximums or a combination thereof. The insurer will often also limit the amount that it will reimburse out-of-network providers to what the insurer deems to be the usual and customary charge for that service in a specific geographic area. The insured and the provider often are unaware of how this maximum fee is calculated by the insurance company. Where the insured has knowingly selected an out-of-network provider, the insured will have the opportunity to work with his or her insurance company to determine the reimbursement rate and to negotiate a rate with the out-of-network provider. The insured has no choice, however, when he or she goes to an out-of-network facility in an emergency situation, or where the insured goes to an in-network facility but is seen by a hospital-based physician who has not contracted with the insurer. The hospital-based physicians, such as emergency room doctors, anesthesiologists, pathologists, radiologists, and on-call specialists are often not hospital employees and will bill separately for their services. During his or her hospital stay, the insured has no choice as to which doctors will see him or her and may not learn until months after leaving the hospital that such providers were not part of his or her insurance network. As such, not only will he or she be surprised at the higher out-of-pocket responsibility, but may also be shocked to learn that the provider is also asking for the difference between what the insurance company called usual and customary and what the provider claims to be his or her usual charge.

B. Personal Injury Protection

States that have no-fault automobile insurance may require automobile drivers to carry Personal Injury Protection (PIP) to cover some portion of the

16. See Furrow et al., supra note 5, at 564.
17. See id.
19. See id. at 4–5.
20. See Hoadley et al., supra note 8, at 13.
21. See id.
22. See id. at 5.
23. See LaMendola, supra note 1.
medical fees for the driver and his or her passengers resulting from an automobile accident regardless of fault. As automobile insurers are often not primarily health insurance companies, they may not have the resources to pre-negotiate rates with a significant number of providers in their coverage area. State legislatures, in their attempt to ensure that automobile insurance rates are affordable, will often specify the maximum fees that providers can charge when treating patients covered under the PIP schedule of an automobile insurance policy. PIP statutory schemes without fixed schedules have produced litigation between automobile insurers and providers. In New Jersey, for example, the statutory scheme required that a government agency establish the 75th percentile of usual and customary charges. Originally, the agency only established such fees for a small number of services. This led to extensive litigation and, according to the New Jersey Department of Banking and Insurance (Department), higher automobile insurance fees. To resolve this uncertainty, the Department then established a fee schedule based on what it deemed to meet the statutory requirements for more than one thousand services. Many providers challenged the Department's fee schedule claiming that the schedules did not represent the statutory required fees. The state appellate court, however, upheld the department's fee schedule.

C. Uninsured

Another situation where a person seeks treatment without a pre-negotiated contractual fee with the provider is where a person does not have health insurance—that is, the person is uninsured. State protection for the

27. N.J. Stat. Ann. § 39:6A–4.6(a). The statute actually requires the fees to represent “the reasonable and prevailing fees of 75% of the practitioners within the region.” Id.
29. Id.
30. Id.
32. Id.
33. If the estimates by the Congressional Budget Office prove accurate, the number of uninsured Americans will drop from approximately 50 million today to about 23 million by 2019 as a result of the Patient Protection and Affordable Care Act. See Letter from Douglas
uninsured varies. Some states will require that the patient only pay a reasonable fee for the services. Other states will allow hospitals and physicians to bill the rates they list as their standard prices—lists which are sometimes referred to as “charge masters”—even if few people ever pay these actual rates and even if the lists contain tens of thousands of items. Court decisions in states where the uninsured are only responsible for a reasonable fee could provide guidance with regard to usual and customary or market rates. Courts, however, might distinguish reasonable rates from customary rates on the theory that the highest contract rate might be reasonable even if it is not the usual and customary rate for that service.

III. USUAL, CUSTOMARY, AND REASONABLE (UCR) CHARGES

Legislatures have left it to the courts to determine what the “usual, customary, and reasonable” rate for medical services are in particular circumstances. This might be because, traditionally, plaintiffs and defendants have come to courts for a factual determination on matters such as how much to award an injured plaintiff in a negligence case, what the fair market value of a closely held corporation is, or what is a reasonable fee for an attorney or other fiduciary. Nevertheless, a factual determination of the “usual and customary” charge in the context of medical services is distinct from these other situations and courts have not been able to effectively resolve these differences. In making a determination as to what is a usual and customary med-

W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatatives 7 (Mar. 18, 2010), available at http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf. Furthermore, the Patient Protection and Affordable Care Act also contains provisions which would require charitable hospitals to charge certain uninsured patients the same amount they generally bill those with insurance. Pub. L. No. 111-148, § 9007(a), 124 Stat. 119 (2010). Thus, uninsured parties may involve the courts less often in disputes over charges as a result of this recent healthcare reform.

35. See id.
36. See id.
37. See Maldonado v. Ochsner Clinic Found., 493 F.3d 521, 526 n.10 (5th Cir. 2007) (noting that calculating a “reasonable rate” based on the median price paid by private insurers would mean that “approximately half of the insurers would have negotiated an ‘unreasonable’ rate”).
38. See Mark A. Hall & Carl E. Schneider, Patients as Consumers: Courts, Contracts, and the New Medical Marketplace, 106 MICH. L. REV. 643, 647–48 (2008). But see id. at 684 (“Certainly, determining reasonableness is well within judicial experience and competence. Valuation is a pervasive judicial function; tort and contract cases routinely present damage issues quite as challenging.”).
ical charge, a court faces at least two initial challenges. First, in light of the modern reality of medical billing, the courts must construe the meaning of a word like “charges” to determine if this refers to the amount the provider bills for services in the absence of any contract, or the amount that the provider accepts as full payment.\(^\text{39}\) Next, assuming a court accepts that “charges” refers to the payments that providers accept as full payment, a court must still determine how to calculate what these “usual and customary” amounts actually are.\(^\text{40}\)

A. What Is a “Charge”?

Before determining what “usual and customary charges” are, a court must first construe the meaning of the word “charges.”\(^\text{41}\) Medical providers may argue that the word “charges” means a provider’s standard charges before applying any contractual discounts. The providers argue this based on the use of the word “charges” rather than “amounts accepted.” When interpreting statutory language regarding compensation for healthcare services, several courts have looked at the legislative intent and determined that “usual and customary” language is generally used to ensure that the insurers are required to compensate the providers at fair market prices for their services.\(^\text{42}\) The fair market value reflects the legislative intent to balance the desire to provide fair compensation to the providers so that qualified people will choose to become healthcare providers with the need to keep insurance costs affordable.\(^\text{43}\) As such, the fair market value would be based on what the providers have agreed to accept as full payment.\(^\text{44}\) Whether the value should include only private contracted amounts or should also include payment from all sources is another issue courts must resolve.


\(^{40}\) See, e.g., id. at 844–45.

\(^{41}\) Id. at 845.


\(^{43}\) See In re Adoption of N.J.A.C., 11:3–29, 979 A.2d at 789 (noting that the purpose of the statute in question was to contain “insurance costs ‘while providing a fair level of reimbursement for services based on what providers received in the market’” (quoting Coal. for Quality Health Care v. N.J. Dep’t of Banking & Ins., 817 A.2d 347, 350 (N.J. Super. Ct. App. Div. 2003))).

\(^{44}\) See id. (citing Coal. for Quality Health Care, 817 A.2d at 350).
The recently enacted federal healthcare legislation, the Patient Protection and Affordable Care Act (Act), could offer some support for the proposition that “charges” should refer to the discounted amounts. Under the Act, to maintain their tax exempt status, charitable hospitals must implement certain charge policies with respect to financial assistance for uninsured patients. The Act prohibits the use of “gross charges,” and as originally written, required the charitable hospitals to charge no more than “the lowest amounts charged to individuals who have insurance covering such care.” The implication from this language is that when unmodified, a “charge” is the amount that a patient or insurer is ultimately responsible to pay. In the Act, the legislature adds modifiers such as “gross” or “standard” when referring to the non-discounted charges.

B. What Is “Usual and Customary”?  

If a court has construed “charges” to mean the amounts that providers in the community are willing to accept as full payment for similar services, the court still faces a daunting task of determining what those rates actually are. This section discusses why the rates are difficult to determine, analyzes the problems that the private market has had in making reliable data publicly available, and explores the possibility of a government sponsored database of fee information.

1. “Veil of Secrecy”

The difficulty in determining the actual prices paid for medical services in the United States is twofold. First, most contracts between insurers and hospitals contain restrictive terms that prevent providers in one hospital system from knowing the prices charged by another hospital system. Second, the contracts themselves often contain a “most favored nation” clause, which ensures that the hospital will not receive less favorable terms from any other insurer. These factors make it difficult for any provider to know the rates charged by another provider, and thus for a court to determine the actual market value of medical services.

46. See id. § 9007(a), (c), 124 Stat. at 855, 857.
47. See id. § 9007(a), 124 Stat. at 857. Section 10903 changes the language from “lowest amounts charged” to “amounts generally billed.” See id. at § 10903(a), 124 Stat. at 1016. The logical implication of this change is that the legislature considers the amount charged (as well as the amount billed) to be the discounted amount and not the full list price which the legislature refers to as “gross charges” in the next paragraph. The use of the modifier “to individuals who have insurance covering such care” indicates that Congress recognized that those with and those without insurance are billed/charged different amounts. The use of “gross charges” also shows that Congress recognizes that hospitals have a policy of setting list prices that do not represent the amount that most pay.
48. See Public Health Service Act § 2718(c) (as amended by Patient Protection and Affordable Care Act § 1001).
providers contain confidentiality agreements that prevent either the insurer or the provider from disclosing the information to third parties.\textsuperscript{50} One scholar refers to this lack of transparency as a "veil that has been draped for so long over the actual prices paid in the U.S. health system."\textsuperscript{51} Second, there is no standard billing practice for all providers, so it is difficult to compare charges from different providers.\textsuperscript{52}

Even without contractual confidentiality agreements, antitrust concerns would also play a part in making such data difficult to obtain. For example, the U.S. Department of Justice and the Federal Trade Commission have warned that disclosure of a provider's fees which may become available to competing providers could violate federal antitrust laws.\textsuperscript{53} The federal authorities have issued guidelines to medical providers regarding the type of fee information they can safely disclose to third party data collectors without violating any of the federal antitrust regulations.\textsuperscript{54} These guidelines require that all disclosures be made to third parties—that is, not directly to any competing providers—the disclosed data must be at least three months old if it may become available to competitors, and "the information must be collected from enough sources so that no individual provider's price may be identified."\textsuperscript{55}

The antitrust concerns create a tension because they may preclude an insurance company involved in litigation from producing, pursuant to a discovery request, documents that include detailed information about contractual relationships with competing providers in the area. While the insurer could provide data that would meet the federal antitrust guidelines—by including only data that is at least three months old and by removing any information regarding individual provider's prices—the provider would likely object to its reliability on three grounds. First, the provider would not be able to investigate the calculations in detail. Second, the data would be at least three months old. Finally, the data would only be collected from one insurer and therefore would not be reflective of the entire marketplace.

\textsuperscript{50} See id. at 61–62.
\textsuperscript{51} Id. at 62.
\textsuperscript{52} See id. at 59, 62–63.
\textsuperscript{54} See id.
\textsuperscript{55} Id.
2. Problems with Private Databases

One potential solution to the difficulty in determining the “usual and customary” amounts paid for medical services would be for a third-party to maintain a reliable database which could be used by the industry to determine how rates compare. For many years, the medical insurance industry relied on databases provided by Ingenix, Inc. for such information. The industry primarily used this database to establish the amount the insurers were willing to pay out-of-network providers based on the insurers’ contractual obligations with their customers to pay a usual and customary amount. The Ingenix database was maintained by a wholly owned subsidiary of UnitedHealth Group, Inc. (UnitedHealth), one of the largest health insurers in the United States.

Although the Ingenix database was used by insurers to calculate the usual, customary, and reasonable rate that they were willing to reimburse out-of-network providers in PPOs, its reliability often did not hold up in court. For example, one federal district judge, in ruling that a class settlement agreement between a health insurance company and its subscribers was fair, reported that there were “serious flaws” in the way the Ingenix data was collected and processed. Similarly, a Massachusetts appellate court found that the database could not be introduced as evidence in a dispute between an automobile insurer and a chiropractor over a “reasonable fee” because the data lacked the “requisite indicia of reliability to be admissible.” Furthermore, a New Jersey appellate court stayed a state agency’s ruling that allowed insurers to use the Ingenix database to determine reasonable and prevailing fees for services which the agency had not established fee schedules. The court criticized the agency for not having investigated fully whether the database was reliable.

The use of the Ingenix database to determine usual and customary rates ended after a settlement between UnitedHealth and the New York Attorney...
In February 2008, the New York Attorney General announced that his office was conducting "an industry-wide investigation into a scheme by health insurers to defraud consumers by manipulating reimbursement rates." Based on this investigation, the New York Attorney General filed a lawsuit against UnitedHealth and its subsidiaries alleging that due to a conflict of interest, Ingenix was intentionally reporting fees below the true market values. This was done because other UnitedHealth subsidiaries were using the data to determine their own liability for reimbursement to out-of-network providers. UnitedHealth eventually settled with the State by agreeing to close the Ingenix database, to contribute $50 million for the creation of a nonprofit organization to run a new database, and to transfer its existing data to the new organization. The New York Attorney General also entered into settlement agreements with other insurance companies where they also agreed to contribute to the creation of this independent nonprofit organization.

The creation of the independent nonprofit organization to maintain a database of paid medical claims is promising; however, this organization will likely face some of the same challenges Ingenix experienced as described in a United State Senate Commerce Committee report. One main problem that the Senate report found was that the insurance companies that would eventually use the same data to determine their own liability were responsible for reporting their own unaudited claims data. As such, these insurers would "scrub" the data before submitting it to Ingenix by excluding high payouts. The insurers would also average some claims together which would distort the method used of finding modal data—such as a price at which 75% of providers charge less. Another criticism by the Senate

64. Lucas & Williams, supra note 6, at 156 (quoting New York Attorney General Cuomo).
65. Id. at 156–57.
66. Id. at 158–59.
68. See Lucas & Williams, supra note 6, at 161.
69. See UNDERPAYMENTS TO CONSUMERS, supra note 18, at i–ii.
70. See id. at 8–9.
71. Id. at 17–18.
72. See id. at 17.
Commerce Committee was that the Ingenix database did not provide transparency to consumers and medical providers.  

3. A New Hope?

In addition to the New York settlement agreement, there is another hope for the compilation of transparent data with regard to the payment of claims. Section 10101 of the Patient Protection and Affordable Care Act (Act) amends section 2794 of the Public Health Service Act and provides funding for the creation of “Medical Reimbursement Data Centers.” A data center created under this provision must, among other things, “develop fee schedules and other database tools that fairly and accurately reflect market rates for medical services and the geographic differences in those rates.” Also, the centers must “make health care cost information readily available to the public through an Internet website that allows consumers to understand the amounts that health care providers in their area charge for particular medical services.” Furthermore, the Act entitles qualifying states to receive between $1 million and $5 million a year for up to five years for creating these centers. The amendment to the original bill seems to correspond with many of the findings of the earlier Senate Commerce Committee report. Only time will tell if states will take advantage of this potential federal grant and whether such data can be implemented to make the elusive “market rates for medical services” easier to determine.

IV. POTENTIAL SOURCES FOR ESTABLISHING REASONABLE CHARGES

In the absence of hard data on the customary rates that providers are actually “charging,” courts could look to government established fee schedules such as those used by Medicare and state worker’s compensation statutes for guidance on prevailing rates.

---

73. See id. at 14–16.
75. Public Health Service Act, § 2794(d)(1)(A) (as amended by Patient Protection and Affordable Care Act § 10101(i)).
76. Id.
77. Id. § 1003, 124 Stat. at 140.
A. Medicare Fee Schedules

Medicare is a federal health insurance program administered by the Centers for Medicare and Medicaid Services (CMS) and primarily covers people who are at least sixty-five years old. The government pays physicians who treat Medicare members based on fee schedules and federal law generally prevents the providers from balance-billing Medicare members. Although Medicare participants do not need protection from balance-billing and their premiums are unaffected by the determination of usual and customary fees, understanding how Medicare fees are determined is important in analyzing whether courts should consider these fees when trying to ascertain the usual and customary charge for a medical procedure.

When Medicare was first started in 1965, the government needed to encourage medical providers to accept patients covered by the program. Accordingly, Medicare initially reimbursed doctors the same way that private insurers were reimbursing them at the time. This was based on the prevailing amount that doctors in a geographic area actually billed. Where the Medicare rate was less than a physician's full charges, the doctors could bill beneficiaries for the balance. This led to a rapid rise in the providers' charges as Medicare reimbursements would increase with any rise in prices. As a result, starting in 1975, the federal government would only increase Medicare reimbursements for fee increases that did not exceed the increase in the Medicare economic index.

Because these changes were not enough to stop total payments from rising more rapidly than Congress anticipated, in 1992, Congress implemented a new payment system that was based on a fee schedule rather than on physi-
HEALTH CARE REFORM

Physicians’ actual charges. This fee schedule calculated fees based on the relative resources required for each service. This scale currently includes factors that consider the amount of training and time required by the physician to perform the work, the physician’s practice expenses, and the physician’s professional liability insurance. This scaled value is then multiplied by a geographic factor and a monetary conversion factor to arrive at a fee for a particular service. Although the Centers for Medicare and Medicaid Services (CMS) is ultimately responsible for setting and reviewing the factors used for every service, CMS relies on input from the American Medical Association and national medical specialty societies. The monetary conversion factors were originally established such that the total reimbursement to all physicians, after converting to the fee schedule, would be the same as when the fees were based on usual and customary charges. As a result, in 1991, the allowed reimbursement for a particular service based on the fee schedule did not necessarily correlate with the usual and customary charge for that same service, but over the years, the use of this formula by Medicare and other private insurers is likely to have influenced the usual and customary charges in general.

B. Workers’ Compensation

Workers’ compensation insurance statutes may also provide guidance to courts as to what constitutes a usual and customary rate for medical services in the absence of a contract. State law will often require employers to carry

86. Id. at 1.
87. Id.
89. See id.
90. See id.
91. SUSTAINABLE GROWTH RATE FORMULA, supra note 85, at 1. The federal government has made several changes since implementing this fee schedule in order to keep overall expenditures within the projected budget. Id. Originally, this was to be done by basing the conversion value for particular services on the total volume of those services used. Id. at 1–2. This method, however, required using volumes from past years and did not restrain the overall costs as expected. Id. at 2. Thus, in 1998, Congress shifted to a Sustainable Growth Rate model. Id. The current impact of this switch is that physician payouts are scheduled to be reduced by more than 20% in the next few years. SUSTAINABLE GROWTH RATE FORMULA, supra note 85, at 2. If this reduction goes into effect, then the proposed relationship between Medicare fees and usual and customary charges will be distorted. See id.
92. See HOADLEY ET AL., supra note 8, at 10.
insurance to fully compensate workers for work related injuries—including medical costs.\textsuperscript{93} The intent is to get the worker back to being productive as soon as possible “at a reasonable cost to the employer.”\textsuperscript{94} An injured employee may choose a provider whose standard rate is much higher than what other providers in the area charge. Typically, in cases involving workers’ compensation, the provider and the insurer do not have a pre-negotiated contract on fees.\textsuperscript{95} To ensure that workers’ compensation insurance remains affordable, many legislatures have adopted maximum fee schedules that providers can charge when treating patients for work related injuries that are covered by workers’ compensation insurance.\textsuperscript{96} Except where fee schedules continue to be based on reasonable and customary charges, the providers and insurers should also be able to determine the maximum fee without litigation. Courts could use the workers’ compensation fee schedules as evidence of market value because under most circumstances providers do not have to take workers’ compensation patients unless they choose to do so, and because such patients are not likely to be such a huge portion of a practice that it would be commercially impracticable for a provider to refuse to participate.\textsuperscript{97} Thus, provider’s acceptance of the worker’s compensation rates suggests that the compensation they receive represents a fair market value.

V. JUDICIAL DETERMINATION OF UCR

Analyzing how courts have dealt with determining the usual, customary, and reasonable charges where there is no contract between the payor and the service provider helps to understand where the courts are and where they should be headed.

A. Lessons from Temple

In \textit{Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.},\textsuperscript{98} a Pennsylvania appellate court held that the “reasonable value” for a hospital’s services should be determined based on the value actually paid by the relevant community.\textsuperscript{99} \textit{Temple} involved a dispute between a Me-

\begin{itemize}
\item \textsuperscript{93} See \textit{e.g.}, FLA. STAT. § 440.09(1) (2010).
\item \textsuperscript{94} \textit{Id.} § 440.015 (2010).
\item \textsuperscript{95} See H.B. 13C Staff Analysis, \textit{supra} note 25, at 10; Lucas & Williams, \textit{supra} note 6, at 138.
\item \textsuperscript{96} H.B. 13C Staff Analysis, \textit{supra} note 25, at 9–12.
\item \textsuperscript{97} Hall & Schneider, \textit{supra} note 38, at 660–63.
\item \textsuperscript{98} 832 A.2d 501 (Pa. Super. Ct. 2003).
\item \textsuperscript{99} \textit{Id.} at 510.
\end{itemize}
HEALTH CARE REFORM

dicaid HMO and a hospital after a contract between the two expired. The hospital had told the insurer that it would not enter into a new contract at the old rates. As the hospital was required to take emergency room patients and the insurer, as a Medicaid HMO, could not prevent its subscribers from visiting any particular hospital, the hospital continued treating the HMO members for a four year period while trying to negotiate with the insurer. During much of that time, the hospital billed at its published rates, but the HMO only paid what it deemed its standard rate—a rate that was lower than the original contract amount between the two parties. The trial court eventually found that the HMO had to pay the hospital the reasonable value for its services under a quasi-contract theory. The trial court determined that the "reasonable value" was the hospital's published rate as long as the court was "not shocked by the amount." The appellate court reversed, holding that the "reasonable value" should be the average charge the hospital received based on its contracts with governmental agencies and private insurance companies. The court reasoned that for the hospital to recover anymore than its average compensation would amount to a windfall for the hospital.

B. New Jersey PIP Case

Section 39:6A-4.6 of the New Jersey Statutes requires the Department of Banking and Insurance (the Department) to establish medical fee schedules for medical expenses paid by automobile insurers pursuant to no-fault personal injury protection. The statute requires that the fee schedule "shall incorporate the reasonable and prevailing fees of 75% of the practitioners within the region." Originally, the Department had established a fee sche-

100. Id. at 505.
101. Id.
102. See id. at 509.
103. Temple Univ. Hosp., 832 A.2d at 505.
104. Id. at 506.
105. Id.
106. See id. at 509–10.
107. See id. at 509. The persuasiveness of this quasi-contract reasonableness argument in cases where the insurer is required to pay a "usual and customary charge" is not clear. Even if "usual and customary" charges are based on payments received, the "usual and customary" charge could be much higher than the average payment which the court proposed in this case. For example, if the provider's paid fee was $100 for just more than half of the patients he or she saw and $50 in the rest of the case, then the "average" charge would be $75, even though the provider never charged that amount.
108. N.J. STAT. ANN. § 39:6A-4.6(a) (West 2010).
109. Id. Although the statute referred to "reasonable and prevailing fees," the agency also used the term "usual, customary, and reasonable" fee in determining how parties are to deter-
After years of using a formula based on billed fees, the Department, in December 2000, proposed changing its fee schedule to reflect the realities of medical billing in the state. The Department noted that in the nine-years since the fee schedules had been in effect, there had been "an increasing difference between fees billed by health care providers and the fees actually accepted by them as payment for services rendered." As a result, the majority of payments accepted were below the seventy-fifth percentile of billed fees. Because the purpose of the statute was to contain costs for automobile insurance while ensuring a fair level of compensation for services provided, the Department proposed setting its schedule based on the paid fees accepted by 75% of the providers.

The Department eventually calculated a revised fee schedule by collecting data of all medical fees actually paid for medical care under PIP claims. The Department noticed a high correlation between the seventy-fifth percentile of the fees actually paid and 130% of the Medicare reimbursement rate. Because the Department found the Medicare participating provider fee schedule to be both "comprehensive" and "resource based," the Department decided that for most of the services for which it was providing a fee schedule, the 130% of the Medicare participating provider fee reflected the reasonable and prevailing fees of 75% of the practitioners in the area. For services where the Department found that the rate from the collected data was much higher than the rate based on Medicare, the Department calculated the seventy-fifth percentile of the fees actually paid based on the collected data.

mine fees for services not in the schedule. See McCoy v. Health Net, Inc., 569 F. Supp. 2d 448, 450–51 (D.N.J. 2008). The New Jersey appellate court, in upholding the agencies fee schedule, distinguished a previous federal case based on New Jersey law where the contractual language had been "charges" rather than fees. In re Adoption of N.J.A.C. 11:3-29, 979 A.2d 770, 783 (N.J. Super. Ct. App. Div. 2009). In McCoy v. Health Net Inc., the federal district court had determined that the insurer had breached its contract with providers when it started paying them the usual and customary payments they received rather than the usual and customary amounts they billed. McCoy, 569 F. Supp. at 464–65. The court emphasized that the contract had used the word "charge" rather than "fee." Id. at 464–68.

110. In re Adoption of N.J.A.C. 11:3-29, 979 A.2d at 775–76.
111. Id. at 776.
112. Id.
113. Id.
114. See id.
115. In re Adoption of N.J.A.C. 11:3-29, 979 A.2d at 778.
116. Id.
117. See id. at 777.
118. Id. at 778.
Several coalitions of healthcare providers challenged the fee schedule as violating the statutory requirement that the fee schedule represents “the reasonable and prevailing fees of 75%.” They argued that the statute required the Department to look at the billed fees rather than the paid fees and that the use of a multiplier of the Medicare participating provider fee schedule did not reflect the “reasonable and prevailing fees of 75% of the practitioners within the region.” Although a New Jersey appellate court initially granted a stay preventing the implementation of the new fee schedule, the appellate court eventually ruled that “the rules, regulations and fee schedule” were valid. In coming to its conclusion, the court noted that the Department’s reliance on the Medicare data was based on two factors. The first factor was the close correlation with data that it had already collected. The other factor was that the Department had analyzed how the Medicare fees were determined. The court acknowledged that the Department had described in detail the methodology used to determine Medicare rates. Further, the court noted that the Department had considered that the Centers for Medicare and Medicaid Services used input from the provider community in determining the relative value units for the physician’s work, practice expenses and malpractice premium expenses.

Perhaps the aspect of this case which provides the most helpful guidance with respect to resolving what constitutes a charge or fee in the context of medical services is the court’s rationale for rejecting the appellants’ claim that the Department violated the statute’s requirements by using “billed fees” rather than “paid fees.” First, the court pointed out “that the purpose of the [PIP] statute was to contain automobile insurance costs ‘while providing a fair level of reimbursement for services based on what providers received in the market.” Next, the court, citing its earlier precedent, noted that “paid fees have diverged significantly from billed fees, making paid fees a much more accurate measure of ‘reasonable and prevailing fees.’” The findings of this case should not be limited to Personal Injury Protections. Courts that

119. Id. at 773.
120. In re Adoption of N.J.A.C. 11:3-29, 979 A.2d at 773 (quoting N.J. STAT. ANN. § 39:6A-4.6 (West 2002)).
121. Id. at 774.
122. See id. at 785–86.
123. Id. at 786.
124. See id. at 785–86.
125. In re Adoption of N.J.A.C. 11:3-29, 979 A.2d at 785–86.
126. See id. at 785.
128. Id. (quoting Coal. for Quality Health Care, 817 A.2d at 350).
are making factual findings with regard to "usual and customary" charges, whether the court is construing a statute or a contract, should acknowledge this divergence between "paid fees" and "billed fees" and try to find the "usual and customary" value based on "paid fees."

C. Florida HMO Cases

This section examines how Florida courts have dealt with disputes between health insurance providers and out-of-network providers over reasonable charges in the absence of a pre-existing contract.

One situation where the courts have had to determine the proper compensation for medical services in the absence of a contract is where HMO subscribers have used non-contracting providers for emergency services and care.129 In Florida, HMO contracts must include coverage for emergency care and services.130 The HMO is not permitted to deny coverage for such care even if the provider that has treated the subscriber does not have a contract with the insurer.131 Section 641.513 of the Florida Statutes also dictates how the HMO must compensate the provider of emergency services.132 In such a case, the HMO must reimburse the medical provider the lesser of:

(a) The provider’s charges;

(b) The usual and customary provider charges for similar services in the community where the services were provided; or

(c) The charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim.133

If the HMO pays the amount the provider initially bills or if the HMO and the provider come to a mutual agreement, there are no issues. Where the parties cannot agree on what the reimbursement should be, providers134 have

---

130. FLA. STAT. §§ 641.31(12), .513(3) (2010).
131. See id. § 641.513(5).
132. Id.
133. Id. (emphasis added).
134. The insurers have no reason to seek redress because the provider, as required by law, has already performed the services. An insurer could seek a declaratory judgment in court of law, but there would be little reason for doing so.
two options: they can file lawsuits to resolve the disputes, or they can seek voluntary alternate dispute resolution processes. The alternate dispute resolution process, however, is nonbinding. As such, the process is not well-suited for resolving the legal question of how to calculate “usual and customary provider charges.”

Although section 641.513 of the Florida Statutes does not specifically indicate that a provider has a private cause of action, Florida courts have determined that providers can sue to establish the appropriate reimbursement under the statutory scheme. Until recently, the Florida appellate decisions had not provided much guidance, however, as to how to calculate the “usual and customary provider charges for similar services.” For example, in Peter F. Merkle, M.D., P.A. v. Health Options, Inc., the Fourth District Court of Appeal provided that the statute requires “HMOs to reimburse non-participating providers according to the statute’s dictates, not based on Medicare reimbursement rates.” In that case, the insurer had a policy of reimbursing non-participating providers at 120% of the Medicare reimbursement rate. The court, however, was ruling on a motion to dismiss based on the defendant’s claim that the statute required the providers to use the alternate dispute resolution process, and, therefore, never provided binding guidance on how a finder of fact should calculate the “usual and customary provider charges.” The court noted that the insurer was not following the statute’s requirement to compensate based on the “usual and customary provider charges” where the insurer was adhering to a strict formula based on a mul-

135. See Adventist Health Sys./Sunbelt, Inc. v. Blue Cross & Blue Shield, 934 So. 2d 602, 604 (Fla. 5th Dist. Ct. App. 2006).
136. See FLA. STAT. § 408.7057(2)(a); Baycare Health Sys., Inc. v. Agency for Healthcare Admin., 940 So. 2d 563, 565 (Fla. 2d Dist. Ct. App. 2006).
137. Baycare Health Sys., Inc., 940 So. 2d at 568 n.5.
138. See id. at 568 (“This case demonstrates that the process created by section 408.7057 is not an adequate method to resolve legal issues of first impression that involve the payment of millions of dollars.”). In one case, the claim-dispute-resolution entity found that “reimbursement of 120% of the Medicare fee schedule would fall within an appropriate range to be considered reasonable,” and thus was the equivalent of the “usual and customary” rates. Id. at 566. If this were binding, then the issue of what constitutes a usual and customary rate in Florida would be resolved.
139. Adventist Health Sys./Sunbelt, Inc., 934 So. 2d 602, 604 (Fla. 5th Dist. Ct. App. 2006).
140. 940 So. 2d 1190 (Fla. 4th Dist. Ct. App. 2006).
141. Id. at 1196.
142. Id. at 1193. Apparently, in 2003, many insurers were paying non-participating providers 120% of the Medicare reimbursement rate. See Adventist Health Sys./Sunbelt, Inc., 934 So. 2d at 603; Baycare Health Sys. Inc., 940 So. 2d at 566.
143. See Health Options, Inc., 940 So. 2d at 1198.
tliplier of the Medicare reimbursement rate. Nevertheless, this statement was not relevant to the court’s resolution of the case and thus, as non-binding dicta, may have little precedential value.

In Baker County Medical Services, Inc. v. Aetna Health Management, LLC, the First District Court of Appeal finally provided some guidance on how courts should construe the term “usual and customary provider charges.” In this case, Baker County Medical Services, a rural hospital, provided emergency care for subscribers to two HMOs. The insurer did not have contracts with the hospital. The hospital would bill the HMOs at its “charge master” rate. The HMOs, however, would send the providers checks for a lesser amount and marked as “payment in full.” Accordingly, the hospital filed suit for declaratory relief seeking a judicial interpretation of the meaning of “usual and customary provider charges.”

At a bench trial, the trial court determined that the “usual and customary provider charges for similar services” was a question of fact “to be determined from the consideration of different factors, including but not limited to amounts billed and amounts received by the provider for payment of the similar services.” The trial court further explained that this calculation should include Medicare and Medicaid reimbursement rates.

On appeal, the First District Court, noting that the statute did not include any definition of “charges,” looked to Black’s Law Dictionary and concluded that “ordinary and customary provider charges” was the equivalent of fair market value. The court defined fair market value as “the price that a willing buyer will pay and a willing seller will accept in an arm’s-length transaction.” The court then held that Medicare and Medicaid reimbursement rates had to be excluded from the calculation because these rates were not indicative of what a “willing seller” would accept because medical providers are required by law to provide emergency care to the Med-

144. Id. at 1197.
145. 31 So. 3d 842 (Fla. 1st Dist. Ct. App. 2010).
146. See id. at 844.
147. Id. at 843.
148. Id. at 844.
149. Id. The Court defined the “charge master” rate as the maximum charges which the hospital had a statutory duty to report to the Agency for Health Care Administration (AHCA) in accord with section 408.061 of the Florida Statutes. Baker Cnty. Med. Servs., Inc., 31 So. 3d at 843–44.
150. Id. at 844.
151. Id.
152. Id. at 845.
153. Id.
155. Id.
HEALTH CARE REFORM

icare and Medicare patients.156 And, in such cases, the government agencies will only reimburse the providers the rates the agencies have established unilaterally.157 The exclusion of Medicare and Medicaid rates should only apply when dealing with providers which do not have the right to refuse to treat patients covered by these programs, such as hospitals providing emergency care.158 The court also did not indicate whether a trier of fact could consider workers' compensation fee schedules in evaluating fair market value.

The appellate court, in excluding Medicare and Medicaid reimbursement rates, ignored the fact, however, that the government must reimburse unwilling providers at a fair rate. Otherwise, accepting the court's finding that participation in Medicare and Medicaid was involuntary in this case, the providers could challenge the government's actions under the Takings Clause if the compensation were not just.159 In fact, this is why the finder of fact should consider the governmental reimbursement rates in determining the fair market value in non-contract cases. The court should give deference, in the absence of evidence to the contrary, that the government will act in accord with the constitution and compensate the health care providers at a reasonable rate. Thus, the government rate should at least be presumed to be a reasonable rate. Whether it represents a "usual and customary charge" is another issue for the finder of fact to decide.

A presumption that the usual and customary provider charge can be calculated based on government reimbursement rates that providers accept would not infringe upon the legislature's statutory scheme. The legislature has given the courts the responsibility of making a factual determination of what the "usual and customary provider charges" are. The legislature has not defined these terms in the statutes, thus leaving it to the courts to interpret the meaning of this phrase. In the absence of a statutory definition, the courts have great latitude in construing the meaning of these terms. A court should not be able to establish an absolute value for such charges, such as equating the "reasonable and customary charge" to always be 125% of the Medicare reimbursable rate. That is a decision for the legislative branch. But by establishing a presumptively reasonable rate, the court would merely be shift-

156. Id. at 845–46.
157. Id. at 845.
158. See id. at 846. Although the court did not specifically state that in non-emergency cases the Medicare rates might be evidence of fair market value, the court implied this by indicating that the fees were only being excluded in this case because the court determined the hospital had no choice but to treat such patients because of state and federal law.
ing the burden to the party that disputes the presumptive rate. If the provider were to consider the presumptive rate too low, the provider could produce evidence that the provider has contracted for higher rates with other insurers. An insurer that believes the presumptive rate is too high can produce evidence of contracts that it has with other providers in the area for similar services. The Medicare rate should at least in some way correlate to actual cost. Rather than presuming a set percentage of Medicare as the reasonable rate, a court could allow the insurer—or the patient if the patient is self-paying—to offer general evidence of how much more private payers on average pay in comparison to Medicare reimbursement rates in that area. A provider could challenge these findings by showing that its actual costs were higher than Medicare allows. The provider could also proffer evidence that the particular procedure was more complicated than the “similar” procedures used by the trier of fact for comparison.

The court in Baker County Medical Services equated the “usual and customary provider charges” with fair market value. The court defined “fair market value” as “the price that a willing buyer will pay and a willing seller will accept in an arm’s-length transaction.” Providers are likely to argue that the “fair market value” for their services should be higher because of their experience or special training. This argument, however, should have little weight in the case of an HMO subscriber seeking emergency medical services unless the provider could show that the patient chose that provider because of the provider’s training. In the case of an HMO subscriber, however, the insurance policy does not permit the patient to choose out-of-network providers. Section 641.513 of the Florida Statutes, however, only applies where the patient is seeking emergency services and care. In such situations, the patient will likely be choosing a facility because of its proximity, or someone else may have selected the facility because of the patient’s condition, preventing him or her from making such a determination. Thus, while a provider’s level of experience may play a factor in justifying a higher rate for non-emergency situations, the same rationale should not apply to section 641.513 of the Florida Statutes.

162. Id. (citing U.S. v. Cartwright, 411 U.S. 546, 551 (1973)).
163. HOADLEY ET AL., supra note 8, at 5.
164. FLA. STAT. § 641.513 (2010).
VI. UCR AND HIGHER HEALTH CARE COSTS

The uncertain nature of "usual and customary" charges not only affects those who face uncertain balance billing as a result of such uncertainty, but also affects the overall cost of health care by increasing insurance premiums. This uncertainty affects insurance costs because insurers set their premiums based in part on their expected payouts. If an insurer cannot predict the amount that it will have to payout to cover medical claims, then it will increase premiums to cover this uncertainty. Furthermore, the uncertainty creates litigation costs that must also be covered by the insurance premiums.

The cost to a single insurer is not the only reason that this uncertainty leads to higher costs. Another reason is that this uncertainty creates barriers to entry for new insurers.\textsuperscript{165} According to the American Medical Association (AMA), "Competition in the health insurance industry is disappearing . . . ."\textsuperscript{166} The AMA reports that in twenty-four states, two insurers had a combined market share of seventy percent or more.\textsuperscript{167} Furthermore, in more than half of the markets, one insurer controlled at least fifty percent of the market.\textsuperscript{168} The AMA recommends that the Department of Justice should investigate if there are any antitrust implications of this consolidation.\textsuperscript{169} Although the AMA cites the rising premiums as the reason for its concern, the AMA is probably more concerned that dominant insurers will be able to dictate the prices that its members must accept for their services in a given market.\textsuperscript{170} Actually, however, the presence of a dominant insurer does not necessarily lead to lower fees for medical providers.\textsuperscript{171} In fact, under the Patient Protection and Affordable Care Act, insurers may have little incentive to negotiate for lower fees.\textsuperscript{172} A group insurer will have to return any premiums in excess of eighty-five percent of the amounts it paid out to reimburse medical costs during a particular year.\textsuperscript{173} This combination of a market dominated by a few

\textsuperscript{165. \textit{Id. at 7.}}
\textsuperscript{167. \textit{Id.}}
\textsuperscript{168. \textit{Id.}}
\textsuperscript{169. \textit{Id.}}
\textsuperscript{170. \textit{See INCREASING TRANSPARENCY, supra note 53, at 7.}}
\textsuperscript{171. \textit{See Ken Terry, More Insurance Competition Will Not Reduce Costs, BNET HEALTH CARE BLOG (Sept. 7, 2009), http://industry.bnet.com/healthcare/10001113/more-insurance-competition-will-not-reduce-costs/?tag=content;selector-perfectcor.}}
\textsuperscript{172. \textit{See Rexford E. Santerre, Competition Beats Regulation; Aggressive Negotiation with Providers Can Contain Premiums, WASH. TIMES, May 6, 2010, at B1.}}
\textsuperscript{173. \textit{See id.}}
insurers and a requirement that the insurers must payout certain amounts for actual medical coverage could lead to uncontrolled increases in both insurance premiums and medical fees.

The reason that making the amounts insurers are required to pay out-of-network providers clearer could help with overall insurance premiums is because this uncertainty creates barriers to entry for potential new insurers.\textsuperscript{174} To compete in a new medical market, the insurer would have to negotiate discount rates similar to those of its established competitors.\textsuperscript{175} Considering that the published rates and discounted rates can differ by such large factors, the risk of having to pay non-discounted rates could make entry into new markets commercially unfeasible.\textsuperscript{176} On the other hand, insurers could enter markets slowly by building up small local networks knowing that in emergency situations, they would only be required to pay a market rate similar to what the more dominant insurers are paying. The courts would be instrumental in making this possible by establishing that usual and customary rates are determined by the amounts providers are accepting as payment, and by establishing a measurable presumptive value in the absence of further data. This could also create an incentive for providers to negotiate contract rates with these new insurers, again increasing the ability for the new insurers to compete in the market.

Some people argue that increased competition among insurers will actually cause overall healthcare costs to increase because medical providers would have more leverage in negotiating with each insurer.\textsuperscript{177} Further, some people have expressed concern that increased price transparency may also lead to higher costs as the providers who currently agree to costs that are below usual and customary amounts would demand more.\textsuperscript{178} Although those at the high end of the scale could be pressured to lower costs to some extent, this lowering might not offset the increases demanded by the lower-cost providers.\textsuperscript{179} Although no one can predict the true effect of increased transparency in actual medical costs and/or increased competition among insurers, the increased transparency would allow policymakers to closely monitor the effects. If costs did rise as a result of transparency, state legislatures could implement maximum fee schedules based on the new data that would be available to them in making their policy decisions.

\textsuperscript{174} See \textit{INCREASING TRANSPARENCY}, \textit{supra} note 53, at 7.
\textsuperscript{175} See id.
\textsuperscript{176} See id. at 4.
\textsuperscript{177} See id. at 4–6.
\textsuperscript{178} See \textit{INCREASING TRANSPARENCY}, \textit{supra} note 53, at 4–6.
\textsuperscript{179} See id. at 8.
VII. CONCLUSION

Statutes that require courts to calculate “usual, customary, and reasonable” values for medical services using traditional discovery principles have contributed to both the problem of a lack of consumer protection from balance billing as well as increased uncertainty (and likely price increases) in health insurance markets. The difficulty is unique to the nature of the health care industry and the third-party payment system that has evolved around the healthcare market. In particular, the problem relates to the confidential agreements between insurers and providers that has evolved as the method of reimbursement in most cases. Combined with these confidential pricing relationships is the public policy that our legislatures want the healthcare market to be somewhat market driven in the sense that our policymakers have wanted the compensation of medical providers to be based on market rates, rather than on a government established fee schedule. The problem, however, is that because of the lack of transparency as to what providers are actually paid, insurers and providers often cannot agree what the fair market value should be when they are in situations where they have not pre-negotiated a rate and statutory or common law requires reimbursement based on some market rate.

The courts have also been an inefficient place to set guidelines for two reasons. First, determining the true market rate has proven to be elusive due to the unavailability of reliable data regarding the true “usual and customary” value for medical services in a given area. Many courts have been unwilling to use other statutory fee schedules to substitute for the indeterminable “usual and customary” value absent some clear direction from the legislature. The greatest hope for the future may be with the creation of a truly independent non-profit organization which will manage a database of all medical fee payments across the country. Perhaps the funds that several large insurers have agreed to contribute as part of a settlement with the State of New York, combined with the availability of federal grant money to create Data Reimbursement Centers pursuant to the Patient Protection and Affordable Care Act will make such a database a reality.

Nevertheless, in the interim, until such a database is operational and courts have had an opportunity to rule on the reliability of its data collection methods, a solution is still needed. While the best solution would come from the legislature in terms of either a maximum fee schedule or a presumptively reasonable fee schedule, in the absence of such legislation, state courts should consider imposing their own presumptions on reasonable rates based on a multiplier of the Medicare reimbursement fee schedules or a State’s own workers’ compensation fee schedules. By creating a presumption, the courts would only be shifting the burden of producing evidence that the pre-
sumptive rate is not the true market rate to the parties that would most likely have evidence to the contrary. For example, if a medical provider truly collects more than the presumptive rate from most other private insurers, the provider could easily produce this evidence to the court—or possibly even the other party before any litigation begins—to rebut the presumptive rate. Thus, there would be no overreaching by the court and when a major medical emergency forces a person to seek care at the nearest hospital, he or she will have a better understanding of what to expect.
ACCOMMODATIONS FOR THE HEARING IMPAIRED IN THE FLORIDA STATE COURT SYSTEM

ARLETTE ABDALLAH*

I. INTRODUCTION ................................................................. 204
II. PUBLIC ACCOMMODATIONS FOR THE HEARING IMPAIRED ...... 205
III. PREFERRED METHODS OF ACCOMMODATION ................. 206
   A. American Sign Language .............................................. 207
   B. Signed English and Pidgin Signed English ...................... 208
   C. Hard-of-Hearing and Late-Deafened Individuals .............. 209
IV. AUXILIARY AIDS AND SERVICES FOR THE HEARING IMPAIRED IN
    THE COURTROOM ........................................................... 210
   A. The Court Interpreters Act ........................................... 210
   B. Communication Access Realtime Translation .................. 211
   C. Assistive Listening Systems ........................................ 213
V. ACCOMMODATING THE HEARING IMPAIRED IN FLORIDA COURTS . 213
   A. Section 90.6063 of the Florida Statutes .......................... 213
   B. Section 901.245 of the Florida Statutes .......................... 214
   C. Section 40.013 of the Florida Statutes ........................... 214
VI. ADA COMPLIANCE IN FLORIDA COURTS .................................... 215
   A. Requests for Accommodations by Persons with Disabilities .. 215
   B. Compliance Issues .................................................... 217
VII. ACCOMMODATING THE HEARING IMPAIRED IN WASHINGTON
     D.C. COURTS ......................................................................... 218
VIII. LIMITATIONS .................................................................... 219
IX. ISSUES ARISING FROM THE REQUIREMENT TO ACCOMMODATE .... 220
   A. Law Enforcement ...................................................... 221
   B. Videotape ............................................................... 223
   C. Lost in Translation .................................................... 223
X. CONCLUSION ....................................................................... 224

* The author is a J.D. Candidate, May 2012, Nova Southeastern University, Shepard Broad Law Center. Arlette Abdallah received her Bachelor of Science in Business Administration from the University of Florida with a major in Economics and a minor in Communication Studies. The author wishes to thank her family for their love, support, and motivation. The author wishes to extend sincere gratitude to Professor Michael Tuccelli at the University of Florida for his encouragement and enthusiasm. The author would also like to thank the faculty of the Law Center for their guidance and support, with a special thanks to the members of Nova Law Review for their hard work and dedication.
I. INTRODUCTION

On July 23, 2010, the United States Department of Justice celebrated the twentieth anniversary of the Americans with Disabilities Act of 1990 (ADA). Twenty years after its implementation, the ADA established enforceable standards aimed at eliminating discrimination against persons with disabilities. The driving force behind its implementation is that discrimination against those with disabilities continues to exist "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Among the disabilities covered by the ADA are hearing impairments, which are recognized under the category of "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."

Following the enactment of the ADA, federal regulations were established to effectuate the ADA’s prohibition on public entities from discriminating against individuals with disabilities. A public entity is defined as "[a]ny state or local government" or an agency thereof. As public entities, state and local governments must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others."

This article centers on the requirement for public entities to accommodate individuals who are hearing impaired. It focuses on the ways in which court administrations, operating as public entities, provide services in the courtroom for parties and other individuals who are hearing impaired, with a specific exploration of the Florida state court system.

The first part of this article will explain the federal regulations that effectuate the ADA as it applies to public accommodations for those with hearing impairments. The second part of this article will discuss the methods of aid that individuals may prefer based on their identification as Deaf, deaf, hard-of-hearing or late-deafened. With regard to these preferences, this ar-

3. Id. § 12101(b)(1)–(2).
4. Id. § 12101(a)(2)–(3).
6. Id. § 35.101.
7. Id. § 35.104.
8. Id. § 35.160(a).
ACCOMMODATIONS FOR THE HEARING IMPAIRED

The article will then explore the kinds of auxiliary aids and services that are provided for hearing-impaired parties, witnesses, and other court participants in Florida courts. The fourth part of this article will take a statutory examination of accommodations for hearing-impaired persons in Florida courts. In assessing the accommodations that Florida courts provide, this article will explore issues that concern accommodation requests, as well as compliance problems. To provide some perspective as to where the Florida state court system stands, the article takes an initial look at the way in which courts in Washington, D.C. approach accommodations under the ADA. Next, this article will review any limitations to the services that the state courts will provide. In addition, this article will identify issues that have risen from the requirement to accommodate hearing-impaired individuals in court. Finally, this article will summarily discuss the patterns of accommodation in the Florida state court system.

II. PUBLIC ACCOMMODATIONS FOR THE HEARING IMPAIRED

The ADA requires public accommodations to be made for individuals who are deaf, hard-of-hearing or otherwise hearing impaired.9

Public accommodations include places of lodging (for example, motels, hotels); places serving food and drink (for example, restaurants, bars); places of public entertainment (for example, movies, theaters, stadiums, concert halls); places of public gathering (for example, auditoriums, convention halls); sales or rental establishments (for example, stores); service establishments (such as gas stations, dry cleaners, banks, doctors’ and lawyers’ offices); transportation stations (for example, terminals, depots); places of public display or collection (for example, museums, libraries); places of recreation (for example, parks, zoos, amusement centers); private schools; social service centers (such as day care centers, food banks, homeless shelters, adoption agencies); and places of exercise or recreation (such as gyms, health spas, bowling alleys, golf courses).10

Federal regulations mandate that, as public entities, state and local governments must “make reasonable modifications in [their] policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless ... making the modifications would funda—

10. Id. at 28–29.
mentally alter the nature of the service, program, or activity." When it is necessary to provide a hearing-impaired individual with an "equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity," state and local governments must supply the "appropriate auxiliary aids and services." Auxiliary aids and services are defined as "effective [means] of making aurally delivered [information] available to [hearing-impaired] individuals." As they apply to those with hearing impairments, auxiliary aids and services include "[q]ualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), [and] videotext displays." Qualified interpreters must be able to "interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary." As illustrated above, the ADA provides for remarkable accommodations for hearing-impaired persons. In many cases, however, these accommodations prove to be extensive and costly. Nevertheless, state and local government entities must bear the cost of providing these necessary accommodations. The government is therefore prohibited from imposing special charges on those with disabilities to compensate for the cost of providing these services.

III. PREFERRED METHODS OF ACCOMMODATION

An individual with a disability is not required to accept a particular form of accommodation or service. Rather, the mode of aid or service preferred by an individual may differ depending on whether the individual considers himself or herself "Deaf, deaf, late-deafened or hard-of-hearing." In

11. 28 C.F.R. § 35.130(b)(7).
12. Id. § 35.160(b)(1).
13. Id. § 35.104.
14. Id.
15. Id.
17. Id.
18. Id.
19. See 28 C.F.R. § 35.130(f).
20. See id. § 35.130(e)(1).
approaching the issue of preferred methods of aid, it is essential to point out that there is not one mode of communication aid that can equally and effectively accommodate each hearing impaired participant.\textsuperscript{22}

Some deaf individuals use American Sign Language (ASL); others employ some form of Signed English; still others use Pidgin Signed English (PSE). A substantial minority of deaf individuals are exclusively oral.\ldots

\ldots Notably, some deaf individuals have minimal or nonexistent linguistic skills. These individuals are not fluent in any signed or voiced language.\ldots

Hard-of-hearing defendants present problems of the same complexity.\ldots Hearing aids only amplify; they do not clarify. Speechreading is an art, not a science. Hearing aids without speechreading or speechreading without a hearing aid usually are ineffective. Most hard-of-hearing individuals must use hearing aids and speechreading together in order to understand speech. They also may require either real-time captioning or broadcasting systems that beam directly to their hearing aids.\textsuperscript{23}

Adequate communication, therefore, requires appropriate accommodation for each participant's specific needs.\textsuperscript{24} Thus, state and local governments bear the burden of paying for sign language interpreters or any other preferred auxiliary aid or service "where necessary to allow equal participation by persons with hearing impairments in state and local government programs and facilities, such as in a courtroom as a party, witness, juror, judge, attorney, or simply [an] observer."\textsuperscript{25}

\textbf{A. American Sign Language}

Those who identify themselves as members of the "Deaf" community use American Sign Language (ASL) as their primary method of communic-
tion. ASL is a “visual language that is not only a means of communication but also a repository of cultural knowledge and a symbol of social identity.”

Contrary to popular belief, ASL is not simply English on the hands. Rather, it “possesses its own grammatical rules, syntax, . . . regional dialects and can convey abstract concepts.”

Generally, individuals who are Deaf and communicate through ASL can be effectively accommodated with “a qualified, nationally certified and legally trained ASL interpreter.” Such interpreters are required to possess the linguistic and cultural knowledge to be able to express legal information. ASL interpreters in the courtroom must also be aware of and respect “attorney-client privilege concerns, disclosure of conflict of interests, [and] protocol requirements.”

It is noteworthy that a family member of the Deaf individual who requires accommodation is not an appropriate interpreter for that person. This is because qualified interpreters must be able to “interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.” Typically, family members cannot remain impartial, and do not have the legal training to interpret such specialized legal concepts in an effective manner. Instead, as required by the Court Interpreters Act, the office of the clerk in each district court keeps a list of certified interpreters on file for use when such services are required.

B. Signed English and Pidgin Signed English

Outside of the “Deaf” community, which is known for its emphasis on ASL, some deaf or hard-of-hearing individuals communicate through what is known as Signed English. Signed English is a system of communication

27. Id.
28. Id.
29. Id.
30. Id.
31. CASERTA, supra note 26, at 16.
32. Id.
33. Id. at 13.
35. CASERTA, supra note 26, at 16.
37. CASERTA, supra note 26, at 6.
"that attempts . . . to replicate the English language manually." People who are deaf or hard-of-hearing may also communicate through another method of signing known as Pidgin Signed English (PSE). PSE is a mixture of both ASL and Signed English. To accommodate an individual who requires Signed English or PSE, an ASL interpreter or transliterator will suffice.

C. Hard-of-Hearing and Late-Deafened Individuals

Some individuals who are hearing impaired communicate orally, and refer to themselves as “hard-of-hearing.” Typically, English is the primary language for those who are hard-of-hearing. Therefore, instead of signing, such individuals may speak and lip-read. Lip-reading, however, poses a challenge to effective communication. This is because the “ability to communicate effectively . . . depend[s] on the environment, the speaker’s voice, the level of anxiety the situation imparts and other factors which the hard of hearing person cannot control.”

Similarly situated persons are those who are considered to be “late-deafened.” A person is late-deafened if he or she loses “hearing any time after the development of speech and language; often it means after the age of adolescence.” Accommodating individuals who are hard-of-hearing or late-deafened may require the use of such auxiliary aids and services as Assistive Listening Systems, Communication Access Real-time Translation (CART), or oral interpreters.
IV. AUXILIARY AIDS AND SERVICES FOR THE HEARING IMPAIRED IN THE COURTROOM

As required by the ADA, the courts, as "state and local government entities [must] make their programs and services fully accessible to deaf and hard-of-hearing persons."\textsuperscript{50} State and local governments must "make reasonable modifications in [their] policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . making the modifications would fundamentally alter the nature of the service, program, or activity."\textsuperscript{51} Reasonable modifications may include such allowances as granting an individual who is using an interpreter more time to respond.\textsuperscript{52} As illustrated above, it is a significant item that in order to achieve satisfactory communication, courts must take appropriate measures for each participant's specific needs.\textsuperscript{53}

A. The Court Interpreters Act

The Court Interpreters Act mandates that courts provide certified court interpreters to enable hearing impaired individuals to comprehend court proceedings and to communicate during the proceedings.\textsuperscript{54} Under the Court Interpreters Act, if the presiding judicial officer decides that a party or witness "suffers from a hearing impairment" in such a way that inhibits the individual's "comprehension of the proceedings or communication with counsel or the presiding judicial officer, or . . . [in such a way that] inhibit[s] . . . [the individual's] comprehension of questions and the presentation of . . . testimony," then the presiding officer must provide a certified interpreter for that individual.\textsuperscript{55} The Court Interpreters Act specifies that if the presiding officer determines that a person meets the above criteria by the "officer's own motion or on the motion of a party or other participant in the proceed-

\textsuperscript{50} Tucker, \textit{supra} note 9, at 28.
\textsuperscript{51} 28 C.F.R. § 35.130(b)(7) (2009).
\textsuperscript{52} Communication Access in State & Local Courts, \textsc{Nat'l Ass'n of the Deaf} (Apr. 2008), http://www.nad.org/issues/justice/courts/communication-access-state-and-local-courts [hereinafter \textit{Communication Access}]. Another example of a reasonable modification may be if:

[O]ne or both litigants are deaf, the court may need to employ a screen to protect the privacy of a conversation between the litigant and his/her attorney during a proceeding. The screen serves to ensure that the other deaf litigant, as well as others present in the courtroom who know American Sign Language, do not "overhear" the attorney-client conversation.

\textit{Id.}

\textsuperscript{53} See McAlister, \textit{supra} note 22, at 168.
\textsuperscript{55} \textit{Id.} § 1827(d)(1).
ing," a sign language interpreter may be appointed "whether or not the proceeding is instituted by the United States." 56 This applies to all proceedings, both criminal and civil. 57 The use of an interpreter, however, remains "within the sound discretion of the trial judge." 58

As a general requirement, when interpreters are used in court, they must translate the proceedings continuously. 59 Nevertheless, as long as the party can comprehend the proceedings and communicate with counsel, the requirements of the Court Interpreters Act have been held to be satisfied, and there is no reversible error for a failure to provide a continuous translation. 60

The Court Interpreters Act also permits simultaneous and consecutive interpretation, 61 allowing a single interpreter to translate simultaneously for several defendants. 62 Simultaneous interpretation occurs when the language interpreter translates and speaks contemporaneously with the person or persons requiring the accommodation. 63 When a single interpreter is used in a multi-defendant lawsuit, however, the "court must ensure that each defendant is able to understand the proceedings." 64 This may require the court to allow more time at trial for defense counsel to confer with a particular defendant who may desire to confer with counsel separately from the other defendants. 65

B. Communication Access Realtime Translation

Another auxiliary aid that is recognized by the ADA as providing effective communication is Communication Access Realtime Translation (CART). 66 "CART is a word-for-word speech-to-text interpreting service for

56. Id. § 1827(l).
57. Id. § 1827(j).
60. United States v. Lim, 794 F.2d 469, 471 (9th Cir. 1986) (per curiam) ("As long as the defendants' ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the district court.").
61. § 1827(k).
62. See United States v. Sanchez, 928 F.2d 1450, 1454 (6th Cir. 1991) (explaining that separate interpreters for multiple defendants in a single case are not required).
63. Id. at 1455 (quoting United States v. Bennett, 848 F.2d 1134, 1140 n.7 (11th Cir. 1988)).
64. Id.
65. Id.
66. CART MODEL GUIDELINES, supra note 21, at 4.
people who need communication access." In 2002, the American Judges Foundation and the National Court Reporters Foundation established model guidelines for the use of CART in the courtroom.

When CART is used in court, the text of the proceedings that the reporter types instantly appears on a computer screen in the courtroom. CART automatically "converts stenographic notes into English text," making it immediately available for viewing. Unlike an official court reporter who "provides the official record of [the] proceedings, the CART provider/interpreter assumes an interpretive rather than an official role." This means that along with recording the words that are being said, the CART provider/interpreter captures "the spirit of the proceedings and [any] environmental sounds."

Although it is not recommended, a CART interpreter may serve as the official court reporter in a last resort situation. In such cases, however, the record will "not include the spirit of the speaker or environmental sounds, or any off-the-official-record conversations." More often though, the CART provider/interpreter and the official court reporter "usually cannot be the same person, because the roles are different and because there are rules and ethical considerations that usually require different people to perform each of those jobs."

CART is available to any court participant who may require it, including "a litigant, juror, judge, attorney [or] witness." Because CART is available to different kinds of court participants, the CART provider/interpreter will often be required to serve different functions. For instance, "a CART provider/interpreter may accompany a consumer into the jury room or into confidential discussions with attorneys."

67. Id.
68. Id. at 1, 4.
69. Id. at 4-5.
70. Id. at 4.
71. CART MODEL GUIDELINES, supra note 21, at 5.
72. Id. "For example, if anyone laughs in the courtroom or the proceedings are disrupted by sounds or other disturbances, CART providers/interpreters include this in their unofficial, onscreen text display." Id.
73. Id.
74. Id.
75. Patricia Lyons, Tips and Tricks for Working with Court Reporters, ARIZ. ATT’Y, Nov. 2008, at 42, 44.
76. CART MODEL GUIDELINES, supra note 21, at 7.
77. See id.
78. Id.
C. Assistive Listening Systems

"Assistive Listening Systems [ALS] are . . . devices which can be used to improve and increase the sound and quality of conversations between parties."\textsuperscript{79} Examples of these devices are induction loops, FM systems, and Infrared devices.\textsuperscript{80} Typically used to accommodate people who are hard-of-hearing or late-deafened, the effectiveness of ALS depends on the "client's residual hearing, type of hearing aid used and personal preference."\textsuperscript{81}

V. ACCOMMODATING THE HEARING IMPAIRED IN FLORIDA COURTS

Courts must "provide [the necessary] auxiliary aids and services for all court or court related events . . . [such as] appearances, hearings, jury duty, [and] court sponsored clinics."\textsuperscript{82}

A. Section 90.6063 of the Florida Statutes

Section 90.6063 lays out guidelines with regard to interpreting services for hearing impaired individuals in court.\textsuperscript{83} The statute applies, not only to hearing impaired defendants, but also to witnesses, jurors, or other litigants who may be deaf.\textsuperscript{84} Specifically, the statute instructs that:

In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person's testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is seated.\textsuperscript{85}

When an interpreter is used, the statute requires that the interpreter be "certified by the National Registry of Interpreters for the Deaf or the Florida

\textsuperscript{79} Caserta, supra note 26, at 24.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 25.
\textsuperscript{83} Fla. Stat. § 90.6063 (2010).
\textsuperscript{84} Id. § 90.6063(2).
\textsuperscript{85} Id.
Registry of Interpreters for the Deaf or an interpreter whose qualifications are otherwise determined by the appointing authority.\textsuperscript{86} To further ensure effective communication, a preliminary determination must be made that the interpreter can successfully communicate with the person requiring the accommodation before he or she is appointed.\textsuperscript{87}

B. \textit{Section 901.245 of the Florida Statutes}

Florida Criminal Procedure explicitly provides for interpreter services for deaf individuals.\textsuperscript{88} In a situation in which a deaf person “is arrested and taken into custody for an alleged violation of a criminal law, . . . the services of a qualified interpreter shall be sought prior to interrogating such deaf person.”\textsuperscript{89} The \textit{Florida Statutes} do allow for the interrogation to proceed in lieu of a qualified interpreter if one cannot be found.\textsuperscript{90} In such a scenario, however, the interrogation and the deaf individual’s answers must be in writing.\textsuperscript{91}

C. \textit{Section 40.013 of the Florida Statutes}

With regard to jury service, \textit{Florida Statutes} prohibit a person from being excused from jury duty on a civil trial “solely on the basis that the person is deaf or hearing impaired.”\textsuperscript{92} Though this statute protects hearing impaired

\begin{itemize}
  \item[86.] \textit{Id.} \textsuperscript{\textcopyright} 90.6063(3)(b).
  \item[87.] \textit{FLA. STAT.} \textsection\textsuperscript{90.6063(6)}.
  \item[88.] \textit{Id.} \textsection\textsuperscript{901.245}.
  \item[89.] \textit{Id.}
  \item[90.] \textit{Id.}
  \item[91.] \textit{Id.}
  \item[92.] \textit{FLA. STAT.} \textsection\textsuperscript{40.013(5)}. Rather, courts must provide those who are summoned for jury duty with appropriate accommodations:
  
  A Florida parent complained that a court failed to provide effective communication for her son, who is deaf and had requested real-time captioning when he was summoned for jury duty. The court agreed to provide real-time captioning when needed and revised its jury summons to include instructions for individuals with disabilities needing accommodations to call the ADA compliance officer. The court also instructed its information officers to refer individuals with disabilities who need assistance to the court’s ADA compliance officer, added captioning to the jury instruction video, produced a written copy of the juror oath, and agreed to review all efforts to improve effective communication on an ongoing basis.
\end{itemize}
ACCOMMODATIONS FOR THE HEARING IMPAIRED

individuals from being excluded from jury service, it does provide an exception to this prohibition. If the judge finds "that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby," a deaf or hearing impaired person may be excused from jury duty on a civil trial.

VI. ADA COMPLIANCE IN FLORIDA COURTS

In Florida, it is estimated that three million people have been diagnosed with hearing loss. This figure makes Florida the second largest state in population of people with hearing impairments. When a deaf or otherwise hearing impaired individual requires an accommodation in Florida courts, the court must not only "pay for the provision of auxiliary aids and services for qualified deaf and hard of hearing parties upon request," but "[t]he court must give primary consideration to the person's expressed choice of the auxiliary aid provided."

A. Requests for Accommodations by Persons with Disabilities

The Florida State Court System demonstrates an overall awareness of and response to disability issues. This awareness is illustrated by rule 2.540 of the Florida Rules of Judicial Administration. Rule 2.540 serves to notify those with disabilities of their "right to request accommodations."


93. See Fla. Stat. § 40.013(5).
94. Id.
95. CASERTA, supra note 26, at 4.
96. Id.
97. Id. at 25. For example, if a "client is an ASL user and prefers the use of a qualified interpreter to communicate effectively, the court may not provide a scribe in lieu of an interpreter if note taking would not be effective for the client." Id. "Courts should not unilaterally limit the range and availability of auxiliary aids and services for deaf people and should give primary consideration to the deaf person's request." Communication Access, supra note 52.
98. SOUTHEAST FLA. CENT. ON AGING OF FLA. INT'L UNIV. & FLA. SUPREME COURT COMM'N ON FAIRNESS, JURY SERVICE ACCESSIBILITY FOR OLDER PERSONS AND PERSONS WITH DISABILITIES IN FLORIDA 3 (1999), available at [hereinafter JURY SERVICE ACCESSIBILITY].
100. In re Amendments to Fla. Rule of Judicial Admin. 2.540, 41 So. 3d 881, 882 (Fla. 2010).
In 2010, the Florida Bar’s Rules of Judicial Administration Committee (Committee) proposed several amendments to rule 2.540 “in order to better guide Florida courts . . . as to their rights and obligations under the [ADA].” After reviewing the Committee’s proposals, the Supreme Court of Florida adopted extensive amendments. These amendments organize the rule into several subdivisions. As amended, the rule now identifies the court’s obligation to make accommodations available to “[q]ualified individuals with a disability” and incorporates definitions from the ADA.

Additionally, in order to encourage uniformity, the rule drafts a statement to be included in all notices of court proceedings informing qualified individuals of their right to government-provided accommodations:

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least [seven] days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than [seven] days; if you are hearing or voice impaired, call 711.

In addition to requiring this standard notice, rule 2.540 now details the procedures for requesting accommodations, as well as the court’s process for responding to such requests. In responding to requests for accommodation, the court must determine whether to grant a particular accommodation or “to provide . . . an appropriate alternative accommodation.” The court may only deny an accommodation request if “the court determines that the requested accommodation would create an undue financial or administrative burden on the court or would fundamentally alter the nature of the service, program, or activity.”

Finally, judicial circuits and appellate courts are now required to create and issue grievance procedures for resolving complaints. This provision is

101. Id. at 881.
102. Id. at 882.
103. Id.
104. Fla. R. Jud. Admin. 2.540(a),(b).
105. In re Amends. to Fla. Rule 2.540, 41 So. 3d at 881.
106. Fla. R. Jud. Admin. 2.540(c)(1) (internal quotation marks omitted).
107. Id. at 2.540(d).
108. Id. at 2.540(e).
109. Id. at 2.540(e)(1).
110. Id. at 2.540(e)(3).
significant in that it allows an individual to address a disability-based discrimination issue regarding "the provision of services, activities, programs, or benefits by the Florida State Courts System." When the grievance concerns an issue that could "affect the orderly administration of justice," the presiding judge has the discretion to "stay the proceeding and seek expedited resolution of the grievance." 2

B. Compliance Issues

Indeed, there is an overall general awareness and responsiveness to disability issues among Florida courts. A study conducted in 1999 found that with regard to particular accommodations, however, some Florida courts were lacking. These specific accommodations included "providing qualified sign language interpreters or real-time reporters, and other requests for accommodations by persons with disabilities other than mobility impairments." Some courts had indicated a lack of experience in these areas because these particular accommodations were not often requested. Others simply did not see the need for certain accommodations in their communities. However, without an interpreter, if a deaf person had been "summoned for jury duty, . . . the potential juror [would have] likely [been] . . . dismissed." 4

Among the data reported, the survey found that some of the sampled Florida courts had not "used any auxiliary aids or services [before]." It further found that some of the courts did not have a "hearing-aid compatible telephone [or a] telecommunications device for the deaf." The survey also found that some courts did not have "assistive-listening devices available in the jury deliberation room . . . or jury box." 5

A report prepared in 2008 noted that while there have been accessibility improvements in Florida courthouses, some barriers remain. For example,

---

112. Id.
113. Id. at 2.540(f)(2).
114. JURY SERVICE ACCESSIBILITY, supra note 98, at 3.
115. Id. at 1, 3–4.
116. Id. at 4.
117. Id.
118. Id.
119. Communication Access, supra note 52.
120. JURY SERVICE ACCESSIBILITY, supra note 98, at 5.
121. Id.
122. Id.
123. COURT ACCESSIBILITY SUBCOMM., STANDING COMM. ON FAIRNESS AND DIVERSITY, ACCESS TO THE FLORIDA COURTS: IDENTIFYING AND ELIMINATING ARCHITECTURAL BARRIERS 1
the report indicated, "Alarm systems do not always include signal appliances in separate spaces such as jury rooms, restrooms, and conference rooms." 124
Additionally, there are often not many TDDs or TTYs available. 125

Today, in a dramatic turnaround, Florida courts appear to be committed to the awareness of disability issues in the state. 126 In most Florida courts, an assigned staff member serves as the ADA coordinator. 127 Because many of the Florida courts provide instruction on ADA compliance and have procedures in place to recognize situations where reasonable accommodations may be required, Florida courts seem to be conscious and receptive to their responsibilities under the ADA. 128 In fact, at the 2008 celebration of "the eighteenth anniversary of the ADA, the Agency for Persons with Disabilities honored the Florida State Courts System for its commitment to the ADA." 129

VII. ACCOMMODATING THE HEARING IMPAIRED IN WASHINGTON D.C. COURTS

Washington D.C., like Florida, has made significant accommodations available in its courts for those with hearing impairments. In 2006, a status report was released concerning the District of Columbia courts and their implementation of improved court access recommendations. 130 This report specifically addresses court access for hearing impaired users. 131 In recent years, the D.C. courts have purchased captioned video tapes for juror lounges and televisions with captioned decoding for deaf or hard-of-hearing court partici-

---

124. Id. at 8.
125. Id. "TTYs/TDDs are devices that the deaf, hard-of-hearing, and the deaf/blind community use to communicate though [sic] standard telephone lines. To speak directly to a TTY user, the receiver of the call also must have a TTY." CASERTA, supra note 26, at 26.
127. JURY SERVICE ACCESSIBILITY, supra note 98, at 3.
128. Id.
129. 2008-2009 ANNUAL REPORT, supra note 126, at 36.
131. See id. at 14–15.
ACCOMMODATIONS FOR THE HEARING IMPAIRED

pants. D.C. courts have "been providing realtime and CART services for many years. They also implement the use of ALS regularly.

It should be noted that the strides that D.C. courts have made in order to better comply with ADA standards may be due in part to the societal influence of Gallaudet University, "the world leader in liberal education and career development for deaf and hard of hearing undergraduate students," located in Washington D.C.

VIII. LIMITATIONS

As discussed, in guaranteeing equality in communication, states and local governments must make communications with individuals with disabilities "as effective as communications with others." Indeed, under the ADA, states and local governments are required to ensure that discrimination based on disability does not affect "participation in programs, activities and services that screen out or tend to screen out persons with disabilities, unless [they] can establish that the requirements are necessary for the provision of the service, program, or activity." The elimination of any such eligibility criteria discourages "stereotypes or generalizations about individuals with disabilities" that may otherwise arise.

These ADA requirements, however, are not without limitation. In the event that real risks are present in relation to these programs or activities, states and local governments may not be required to make particular accommodations available. Rather, states and local governments may establish "legitimate safety requirements necessary for safe operation."

---

132. Id. at 14.
133. Id. at 16.
134. Id. at 17 (recommending the courts make use of ALS which D.C. courts refer to as assistive listening devices (ALD)).
138. Id.
139. See id.
140. Id.
141. Id.
accommodation if that “particular modification would fundamentally alter the nature of its service, program or activity.”

One important limitation to distinguish from the requirements that states and local governments are required to adhere to is that, while courts must make necessary auxiliary aids and services available for court related events, the government is not obligated to provide these services in certain contexts. For example, the court itself is not required to provide accommodations for events such as “depositions or evaluations (psychological, etc.) as requested by counsel in relation to a court matter.” In these situations, the individual giving the evaluation or the attorney requesting depositions must accommodate the hearing impaired person.

In addition, some courts have refused other impractical accommodations. In response to the recommendation that front row seats of courtrooms be reserved for those with hearing impairments, the D.C. courts have responded that “[i]t is impracticable to routinely reserve space in public courtrooms for spectators. Seats can be reserved on a case-by-case basis, when necessary.” Also attended “on a case-by-case basis,” is the recommendation that courtroom equipment and furniture steer clear of “the line of sight for persons who are hard of hearing or deaf who rely on lip reading.”

IX. ISSUES ARISING FROM THE REQUIREMENT TO ACCOMMODATE

Despite the requirement to provide accommodations for hearing impaired court participants, there are still issues that stand in the way of effective communication. The National Association of the Deaf (NAD) has emphasized that “[w]hen a deaf or hard of hearing person does not understand what is going on in the courtroom, justice has not been served.” In addition, an absence of effective communication in police encounters “may result in detention without the ability to call one’s lawyer.” In its devotion to protecting the rights of deaf and hard of hearing persons, NAD has gained

142. Questions and Answers, supra note 137.
143. Caserta, supra note 26, at 25.
144. Id.
145. Id.
146. Status Report, supra note 130, at 15.
147. Id.
148. Id.
149. See Communication Access, supra note 52.
151. Id.
"greater access in the legal system" for individuals who are hearing impaired.\textsuperscript{152}

Police officers now receive more training about the rights of deaf and hard of hearing individuals. Jails and prisons are implementing procedures to ensure that deaf and hard of hearing inmates have equal access to communication. Courts are providing qualified sign language interpreters and CART more regularly. The NAD continues to advocate for equality and to ensure that lawyers, the police, jails, and the courts comply with the Americans with Disabilities Act and the Rehabilitation Act.\textsuperscript{153}

Notwithstanding these advances, serious consequences continue to occur "from the lack of communication access for deaf people in the court system."\textsuperscript{154}

\textbf{A. Law Enforcement}

As designated agencies, law enforcement agencies must provide accommodations for deaf and hard of hearing people so as to accomplish effective communication.\textsuperscript{155} In 2001, a study analyzed "22 post-ADA state and federal criminal cases" nationwide that exemplified compliance issues.\textsuperscript{156} The people who allegedly committed the crimes in these particular cases were hearing impaired individuals.\textsuperscript{157} The study indicates that, at the time, the most common accommodation provided by law enforcement was "no accommodation at all."\textsuperscript{158} With regard to those who interacted with law enforcement with some form of assistance:

Court records indicate that 22.7\% of suspects in these cases had to communicate through signing family members, friends, or law enforcement employees; 13.6\% were interrogated by law enforcement using notewriting. Only 13.6\% of the suspects were provided with professional interpreters at the time of arrest or during subsequent legal proceedings, and approximately 9.1\% of suspects

\begin{itemize}
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Communication Access, supra note 52.
  \item \textsuperscript{155} See 28 C.F.R. §§ 35.101, .190(b)(6) (2009).
  \item \textsuperscript{156} Katrina R. Miller, Access to Sign Language Interpreters in the Criminal Justice System, 146 AM. ANNALS DEAF 328, 329 (2001).
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id.
\end{itemize}
As a result of instances such as these, researchers blame inadequate accommodation on "a lack of knowledge of the communication issues facing persons with hearing loss."\textsuperscript{160}

In response to the need for effective communication with the deaf and hard-of-hearing, the U.S. Department of Justice suggests a variety of communication ideas that may be practical in certain situations.\textsuperscript{161} Of course, the use of qualified sign language interpreters is the best communication method for someone who understands it.\textsuperscript{162} Additional suggestions include speaking while using visual aids and exchanging written notes.\textsuperscript{163} It is important to recognize when exchanging written notes, however, that people "who use sign language [as their primary method of communication] may lack good English reading and writing skills."\textsuperscript{164}

Some other helpful tips include making sure the environment is one that maximizes the potential for effective communication.\textsuperscript{165} For example, a well-lit area with little background noise is ideal.\textsuperscript{166} Also, "[o]nly one person should speak at a time."\textsuperscript{167} Finally, maintaining face-to-face contact when speaking and speaking slowly, using short, direct statements will facilitate comprehension.\textsuperscript{168}

In an effort to further clarify appropriate accommodations, the U.S. Department of Justice warns against the use of family members as interpreters.\textsuperscript{169} The Department also touches on the previously discussed issue of lip-reading and indicates that lip-reading will not be successful in most situations.\textsuperscript{170}

\begin{itemize}
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} McCay Vernon \& Katrina Miller, \textit{Obstacles Faced by Deaf People in the Criminal Justice System}, 150 AM. ANNALS DEAF 283, 290 (2005).
  \item \textsuperscript{162} \textit{Id.}
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{See id.}
  \item \textsuperscript{166} U.S. DEP’T OF JUSTICE, ADA GUIDE, \textit{supra} note 161, at 1.
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} Id. "Do not use family members or children as interpreters. They may lack the vocabulary or the impartiality needed to interpret effectively." \textit{Id.}
  \item \textsuperscript{170} U.S. DEP’T OF JUSTICE, ADA GUIDE, \textit{supra} note 161, at 1.
\end{itemize}
B. Videotape

With respect to police interviews, "[f]or a deaf suspect, videotape is the equivalent of audiotape for a hearing suspect." For a hearing impaired suspect, videotape serves as a record of what occurred, and is essential in determining whether the interpreter conveyed the messages accurately and in such a way that the hearing impaired suspect could comprehend. Without videotape of police interviews with deaf or hard-of-hearing suspects, "everything that the deaf person sign[ed] is hearsay evidence; that is, it is what the interpreter says the deaf person said, not necessarily what was actually said."  

C. Lost in Translation

In addition to arrests of deaf individuals, even more communication barriers arise in "plea and sentencing hearings, suppression hearings, and jury trials." It has been found that a reading level of 7.4 is the typical reading grade level required to comprehend these hearings and trials. As previously mentioned, those who communicate primarily through ASL may lack the reading and writing skills required to comprehend such situations. Adding to this frustration, much of the legal terminology used at these hearings does not translate into ASL with equivalent signs. Rather, when no sign for a particular concept exists, "it can be rendered in fingerspelling (a visual representation of English) or explained in detail by the interpreter, [using] a technique called expansion in the field of interpreting." Although these solutions can be helpful in getting the message across, it takes roughly "4 times longer to provide an accurate interpretation to sophisticated and educated deaf people who are fluent in sign language than it does to transmit the information in spoken English." In order to keep up with the oral presentation, the interpreter is bound to leave out some significant information. Furthermore, if there is not enough time to do an expansion,
and information is left out of the translation, the message will be “simply incomprehensible to the [D]eaf person.”\textsuperscript{181}

Even when granted sufficient time to fingerspell or do expansions for concepts that do not translate, these solutions may not effectively aid a deaf individual with Primitive Personality Disorder (PPD).\textsuperscript{182} PPD has an effect on a “segment of the deaf population that is incompetent, or minimally competent,” regarding comprehension of the legal system.\textsuperscript{183} It affects roughly “20\%-30\% of deaf people.”\textsuperscript{184} Persons with this condition demonstrate “little or no knowledge of sign language,” read at a “grade level of 2.9 or lower,” have “little or no formal education,” have “little or no knowledge of . . . the U.S. Constitution, . . . or how to make change, pay taxes, follow recipes, plan a budget, or function on a job,” and have “a performance IQ of [seventy] or higher.”\textsuperscript{185}

Unfortunately, despite requirements for accommodation and the receptiveness to these requirements, the bulk of deaf individuals who are convicted of a criminal charge and sentenced have no understanding of the legal proceedings that led to their conviction.\textsuperscript{186} The struggle with this complication has even led some to suggest that deaf defendants with PPD should be “declared incompetent to stand trial . . . until made competent.”\textsuperscript{187}

X. CONCLUSION

Aimed at eliminating discrimination against disabled persons,\textsuperscript{188} the ADA “guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, [and] [s]tate and local government services.”\textsuperscript{189} Federal regulations have enforced these requirements.\textsuperscript{190} In so doing, federal regulations also specify, in detail, the various “auxiliary aids and services” that state and local governments may need to make available to hearing-impaired individuals.\textsuperscript{191}

\textsuperscript{181} Id.
\textsuperscript{182} See Vernon & Miller, supra note 160, at 289.
\textsuperscript{183} Id. at 285.
\textsuperscript{184} Id. at 286.
\textsuperscript{185} Id. at 285 Table 1.
\textsuperscript{186} Id. at 289.
\textsuperscript{187} Vernon & Miller, supra note 160, at 289.
\textsuperscript{189} Questions and Answers, supra note 137.
\textsuperscript{190} See 28 C.F.R. § 35.101 (2009).
\textsuperscript{191} 28 C.F.R. § 35.160(b)(1).
The appropriate aid or service for a particular individual, however, will depend on that person’s communication preference. Depending on whether the individual considers himself or herself “Deaf, deaf, late-deafened, or hard-of-hearing,” the individual may require ASL, PSE, Assistive Listening Systems, or CART. Equipped with these aids and services, courts are specifically required to provide accommodations for all court-related events. Indeed, deaf defendants as well as witnesses, jurors, or other litigants who are hearing impaired are all entitled to accommodation.

The Florida state court system continues to demonstrate an overall awareness of and response to disability issues. This is exhibited by Florida’s adherence to ADA compliance and to court procedures that are aimed at recognizing situations where reasonable accommodations may be required. Statutes address interpreting services for the deaf in criminal procedures and protection against discrimination concerning jury duty. The Supreme Court of Florida has recently laid out in extensive detail the procedure for persons with a disability to request accommodation, how courts should respond to such requests, and the requirement to notify disabled individuals of their right to request accommodations.

In comparison, Washington, D.C. courts also exhibit a sensitivity and awareness to the barriers facing effective communication with the deaf and hard-of-hearing. While Washington, D.C. courts demonstrate responsiveness to disability issues, limitations have been set regarding particular accommodations. General limitations based on safety concerns, however, are practical.

Unfortunately, accommodation issues for the deaf and hard-of-hearing remain and continue to pose challenges for the courts to resolve. Due to a lack of understanding about the communication barriers affecting those with hearing impairments, law enforcement has struggled to effectively communi-
cate with deaf or hard-of-hearing suspects.\textsuperscript{206} Videotape conflicts have brought in the issue of hearsay evidence as to what a deaf person, and not the interpreter, actually communicated.\textsuperscript{207} In addition, sign language interpreters cannot always provide effective communication due to time restraints, and as a consequence, much information is lost in translation.\textsuperscript{208} The recognition of PPD and its significance as to the competency level of certain individuals has presented yet another barrier.\textsuperscript{209} Therefore, even with remarkable compliance with accommodation responsibilities by courts, there still remain obstacles in the way of effective communication with hearing-impaired individuals in the court system.

\textsuperscript{206} See generally Vernon & Miller, supra note 160.
\textsuperscript{207} Id. at 287.
\textsuperscript{208} Id. at 288–89.
\textsuperscript{209} Id. at 289.
LABOR RELATIONS IN FLORIDA’S PUBLIC SECTOR: VISITING THE STATE’S PAST AND PRESENT TO FIND A FUTURE SOLUTION TO THE FIGHT OVER THE PUBLIC PURSE UNDER FLORIDA’S FINANCIAL URGENCY STATUTE

JENNIFER L. ROSINSKI*

I. INTRODUCTION................................. 228

II. THE DEVELOPMENT OF BARGAINING RIGHTS FOR FLORIDA’S PUBLIC EMPLOYEES ........................................ 232
    A. The Turning Point: Dade County Classroom Teachers’ Ass’n v. Ryan.............................................. 235

III. FLORIDA’S FRAMEWORK OF THE COLLECTIVE BARGAINING PROCESS UNDER PERA ........................................... 237
    A. The Bargaining Process ........................................ 239
        1. Resolving Bargaining Conflict Through Impasse............. 240

IV. UNILATERAL CHANGE AND FISCAL CONTROL .................................................. 241
    A. Unilateral Action Allowed by PERC ................................... 242
    B. Unilateral Action Allowed by Florida Statutes ................. 244
        1. The Underfunding Statute Prior to 1995 ..................... 245
            a. United Faculty of Florida v. Board of Regents .......... 246
            b. PERC Cases.................................................. 248
    C. Application to State Government .................................. 252
        1. State v. Florida PBA ............................................. 253
        2. The Chiles Case .................................................. 255
        3. The Standards of the Chiles & Florida PBA Tests ......... 257

V. THE FINANCIAL URGENCY STATUTE .................................................. 260
    A. How It Was Created................................................ 260
    B. Case One: Communications Workers of America v. Indian River School Board .............................. 264

+ When cited as part of a party name, “Police Benevolent Association” will be abbreviated “PBA.”

* J.D. Candidate 2010, Nova Southeastern University, Shepard Broad Law Center. The author wishes to thank her husband Nick and their two rays of sunshine—Kyle and Hailey—for their endurance, patience, and love; and her dear friend Dani Moschella for sharing her incredible optimism. She would like to recognize the counsel and encouragement of Christine Cautccy, Professor Michael Flynn, Dean Catherine Arcabascio, and Dean Leslie Cooney. Finally, to the talented 2010–2011 staff of the Nova Law Review, the author extends her sincere appreciation and gratitude, especially to Jeremy Singer, Ashley Dutko, Janelle Mason, and Brandon Chase; and of course, to the junior staffers for their humor, support, and entertainment.
I. INTRODUCTION

In public sector bargaining it is often hard to distinguish between an employer's contended inability to fund a collective bargaining agreement with its unwillingness to pay.1 Undoubtedly governments do experience periods of fiscal concern, but claiming “inability to pay” as frequently as they do renders those claims about as effective as “crying wolf.”2 The notion of underfunding a bargained-for labor agreement in the public sector is not simply a problem of economics; rather, such a decision is driven largely by political pressures inherent to the public domain.3 It is that political feature that distinguishes collective bargaining in the public sector from that in the private.4

The political habits of Florida’s public sector are no less intrusive. The state’s collective bargaining scheme is riddled with concessions, exceptions, limitations, and conditions, all in the name of striking a balance among competing legal powers and political decision-making.5 For instance, the process requires reconciliation of labor bargaining laws with non-labor laws,6 with the legislature’s law-making and appropriation powers,7 and with public em-

2. See id.
3. See id. at 122–24.
4. See id. at 113.
6. See id. at 1252.
7. Id. at 1243, 1245.
employers’ struggle to maintain flexibility in cases of bona fide fiscal crises. The latter example is especially relevant today as Florida governments struggle to maintain integrity in their enterprises amidst the state’s historically weak economy.

Within the state’s statutory regulations for bargaining in the public sector, public employers will find the Financial Urgency Statute in section 447.4095 of the Florida Statutes quite appealing. Passed in 1995, the law seemingly allows a public employer to avoid its collective bargaining responsibility and abridge the collective bargaining contract in cases of "financial urgency." But despite the legislature’s good intentions when crafting the statute, its language poses more questions than answers. Even now, fifteen years after its enactment, the statute remains a mystery. Outside of a single decision granted by Florida’s Public Employees Relations Commission (PERC) in 2009, there is not much guidance for those seeking to in-
voke the statute. Nonetheless, public employers are declaring “financial urgency” more frequently now than ever before.16

The City of Miami’s fiscal condition in late 2010, as it was displayed by the media, painted a good portrait of the conflict between public spending and collective bargaining.17 Purportedly facing a $100 million budget deficit in 2011, the city contemplated layoffs for more than 1000 of its employees.18 A large part of its financial woes, claimed the city, was attributed to growing pension costs promised to city firefighters through its existing labor agreement with the group’s powerful union.19 The bargaining agreement carried with it a $101 million price tag for the 2011 fiscal year.20 The city’s desperation to avoid that price led it to invoke a “financial urgency” under Florida Statutes section 447.4095.21

There was, however, a large chunk of information missing from the media’s story. The city’s obligation to pay the pension costs was imposed by a mutually agreed to collective bargaining agreement.22 At some point prior to the dispute, Miami officials bargained over the terms contained therein, a process that envisions a give and take relationship, where concessions are made in exchange for giving by the other side.23 That suggests the firefighter union forfeited something in return for its sought-after pension.24 Allowing the city to unilaterally change the terms of that bargained-for-benefit based on an unverified assertion of inability to pay—and without returning to the collective bargaining process to remedy the problem—essentially renders the bargaining process null.25

PERC, in 2009, issued the first and most recent interpretation of the Financial Urgency Statute whose surprising decision lends support to the city’s actions.26 But adhering to PERC’s decision would cause the city to abridge

17. See Ruby, supra note 13, at 10 (recognizing that 2002 was the first year in which any public entity and employee union commenced litigation over the statute); see, e.g., Julie Brown, City Weighs Layoffs, Event Cuts, MIAMI HERALD, Sept. 17, 2010, at 3B (“Following in the steps of the city of Miami, [the] Hollywood City Commission earlier this month declared a ‘financial urgency,’ a legal maneuver that allows city officials to unilaterally reopen labor contracts when in a dire financial crisis.”).

18. Id.
19. Id.
20. Id.
22. See Rabin, supra note 17.
23. See Befort, supra note 5, at 1266.
24. See id.
25. See id.
two fundamental rights that its employees enjoy under the Florida Constitution. Article I, section 6 of the Florida Constitution grants public employees the right to collectively bargain over terms and conditions of employment. And article I, section 10 of the Florida Constitution that protects public employees' vested right to collectively bargain. The Supreme Court of Florida has held that in a situation in which the government seeks to violate those rights, it must first prove a compelling state interest and show no viable alternatives to its proposed action. When the imposition of a fundamental right is involved, Florida's highest court does not approve the application of any less-stringent standard, particularly in this context.

The Financial Urgency Statute is not the first of its kind in Florida. Section 447.309(2) of the Florida Statutes, commonly referred to as the Underfunding Statute, serves a similar purpose. The Supreme Court of Florida interpreted and applied the Underfunding Statute in two significant cases just a few years prior to that statute's major amendment; the amendment to section 447.309(2) was part of the same bill in which the legislature adopted section 447.4095. The Court, in State v. Florida Police Benevolent Association (Florida PBA) and Chiles v. United Faculty of Florida, set the standards for when and how a public employer can abridge its employees' fundamental rights by making unilateral changes to the collective bargaining agreement in times of a financial crisis. Accordingly, there is no need, and no justification, for Florida courts to start from scratch in deciding how to interpret and apply the new Financial Urgency Statute since Florida PBA and Chiles have established the relevant precedent. Any interpretation or appli-

27. FLA. CONST. art. I, § 6. Article I, section 6 is known as the "Right to work" provision. Id. It reads:
The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Id.

28. FLA. CONST. art. I, § 10. Article I, section 10, the contracts clause, reads: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Id.

29. Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).


32. See Chiles, 615 So. 2d at 673; State v. Fla. Police Benevolent Ass'n (Fla. PBA), 613 So. 2d 415, 419 (Fla. 1992).

33. 613 So. 2d 415 (Fla. 1992).

34. 615 So. 2d 671 (Fla. 1993).

35. See Chiles, 615 So. 2d at 673; Fla. PBA, 613 So. 2d at 421.

36. Chiles, 615 So. 2d at 673; Fla. PBA, 613 So. 2d at 421.
cation of the Financial Urgency Statute incongruent with those cases would render it unconstitutional, and therefore void.

This paper offers insight into how Florida has dealt with the conflict between control of the public purse and collective bargaining, and how it should proceed in the future to ease those conflicts under the Financial Urgency Statute. Part II will provide an overview of the history of collective bargaining in Florida’s public sector and lead into a framework of how the collective bargaining process works today. That discussion will make the important distinction between impact and collective bargaining, and how each relates to the statutory impasse procedure. The next section will review the regulations that guide the relationship between a public employer’s fiscal control and its permissive unilateral change to the terms of a labor contract. Part V will discuss the Florida Public Employees Relations Commission (PERC) as well as court decisions on the Underfunding Statute and how those interpretations provide examples of how the Financial Urgency Statute should be applied today. Part VI will attempt to unravel the Financial Urgency Statute by interpreting its legislative history and its existing case law, and will be followed by a discussion of its constitutional implications. Ultimately, that part will demonstrate how the statute can—and should be—interpreted in order to make it compatible with the Florida Constitution, the rights of public employers, and the rights of public employees.

Finally, the paper will conclude with an outlook of the Financial Urgency Statute with an interpretation that makes it compliant with the state Constitution and common law. In that form, it has the potential to provide each side of the bargaining table with the protection it deserves: a solution for a public employer that needs to avoid its contractual labor obligations to preserve its financial integrity, while congruently preserving the bargaining process and fundamental rights of public employees under Florida’s Constitution.

II. THE DEVELOPMENT OF BARGAINING RIGHTS FOR FLORIDA’S PUBLIC EMPLOYEES

Congress paved the way for union activity in the private sector with the passing of the 1935 National Labor Relations Act (NLRA). Eight years

---


Later, the Florida Legislature crafted its own law, Chapter 447 of the Florida Statutes, to recognize the rights of employees within the state to self-organize and collectively bargain with their employers. But the term “employee” as used in chapter 447 was ambiguous. Unlike the language in the NLRA, which specifically excluded public employees from its application, the Florida legislation was silent as to whether the term “employee” included public workers.

Also in 1943, the year it adopted chapter 447, Florida amended section 12 of the Declaration of Rights of its 1885 Constitution to include a “right to work” provision, thereby designating itself a “right to work” state. Under that provision, the state prohibited employers from requiring their employees to join unions as conditions of employment. It gave public employees the right to make independent decisions about their participation in organized labor. But again, the legislature left section 12 ambiguous in regard to its application to public employees. The ambiguity in section 12 and chapter 447 left no choice for public employees but to return to the common law rule, which imposed no obligation on their employers to collectively bargain with them.

Then in 1946, in Miami Water Works Local No. 654 v. City of Miami, the Supreme Court of Florida resolved the ambiguities by ruling that chapter

---

Congress passed the NLRA to protect the rights of employees to organize and bargain collectively, to encourage the collective bargaining process and to protect employers from work disruptions caused by bargaining issues. See 29 U.S.C. §151 (2006).


41. 29 U.S.C. § 152. “The term ‘employer’ includes any person acting as an agent of an employer . . . but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . .” Id.

42. See Fla. Stat. § 447.02 (missing a definition of “employee”).

43. H.R.J. Res. 13, 29th Leg., Reg. Sess. (Fla. 1943) (enacted). The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Id.

44. Schermerhorn v. Local 1625 of Retail Clerks Int’l Ass’n, 141 So. 2d 269, 272–73 (Fla. 1962), aff’d 375 U.S. 96 (1963).

45. Id.


47. McGuire, supra note 37, at 34.

48. 26 So. 2d 194 (Fla. 1946) (en banc).
447 and section 12 applied to only the private sector.\textsuperscript{49} It based part of its reasoning on the fact that chapter 447 afforded those covered under its provisions a right to strike, the act of which was adverse to the theory of government.\textsuperscript{50} Logically then, the Court concluded that the legislature must not have intended for the statute to apply to public labor affairs.\textsuperscript{51}

The aftermath of the \textit{Miami Water Works Local No. 654} decision, paired with the common law regulation of collective bargaining, stripped public employees' access to any meaningful union activity in Florida.\textsuperscript{52} But with the onset of the sixties, their pent-up frustration emerged aimed at state lawmakers.\textsuperscript{53}

Between 1960 and 1969, the state experienced twenty-five public employee strikes that caused public agencies significant losses in manpower and services.\textsuperscript{54} Their hostility peaked in 1968 when 35,000 public school teachers gathered to protest their lack of bargaining rights—the first protest of its kind in the nation.\textsuperscript{55} The statewide teachers' strike caught the interest of state lawmakers, who were otherwise distracted by the 1968 revision of the Florida Constitution.\textsuperscript{56} Their inattentiveness contributed to the death of every bill submitted in response to the teachers' protest.\textsuperscript{57} But their efforts were not entirely in vain.\textsuperscript{58} Floridians approved the new constitution that year, which did away with section 12 and replaced it with a new “right to work” provision found in article I, section 6.\textsuperscript{59} The language in the new section was almost identical to that in section 12,\textsuperscript{60} but nonetheless would be

\textsuperscript{49.} Id. at 197.
\textsuperscript{50.} Id.
\textsuperscript{51.} Id.
\textsuperscript{52.} McGuire, supra note 37, at 34, 38.
\textsuperscript{53.} Id. at 29–30.
\textsuperscript{55.} McGuire, supra note 37, at 28–29.
\textsuperscript{56.} Id. at 30.
\textsuperscript{57.} See id. at 30–31.
\textsuperscript{58.} See John-Edward Alley & Joseph W. Carvin, \textit{Collective Bargaining for Public Employees in Florida—in Need of a Popular Vote?}, 56 FLA. B.J. 715, 717 (1982). The 1968 Constitutional Revision Commission made two recommendations affecting collective bargaining: 1) to specify that public employees do not have the right to strike, and 2) to include “in the collective bargaining provision an extension of collective bargaining rights to ‘employees, public and private.’” Id.
\textsuperscript{59.} McGuire, supra note 37, at 40.
\textsuperscript{60.} Id. For the language of Florida's post-1968 “Right to work” provision, see supra text accompanying note 27.
interpreted to provide public sector employees the rights for which they had been fighting. 61

A. The Turning Point: Dade County Classroom Teachers’ Ass’n v. Ryan

In 1969, the Supreme Court of Florida, in Dade County Classroom Teachers’ Ass’n v. Ryan, 62 interpreted the new “right to work” provision as it related to public employees’ right to collectively bargain with their employers. 63 With an opinion written by Chief Justice Ervin, a unanimous Court held that “with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted [to] private employees by [s]ection 6.” 64 The Court then sent a clear message to the legislature pushing it to enact regulations that would allow its decision to have effect. 65 To that regard, Chief Justice Ervin noted:

A delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process. 66

Following the landmark decision in Ryan, Florida became the first state to provide public employees a constitutional right to collectively bargain. 67 The case also signified the beginning of a judicial pledge to protect the those rights for public employees in Florida. 68

The opinion in Ryan was significant, but like the provision in article I, section 6, not self-executing. 69 As Chief Justice Ervin so urged, the legislature needed to adopt guidelines before public employees could fully enjoy

---

61. McGuire, supra note 37, at 40 nn.55–58.
62. 225 So. 2d 903 (Fla. 1969).
63. Id. at 905.
64. Id.
65. Id. at 906.
66. Id.
68. Orta, supra note 54, at 277.
69. See Ryan, 225 So. 2d at 906.
their new constitutional right.\textsuperscript{70} After two years of waiting for the Court’s mandate to be obeyed, public employees again grew frustrated by the ignorance of lawmakers at all levels of government.\textsuperscript{71}

Then, three years post the Ryan decision, a Dade County teacher’s union filed suit against the Florida Legislature in an effort to compel it to adopt the necessary guidelines.\textsuperscript{72} In Dade County Classroom Teachers Ass’n v. Legislature,\textsuperscript{73} the Supreme Court of Florida reiterated its decision that public employees enjoy the same right to collectively bargain as do private employees under the Florida Constitution.\textsuperscript{74} Nonetheless, on balance, the Court decided that it was premature to certify judicial enactment of the rights.\textsuperscript{75} But it noted that if the legislature did not act within a reasonable amount of time, then the Court would be forced to create the guidelines by judicial decree.\textsuperscript{76}

Heeding the Court’s warning, the 1973 Florida Legislature passed the comprehensive Public Employees Relations Act (PERA),\textsuperscript{77} making Florida the first southern state to grant all its public workers the right to collectively bargain with their employers.\textsuperscript{78} PERA essentially provided public employees with the right to join and participate in labor unions, required public employers to negotiate with their employees’ bargaining agents, and authorized the

\begin{itemize}
\item \textsuperscript{70} Id.
\item \textsuperscript{71} See McGuire, supra note 37, at 49 (In 1971, a local of the International Association of Firefighters in Broward County sought from the court a writ of mandamus to compel its employer to collectively bargain, per the Ryan decision. The Fraternal Order of Police took the same action against its employer in Orlando). “[L]ocal governments refused to bargain absent statutory guidelines.” McHugh, supra note 67, at 267.
\item \textsuperscript{72} Dade Cnty. Classroom Teachers Ass’n v. Legislature, 269 So. 2d 684, 685 (Fla. 1972).
\item \textsuperscript{73} Id. at 685.
\item \textsuperscript{74} Id. at 688.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Public Employee Relations Act (PERA), ch. 74-100, § 3, 1974 Fla. Laws 134 (codified as amended at Fla. STAT. §§ 447.201–609 (1975)). For a comprehensive review of PERA, see generally McHugh, supra note 67. The statement of policy for PERA as it reads today is:

The public policy of this state, and the purpose of this part, is to provide statutory implementation of [article I, section 6] of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. Nothing herein shall be construed either to encourage or discourage organization of public employees.

FLA. STAT. § 447.201 (2010).
\item \textsuperscript{78} McHugh, supra note 67, at 264.
\end{itemize}
creation of PERC to oversee public labor relations in the state. The legislature constructed the provisions of PERA to resemble the rights afforded to private employees under the NLRA. But, unlike its private sector counterpart, PERA prohibited public employees from striking.

III. FLORIDA'S FRAMEWORK OF THE COLLECTIVE BARGAINING PROCESS UNDER PERA

The provisions contained in part II, chapter 447 of the Florida Statutes implement the article I, section 6 guarantee of collective bargaining for public employees. Collective bargaining means a process of mutual obligations in which a public employer and a bargaining agent have to meet at reasonable times, "negotiate in good faith", and effect a written contract encompassing agreements reached concerning the "wages, hours, and terms and conditions of employment"—otherwise known as mandatory subjects of bargaining. Neither party is compelled to agree to an offer or yield to a

79. FLA. STAT. § 447.201(1)-(3). PERC is "the ultimate authority to administratively interpret chapter 447 and article I, section 6, of the Florida Constitution." Pub. Emps. Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n (Dade Cnty. PBA), 467 So. 2d 987, 989 (Fla. 1985).
80. McHugh, supra note 67, at 270.
81. FLA. STAT. § 447.201(4).
82. Id. § 447.201.
83. The term "public employer"—like "legislative body"—is a term of art used by PERC. See id. § 447.203(2) (stating that "[p]ublic employer . . . means the state or any county, municipality, or special district or any subdivision or agency thereof which the commission determines has sufficient legal distinctiveness properly to carry out the functions of a public employer").
84. Id. § 447.203(14). The Florida Legislature defines good faith bargaining as:

[T]he willingness of both parties to meet at reasonable times and places, as mutually agreed upon, in order to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord. It shall include an obligation for both parties to participate actively in the negotiations with an open mind and a sincere desire, as well as making a sincere effort, to resolve differences and come to an agreement.

Id. § 447.203(17).
85. FLA. STAT. §§ 447.309(1), 203(14); see also Sch. Bd. of Orange Cnty. v. Palowitch, 367 So. 2d 730, 732 (Fla. 4th Dist. Ct. App. 1979) (holding that the bargaining table is the legislatively mandated forum to determine wages, hours, and terms and conditions of employment).
86. Chapter 447 does not provide a list of subjects to be treated as mandatory in terms of bargaining. See FLA. STAT. § 447.309(1) (requiring only that the certified employee union and the public employer "bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit"). As such, PERC is tasked to make that decision on a case-by-case basis. PUB. EMPS. RELATIONS COMM’N, SCOPE OF BARGAINING 2 (2d ed. 2005), available at http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf [hereinafter PERC SCOPE OF
concession, unless otherwise provided by PERC. Florida law also requires that the negotiation process be effective and meaningful for public employees. That means the negotiations process cannot lead to a result that renders that right empty or hollow, and agreed upon contract provisions should not be subject to unilateral change at the whim of the public employer. In support of that reasoning, PERC established through its case law that public employers may not unilaterally change a mandatory subject of bargaining until the parties bargain to impasse or in two other limited circumstances: 1) where the bargaining agent is found to have unmistakably waived its right to bargain, or 2) when the employer has a valid defense of “exigent circumstances,” which will be discussed at greater length in section IV below. Otherwise, unilateral change of a collective bargaining contract by a public employer results in a per se unfair labor practice charge for the employer. In addition to the three exceptions established by PERC, there are two statutory exceptions to when a public employer may act unilaterally to change a mandatory subject of bargaining encompassed in a collective bargaining agreement—the Underfunding Statute, which applies to only state-level government, and the Financial Urgency Statute. The particulars of

BARGAINING]. However, PERC allows a broad scope of topics to be included as “mandatory” in an attempt to balance the power between employers and unions. Palm Beach Junior Coll. Bd. of Trustees v. United Faculty of Palm Beach Junior Coll., 425 So. 2d 133, 139, 140 (Fla. 1st Dist. Ct. App. 1982) approved in part by Palm Beach Junior Coll. Bd. of Trustees v. United Faculty of Palm Beach Junior Coll., 475 So. 2d 1221 (Fla. 1985) (stating that “[t]he courts of Florida in numerous instances have noted that section 447.309(1), Florida Statutes, requires a relatively broad scope of negotiations to help counter-balance the absence of the right to strike by public employees,” and further stating that “PERC has concluded, rightly we believe, that the stability to be encouraged in the bargaining relationship between public employer and employee requires the parties to conduct negotiations over a broad range of subjects”). See supra PERC SCOPE OF BARGAINING for a comprehensive look at PERC’s decisions regarding which subjects are and are not mandatory.

87. FLA. STAT. § 447.203(14).
89. Id. (finding that the right of employees to collectively bargain “is not an empty or hollow right subject to unilateral denial,” but “is one [that] may not be abridged except upon showing of a compelling state interest”).
90. Fraternal Order of Police, Fort Lauderdale Lodge 31, 14 F.P.E.R. ¶ 19150, at 394 (1988) (“To meet this burden of proof an employer must make a clear and unmistakable showing that the certified employee organization consciously yielded its right to negotiate with respect to the particular subject of bargaining in question.”).
92. Id.
those two statutes are at issue in this paper and will be discussed below at great length.

A. The Bargaining Process

Sometimes, there is a very thin line between a mandatory subject and a permissive subject of bargaining. Normally, a public employer is permitted to make a unilateral change to conduct or action that escapes the statutory definition of a mandatory subject, or if the subject of that action falls within a right of management. In those two instances, the subject is considered a permissive subject of bargaining.

The legislature defined "management rights" in section 447.209 of the Florida Statutes. But, generally, management rights are those rights that allow employers to exercise control over decisions that have significant impacts on the functioning of their enterprises. But, there is an important caveat to that rule that makes management rights more of a hybrid between permissive and mandatory subjects: if the modification of a subject classified as a management right would have an effect on the employees' terms and conditions of employment, then the public employer is required to give those employees' bargaining agent an opportunity to bargain the impact of that modification, which is known as impact bargaining.

Impact bargaining, unlike collective bargaining, restricts negotiations only to the effect of the change and not the change itself. Also, unlike collective bargaining, the employer that impact bargains does not need to

94. Id. § 447.4095.
95. See Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 609 So. 2d 31, 33-34 (Fla. 1992).
96. Id. at 33.
97. Id.
98. See FLA. STAT. § 447.209. The Florida Legislature defines public employers' rights as:

[T]he right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons.

Id.

99. See Fraternal Order of Police, Miami Lodge 20, 609 So. 2d at 34.
100. City of Jacksonville v. Jacksonville Supervisor’s Ass'n, 791 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 2001) (holding that section 447.209 does not require a public employer to negotiate good faith changes in its organization and operations “unless those [changes] impact the determination of wages, hours, and terms and conditions of employment of employees within the bargaining unit”).
101. See id. at 511.
complete negotiations before it implements its changes. The employer must, however, provide adequate notice to the bargaining unit of its intention to implement the change, and if the bargaining unit requests to bargain the impact of the management rights, the employer must do so for a reasonable period of time before implementing its decision.

Public sector collective bargaining agreements that are accepted and ratified by the parties become legally enforceable contracts. Based on the law of contracts, the parties must abide by the provisions of a collective bargaining agreement during its life. But unlike contract law, in which parties' obligations expire along with the contract, the terms of a collective bargaining contract survive its death. The time following expiration of the contract is known as the "status quo" period. The status quo encompasses the terms and conditions of employment that employees covered under the previous contract have reasonable expectations to continue, and it mandates that the employer actually continues implementation of those terms until a new agreement is reached. The "reasonable expectation" can stem from an established past practice or from an explicit provision in the collective bargaining contract.

1. Resolving Bargaining Conflict Through Impasse

Whether engaged in collective or impact bargaining, parties are never forced to reach an agreement. In situations where the parties cannot agree to a term, each has the option to declare an impasse. The impasse procedure specifies an intricate procedure an employer must follow before unilate-

102. Id. at 510.
103. Id. (noting that an employer can satisfy its obligation to impact bargain by providing to the bargaining agent "notice and a reasonable opportunity to bargain").
105. See Palowitch, 2 F.P.E.R. ¶ 280, at 282 (1977) (holding that a public employer's unilateral change to any mandatory subject of bargaining is a "per se violation of the duty to bargain collectively and constitutes an unfair labor practice").
107. City of Delray Beach v. Prof'l Firefighters of Delray Beach, Local 1842, 636 So. 2d 157, 159 n.3 (Fla. 4th Dist. Ct. App. 1994).
108. Id. at 162–63.
109. Id. at 159 n.3, 162.
110. See FLA. STAT. § 447.403(1) (2010).
111. Id.
rally implementing its own terms. The procedure allows for optional mediation between the parties before they proceed to a special magistrate hearing. The special magistrate will recommend a non-binding resolution. If the special magistrate’s proposal for settlement of the contract is rejected by either party, the matter is referred to the designated legislative body for final disposition.

IV. UNILATERAL CHANGE AND FISCAL CONTROL

Espousing a general principle of bargaining in the private arena, Chief Justice Burger, speaking for the Supreme Court of the United States, once stated, “Having had the music, he must pay the piper.” He directed his words at a private employer who sought to reap the benefits of a bargained-for labor contract without paying its cost. Therein lies one of the major differences between collective bargaining in the two sectors. For private actors, collective bargaining is all about the economics, while those in the public sphere act according to not only economics, but to politics, as well.

Public employees bargain over public money, the control of which is a legislative function. Bargaining in the public sector is largely intertwined with politics; public employees are not the only ones fighting for a piece of the budget—citizens, interest groups, and politicians each have a perspective.

112. Orta, supra note 54, at 279. The impasse process acts as a substitute for public employees’ right to strike. Id.
113. Id. at 279–80; FLA. STAT. § 447.403(1)–(2)(a).
114. Id. § 447.403(3).
115. Id. § 447.403(4); see also id. § 447.203(10) (defining “legislative body” in the context of the impasse procedure). The legislative body should determine a resolution based on the best interests of the public and the employees. Id. § 447.403(4)(d). Once its decision is issued, the provisions of the contract are reduced to writing, signed by the parties, and submitted to the union for ratification. Id. § 447.403(4)(e). If the union ratifies the contract, it becomes binding for the mutually agreed-to term. FLA. STAT. § 447.403(4)(e). If it is not ratified, the contract takes effect on the date of the legislative action and is binding only through “the remainder of the first fiscal year which was the subject of negotiations.” Id.
117. Id. at 270–71.
118. See KEARNEY WITH CARNEVALE, supra note 1, at 113.
119. Id.
120. State v. Fla. Police Benevolent Ass’n (Fla. PBA), 613 So. 2d 415, 418–19 (Fla. 1992) (noting that public and private sector collective bargaining will never be the same when it comes to funding negotiated agreements); see also David H. Allshouse, The Role of the Appropriations Process in Public Sector Bargaining, 17 URB. LAW. 165, 165 (1985) (“[T]he appropriations process [at all levels of government] has become a major factor in public sector employee relations.”).
on how the money should be spent. The political context in which those funding decisions are made place great limitations on the abilities of employers and bargaining agents to cut deals. This is especially true when money is tight—making decisions on what to fund gets harder and pressure from outside groups stronger.

In the spirit of relieving that pressure on governments, the trend in Florida law is to allow public agencies leeway to deal with financial emergencies by expanding the instances in which they may take unilateral action to modify a term of the contract. Besides the three aforementioned instances when, pursuant the PERC, a public employer may unilaterally change a mandatory subject of bargaining, public agencies too have options to act under statutory provisions.

A. Unilateral Action Allowed by PERC

As pronounced by the legislature in part II, chapter 447 of the Florida Statutes, the provisions therein are implemented to ensure employees the rights they are promised under article I, section 6 of the Florida Constitution. To that end, the legislature granted PERC the power to “adopt, promulgate, amend, or rescind such rules and regulations as it deems necessary . . . to carry out the provisions of [chapter 447].” Under that authority, PERC forbids unilateral action by an employer concerning a mandatory subject of bargaining absent an explicit waiver or in situations in which it can prove exigent circumstances, or after the parties bargain to impasse and the employer enacts the legislative body’s recommendation. The only excep-

121. See KEARNEY WITH CARNEVALE, supra note 1, at 113.
123. See id. at 60.
124. Compare Dade Cnty. Classroom Teachers’ Ass’n v. Ryan, 225 So. 2d 903, 905 (Fla. 1969) (holding that “with the exception of the right to strike, public employees have the same rights [as private employees in terms of collective bargaining”), with Chiles v. United Faculty of Fl., 615 So. 2d 671, 673 (Fla. 1993) (recognizing “the legislature must be given some leeway to deal with bona fide [financial] emergencies”) and Fla. PBA, 613 So. 2d. at 418 (holding public and private employees’ rights to collectively bargain are inherently different since a negotiated agreement is always subject to funding by the legislature).
125. See FLA. STAT. § 447.403(1) (2010).
126. Id. § 447.201.
127. Id. § 447.207(1).
tion addressed in this paper is exigent circumstances, because it is the exception pled by employers facing financial distress.129

The exigent circumstances exception is an affirmative defense to unilateral change available to public employers.130 Its purpose is to "provide relief to an employer who is forced by an emergency to quickly and immediately modify the wages, hours, or terms and conditions of employment of its employees."131 Ultimately, it allows the employer to modify the terms or conditions of a mandatory subject of bargaining without first negotiating the change.132 Unilateral action based on this exception is proper only in response to an urgent need,133 and only when the employer can prove there is no viable alternative to its action.134 The defense of waiver will not be discussed in this paper, because it is not an applicable defense to a public employer's financial distress.135

In the context of financial emergencies, an employer can claim exigent circumstances in defense to a complaint by a union for the employer's unilateral change to a mandatory subject of bargaining.136 But PERC has been reluctant over the years to allow employers to use the defense based on assertions that they cannot afford to abide by their contract terms.137 For instance, PERC has recognized that a shortfall of funds in one budget is not a per se emergency because of the availability of funds in other budgets that can be

130. See id.
131. Id. (quoting Fla. Sch. for the Deaf & the Blind Teachers United (Fla. Sch. for the Deaf & the Blind Teachers United I), 11 F.P.E.R. ¶ 16080, at 263 (1985), aff'd, 483 So. 2d 58 (Fla. 1st Dist. Ct. App. 1986)).
132. See id.
134. See Volusia Cnty. Fire Fighters Ass'n, Local 3574, 32 F.P.E.R. ¶ 89, at 218 (2006) (finding that an inability to reach an agreement is not an exigent circumstance because, the employer has an alternative solution in impasse procedures); Fla. Classified Emp's. Ass'n, 7 F.P.E.R. ¶ 12100, at 236 (1981) (declaring the exigent circumstances defense requires a showing of no viable alternative to taking immediate action).
135. Sarasota Classified-Teachers Ass'n 1, 18 F.P.E.R. ¶ 23069, at 122 (finding that the appropriate defense is exigent circumstances for public employer financial distress).
136. See id.
transferred to remedy the shortfall. Moreover, the Commission has held that even if there is a known problem of decreased revenue for the employer, that fact alone is not enough to show a financial emergency.

A good example of PERC's position on that issue is found in Martin County Education Ass'n (Martin County 1). In that case, the Martin County School Board, contrary to the terms of the collective bargaining agreement, unilaterally froze salaries for the upcoming year because of an anticipated shortfall in the budget. But PERC declined to find that the school board faced an exigent circumstance, which would excuse its unilateral action. It noted that while it could "not intrude into the political decision-making process of local school boards as they decide how to prioritize spending," it did have the authority to determine whether a true emergency existed. In that case, the school board failed to show proof of a real emergency that justified its action to bypass the bargaining process, because its financial records showed a pool of unallocated funds large enough to cover the cost of the contractual pay raises. It did not matter that those funds were from a budget other than the one from which they usually distributed the pay raises.

B. Unilateral Action Allowed by Florida Statutes

Currently there are two Florida laws that create statutory exceptions to the prohibition of unilateral action by a public employer over mandatory subjects of bargaining: section 447.309(2), the Underfunding Statute, and section 447.4095, the Financial Urgency Statute. The latter was born from the amendment of the first. In that context, it is important to understand

138. Tarpon Springs Fire Fighters Ass'n, Local 3140, 19 F.P.E.R. ¶ 24013, at 48 (finding that funds available from other budget sources, regardless of whether the city wanted to use those funds, negated the existence of a financial exigency).
139. Id.
141. Id.
142. Id. at 101.
143. Id.
144. Id.
146. See FLA. STAT. §§ 447.309(2), 4095 (2010).
how governments used—or misused—the Underfunding Statute prior to its amendment in 1995.  

1. The Underfunding Statute Prior to 1995

In an effort to resolve the inherent conflict between the constitutional right to bargain granted by Florida Constitution, article I, section 6, and the legislature’s power to appropriate funds granted by Florida Constitution, article VII, section 1(c), the legislature included the language codified in section 447.309(2) in the Public Employment Relations Act (PERA). As originally adopted, the statute read:

Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute nor be evidence of any unfair labor practice.

The Underfunding Statute, as it was interpreted and applied prior to 1995, allowed a “legislative body” to disregard the amount of funding pre-

---

149. Id.
150. Id. “No money shall be drawn from the treasury except in pursuance of appropriation made by law.” FLA. CONST. art. 7, § 1(c). “That provision, and the vesting of ‘the legislative powers of the state’ in the Florida Legislature by [article III, section 1, renders the appropriation of State funds the exclusive constitutional prerogative of the Legislature.” United Faculty of Fla. v. Bd. of Regents, 365 So. 2d 1073, 1074 (Fla. 1st Dist. Ct. App. 1979).
151. Public Employee Relations Act (PERA), ch. 74-100, § 3, 1974 Fla. Laws 134, 144 (codified as amended at FLA. STAT. §§ 447.201–609 (1975)).
152. Id.
153. “Legislative body” is a term of art as used in Chapter 447 of the Florida Statutes. The legislature defines the term in section 447.203:

“Legislative body” means the State Legislature, the board of county commissioners, the district school board, the governing body of a municipality, or the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment and which, as the case may be, is the appropriate legislative body for the bargaining unit.
viously agreed to in a collective bargaining agreement between the public employer and the public employee, on the theory that a "legislative body" could not be charged by the executive branch with an order to spend money.154 The First District Court of Appeal first interpreted the Underfunding Statute in United Faculty of Florida v. Board of Regents155 in 1979 as it applied to the state government, creating a limitation on the constitutional right of public employees to collectively bargain.156

a. United Faculty of Florida v. Board of Regents

In Board of Regents, the First District held that a collective bargaining agreement between the Board of Regents (BOR) and United Faculty of Florida (UFF)157 does not strip the legislature of its appropriations power, but instead, that agreement is subject to legislative funding.158 Here, after extensive negotiations and just before an impasse hearing, the parties reached an agreement over pay increases.159 Pursuant to statutory duty, the governor amended his budget to request appropriations from the legislature sufficient to fund the parties' recent agreement.160 But instead of funding the requested $6.6 million, the legislature appropriated only $5.1 million.161 UFF thereafter brought a charge against the State claiming that there was enough money contained in the aggregate appropriations to fund the amount negotiated in the contract.162 BOR countered that the legislature had chosen to appropriate

---

154. See, e.g., Holmes Cnty. Teachers' Ass'n, 9 F.P.E.R. 14207, at 401 (1983) ("The collective bargaining agreement to which the petitioner is a party did not divest the legislature of its constitutional powers in the appropriation of public monies" pursuant to section 447.309(2)).
156. Id. at 1077–79; Orta, supra note 54, at 281.
157. "The UFF is the certified bargaining agent [that] represents approximately 5,000 faculty and professional employees of the BOR." Bd. of Regents, 365 So. 2d at 1074.
158. Id. at 1078–79.
159. See id. at 1076.
160. Id. The governor was acting pursuant to his statutory duty under section 447.309(2), which, prior to its 1995 amendment, read: "Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement." Id. at 1075–76 n.4 (quoting Fla. Stat. § 447.309(2) (1993) (amended 1995)).
161. Bd. of Regents, 365 So. 2d at 1077.
162. Id. at 1074.
only a specific amount for use in implementing the contract from which it could not stray.\(^{163}\)

The opinion began by noting that article VII, section 1(c) of the Florida Constitution grants to the Florida Legislature exclusive control over state monies.\(^{164}\) Acting under that power, the legislature "explicitly and unmistakably" chose to underfund the negotiated agreement by $1.5 million, which it had a constitutional right to do.\(^{165}\) The court held that collective bargaining agreements do "not divest the [l]egislature of its constitutional powers" to appropriate public funds;\(^{166}\) they do not make "the exercise of legislative discretion a simple ministerial function."\(^{167}\) Instead, collective bargaining agreements are always made subject to the legislature's appropriations authority.\(^{168}\) Any attempt by BOR to fund the contract at any other amount would be a "blatant disregard" of that legislative power.\(^{169}\) Moreover, the district court commented that even if the appropriations to fund the collective bargaining agreement in question were free of restrictions, the court could not demand that BOR pull funds from other appropriations to supplement that agreement's funding.\(^{170}\) It reasoned that such a ruling would cause irreconcilable conflict among other funded agreements.\(^{171}\) Lastly, the court held that the legislature's underfunding was not an impairment of the contracts clause\(^{172}\) since collective bargaining agreements are always contingent on legislative appropriations, a fact well-known by both parties before they began negotiations.\(^{173}\)

The district court's holding was not explicitly limited to the state government,\(^{174}\) but at the same time, its language did not contemplate application of the same theory to local government entities—especially those whose

\(^{163}\) Id.

\(^{164}\) Id. See infra accompanying text note 233 for the language of article VII, section 1(c).

\(^{165}\) Bd. of Regents, 365 So. 2d at 1077.

\(^{166}\) Id. at 1078–79.

\(^{167}\) Id. at 1079.

\(^{168}\) Id. at 1078.

\(^{169}\) Id.

\(^{170}\) Bd. of Regents, 365 So. 2d at 1078.

\(^{171}\) Id.

\(^{172}\) Id.; see Fla. Const. art. I, § 10. See supra note 28 and accompanying text for the language of article I, section 10.

\(^{173}\) Bd. of Regents, 365 So. 2d at 1078.

\(^{174}\) See id. at 1079. The court concluded that "the collective bargaining agreement in question incorporated the Constitution and laws of this State, the provisions of which commit to the Florida Legislature the final say in the appropriation of State monies." Id.
"public employer" and "legislative body," pursuant to section 447.203 of the Florida Statutes, are one in the same. Nonetheless, the language of the Underfunding Statute, prior to its 1995 amendment, provided the power to underfund collective bargaining agreements to a "legislative body" and not the "Legislature"—the latter implicating the state legislature. "Legislative body" is a term of art as it is used in PERA, with a precise definition that includes several local governing bodies and those entities that can appropriate funds and establish policy to regulate terms and conditions of employment. The combination of that statutory language with the United Faculty of Florida decision paved the way for both state and local public bodies to underfund or unilaterally change collective bargaining agreements under section 447.309(2) of the Florida Statutes.

b. PERC Cases

In 1983, in a case of first impression, PERC found that a local school board had underfunded a collective bargaining agreement in bad faith, and thereby, in essence, had committed an unfair labor practice. But, the commission declined to award damages because the holding in Board of Regents and section 447.309(2) prohibited it from using the evidence of the underfunding to support an unfair labor practice charge against the board. In its opinion, PERC struggled with applying the Underfunding Statute to the situation because the school board assumed both the role of public employer and legislative body, especially because Board of Regents was decided on the premise of the public employer and legislative body being independent.

175. See supra note 83 for the language of section 447.203(2), which defines "public employer" as it is used under PERA.

176. For instance, a county commission is both the public employer and legislative body within the meaning of section 447.203. See Fla. Stat. § 447.203(2), (10). On the other hand, a county sheriff’s office only meets the definition of public employer and does not have the authority under statute to act as the legislative body—the county commission typically will serve as the sheriff’s legislative body. See id.


181. Id. at 401; Fla. Stat. § 447.309(2) (1993) (amended 1995) ("The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.").
identities. Nonetheless, PERC found no evidence of legislative intent surrounding section 447.309(2) to support an alternate funding procedure for those agencies with independent identities, such as the State, and those agencies that assume binary roles, like the school board, and so felt bound by the holding in *Board of Regents.*

The commission, however, did express its discontent with how the Underfunding Statute was being applied. It noted its holding conflicted with the notion of good faith bargaining because it allowed a public employer who is also the legislative body to agree to a salary provision and then refuse to fund it. Moreover, it found the application of the Underfunding Statute in this regard to be adverse to public employees' constitutional rights under article I, section 6:

> The ability to require a public employer to live up to its economic contractual commitments [is] an important right that Florida's public employees should have, as do its private employees. Employees of a private sector employer in Florida . . . can force their employer to implement negotiated monetary provisions of a contract. However, similarly situated public employees apparently possess no similar right, due to a legislative body's prerogative, granted by [section] 447.309(2), to underfund a contract. . . . The stability of labor relations is enhanced if negotiated contracts voluntarily entered into must be fully implemented.

PERC's finding that the Underfunding Statute, as it was being applied, constituted an abridgment of public employees' rights under article I, section 6, carried over to 1992 when it again had an opportunity to deal with the application of the Underfunding Statute. That year, two local school boards came before PERC to defend their unilateral actions, claiming their actions were justified under section 447.309(2) and under the exigent circumstances exception. In both *Martin County I* and *Sarasota Classified-Teachers Ass'n v. Sarasota County School District* (Sarasota Classified-Teachers Ass'n v. Sarasota County School District)

---

183. *Id.* at 401.
184. *See id.*
185. *Id.*
186. *Id.* at 402–03 n.8 (citations omitted).
188. *See Martin Cnty. I,* 18 F.P.E.R. ¶ 23061, at 100–01; *Sarasota Classified-Teachers Ass’n I,* 18 F.P.E.R. ¶ 23069, at 123.
PERC applied a very narrow construction to the statute, resulting in decisions that section 447.309(2) did not apply in either situation. Both cases, however, were reversed—arguably mistakenly—by Florida Courts of Appeal.

In Martin County I, the school board unilaterally decided to freeze teachers' salaries while the parties were engaged in reopener negotiations over wages. The freeze eliminated teachers' annual experience salary increases, which they had been receiving since 1982. The school board defended the union's unfair labor practice charge on the grounds that its action was permissible under section 447.309(2). PERC—noting the statute's potential interference with the teachers' constitutional rights to collectively bargain—strictly limited its application of the statute to the narrow facts of the case. Under that standard, PERC decided the statute applied to only bargaining agreements that had been executed by both parties. And since the parties in this case were still negotiating the issue of wages under the reopener provision, they had not yet executed an agreement. The school board appealed to the Fourth District Court of Appeal.

The district court disagreed with PERC and declared that the Underfunding Statute applied to any collective bargaining agreement, so long as that agreement had at one point been executed by both parties. In the case at hand, since the parties had executed the original agreement well before the reopener negotiations, section 447.309(2) applied, and the union could not use underfunding as evidence of an unfair labor practice against the school board.

190. Martin Cnty. I, 18 F.P.E.R. ¶ 23061, at 100; Sarasota Classified-Teachers' Ass'n I, 18 F.P.E.R. ¶ 23069, at 123.
193. Id. at 99, 101.
194. Id. at 99.
195. Id. at 100.
196. See id.
199. Id. at 523. ("After a collective bargaining agreement is negotiated and concluded in good faith, section 447.309(2) prevents any subsequent legislative underfunding from being used as evidence of an unfair labor practice against the public employer.").
200. Id.
PERC's review of Sarasota Classified-Teachers Association I followed soon after. There, the school board and the union entered into a three-year agreement, and each year the school board appropriated funds sufficient to fund the step increases contained within the provisions of the contract. But, after the contract expired—during the status quo period—the school board decided to eliminate the increases. When the union filed an unfair labor practice charge against the school board, it defended its unilateral action as permissible under section 447.309(2).

Similar to its decision in Martin County I, PERC declared that the Underfunding statute impaired the constitutional right of public employees to collectively bargain and so gave the statute a strict construction. Since the language in statute referred repeatedly to the application of a collective bargaining agreement, PERC determined it did not apply to the status quo period while the parties were engaged in negotiations. Therefore, the school board could not use section 447.309(2) to defend its action and was subject to an unfair labor practice. The school board appealed to the Second District Court of Appeal.

The district court disapproved of PERC's narrow construction of section 447.309(2) and instead interpreted it broadly. It held that a legislative body may choose to underfund a collective bargaining agreement in any circumstance so long as the circumstance deals with a collective bargaining situation in which the employer is requested to appropriate funds. Its holding thereby extended the application of the underfunding statute to the status quo period, and the school board successfully defended its unilateral change to the status quo under section 447.309(2).

Obvious distinctions appear when comparing PERC's reasoning to the district courts' reasoning in the Martin County I and Sarasota Classified-Teachers Association I.
Teachers Ass’n I cases. PERC maintained that the Underfunding Statute as it applied to local governments abridged public employees’ rights under article I, section 6, and thus required a strict interpretation. And interestingly enough, it was PERC, and not the appellate courts, that applied the Supreme Court of Florida’s standard that requires a compelling state interest in order to destroy an employee’s right to effective collective bargaining.

On the other hand, the district courts applied broad, generous interpretations, thereby expanding the rights of public employers under section 447.309(2) without ever considering the interference with public employees’ constitutional rights. The courts also explicitly approved the application of the statute to local public agencies. The cumulative effect of the courts’ decisions permitted section 447.309(2) to be applied in a way that rendered ineffective public employees’ constitutional right to collectively bargain—holdings contrary to Supreme Court of Florida’s precedent. A public employer that both negotiates and funds a collective bargaining contract could now unilaterally underfund it at any time, and for any reason, and would be protected from an unfair labor charge pursuant to the Underfunding Statute.

C. Application to State Government

Right around the same time as the decisions in Martin County I and Sarasota Classified-Teachers Ass’n I, the Supreme Court of Florida was pondering the same statute as it applied to the state government. The court’s

213. Id.; see also Holmes Cnty. Teachers’ Ass’n, 9 F.P.E.R. ¶ 14207, at 401 (1983).
214. Martin Cnty. I, 18 F.P.E.R. ¶ 23061, at 100 (remembering the Supreme Court of Florida’s decision “that the constitutional right of public employees to collectively bargain is not to be abrogated absent a compelling state interest”) (citation omitted).
216. See Martin Cnty. II, 613 So. 2d at 523 (“This statute makes no exception for the situation involved herein where the public employer wears two hats, one as the public employer, and the other as the legislative body.”).
218. See id.
219. See, e.g., State v. Fla. Police Benevolent Ass’n (Fla. PBA), 613 So. 2d 415, 416 (Fla. 1992).
holdings in two cases during late 1992 and 1993 called into question the holdings of the two 1993 school board cases.\footnote{See id. at 415–16; see Chiles v. United Faculty of Fla., 615 So. 2d 671, 672–73 (Fla. 1993).}

1. \textit{State v. Florida PBA}

The PBA ratified a three-year collective bargaining agreement with the state, effective from 1987–1990.\footnote{Fla. PBA, 613 So. 2d at 416; see generally Orta, supra note 54 (comprehensively analyzing this case).} In 1988, the legislature passed an appropriations act that did not underfund the agreement, but instead, modified the leave bank provisions of the contract.\footnote{Fla. PBA, 613 So. 2d at 416. The legislature reduced the hours of personal leave and increased the hours of sick leave that employees accumulated on a monthly basis. \textit{Id.} It also eliminated accrued sick leave that totaled more than 240 hours and eliminated the requirement that employees submit doctors' notes when using sick time. \textit{Id.}} The Court decided, however, that this presented a unique situation because the legislature had used its appropriations power unilaterally to change the terms of the contract and not to underfund it, as seen in previous cases.\footnote{Id. at 420.}

The PBA brought an action against the State claiming that it had abridged its members' constitutional rights to collectively bargain under the Florida Constitution because the legislature did not show a compelling state interest before acting.\footnote{Id. at 416, 419 n.6. The PBA depended on the Court's holding in \textit{Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Authority}, 522 So. 2d 358, 362 (Fla.1988), that a public agency must show a compelling state interest in order to abridge employees' fundamental right to collectively bargain. \textit{Fla. PBA}, 613 So. 2d at 419 n.6; \textit{Hillsborough Cnty. Govtl. Emps. Ass'n}, 522 So. 2d at 362.} Both the trial court and the district court agreed with the PBA that the State, by unilaterally modifying the terms of the collective bargaining agreement, abrogated the PBA members' fundamental rights under article I, section 6.\footnote{Fla. PBA, 613 So. 2d at 416.} The State appealed to the Supreme Court of Florida, which reversed and remanded the district court's decision.\footnote{Id. at 421.}

The majority opinion in this case spent a great deal of time making distinctions between the rights of private and public employees under article I, section 6—particularly in the area of funding collective bargaining agreements.\footnote{See id. at 416–19.} It stated that unlike the private sector, a public employees' union

\footnote{The fact that public employee bargaining is protected under Florida's Constitution does not require us to ignore universally recognized distinctions between public and private employees. The constitutional right to bargain must be construed in accordance with all provi-}
could never require the legislature to fund a collective bargaining agreement because that would involve the executive branch invading legislative territory—an act forbidden by the separation of powers doctrine. In order to maintain the integrity of that doctrine, the Court reasoned that collective bargaining agreements must be subject to the legislature’s constitutional right to appropriate public funds.

The Court reconciled its holding in *Florida PBA* with its previous holding in *Hillsborough County Governmental Employees Ass’n*, in which it necessitated a public employer to show a compelling state interest before abridging employees’ constitutional rights to collectively bargain. The Court explained that the public agency in this case did not act contrary to that standard “because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation,” and, so, the *Hillsborough County Governmental Employees Ass’n* holding did not ap-
The Court, however, added one caveat to its conclusion: “[S]hould the legislatively mandated change fall outside the appropriations power, it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test [under Hillsborough County Governmental Employees Ass’n].”

Having no precedent to follow on the legislature’s unilateral modification of a mandatory subject of bargaining, the Court looked to a Supreme Court of New Jersey case for guidance. From there it adopted a funding test that purportedly offered “a reasonable accommodation of both the right to collectively bargain and the legislature’s exclusive control over the public purse.” The test is: if the legislature appropriates enough money to fund the benefit as negotiated then, it may not unilaterally alter the benefit; but, if it does not appropriate enough funds—which is within its right to do—then the legislature may unilaterally change the negotiated benefit, even to the extent that it becomes contrary to the original intent of the parties.

Three months after the Florida PBA decision, the Court in Chiles would adopt yet another test in an attempt to balance the legislature’s appropriations power with the collective bargaining rights of public employees.

2. The Chiles Case

The State and one of its unions, United Faculty of Florida (UFF), reached an impasse over their collective bargaining agreement for fiscal year 1991–1992. In resolving the impasse, the legislature authorized a three percent pay raise for UFF employees effective the first of January 1992. The decision was reduced to writing and inserted into the collective bargaining agreement, which UFF members soon ratified. Following its resolution of the impasse, however, the legislature delayed the effective date of the

233. Fla. PBA, 613 So. 2d at 419 n.6. Justice Kogan disagreed with the majority’s reconciliation with Hillsborough County Governmental Employees Ass’n. Id. at 423 (Kogan, J., dissenting). Kogan reminded the Court of its decision that “[t]he right to bargain collectively is, as a part of the state constitution’s declaration of rights, a fundamental right. As such it is subject to official abridgement only upon a showing of a compelling state interest . . . .” Id. (quoting Hillsborough Cnty. Govtl. Emps. Ass’n, 522 So. 2d at 362).
234. Id. at 419 n.6 (majority opinion).
235. Id. at 420–21 (citing State v. State Troopers Fraternal Ass’n, 453 A.2d 176 (N.J. 1982)).
236. Fla. PBA, 613 So. 2d at 421.
237. Id.
238. See Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).
239. Id. at 672.
240. Id.
241. Id.
pay raises until February 1992, in response to new information concerning an expected shortfall in revenue.\(^{242}\) When the fiscal problems continued to escalate, the legislature unilaterally decided to eliminate the pay raises altogether.\(^{243}\)

UFF filed suit claiming that the legislature’s action was unconstitutional as an abridgment of article I, sections 6 and 10 of the Florida Constitution.\(^{244}\) The trial court ruled in the union’s favor finding that the legislature’s act “violated the right to collectively bargain and constituted an impermissible impairment of contract.”\(^{245}\) The State appealed to the district court, which certified the case for immediate review by the Supreme Court of Florida.\(^{246}\)

Before proceeding with its decision, the Court noted that the situation at hand was different from Florida PBA, because, unlike that case, the newer case dealt with a collective bargaining agreement that had already been funded before being unilaterally changed and eventually “unilaterally abrogated by the legislature.”\(^{247}\)

Justice Kogan refused to acknowledge the State’s argument that collective bargaining agreements never reach the level of fully binding contracts.\(^{248}\) Instead, he announced that “[o]nce the executive has negotiated and the legislature has accepted \textit{and} funded an agreement, the state and all its organs are bound by that agreement under the principles on contract law.”\(^{249}\) On that note, he accentuated the importance of the right to contract in Florida, finding it “one of the most sacrosanct rights guaranteed by our fundamental law” and confirming that the legislature was severely limited in its ability “to eliminate a contractual obligation it has itself created.”\(^{250}\) But on the other side of that argument, Justice Kogan expressed concern that the legislature, in its continuing obligation to fund collective bargaining contracts, would be unable “to deal with bona fide [fiscal] emergencies.”\(^{251}\)

Balancing these competing interests, the Court held that the legislature could choose to underfund a collective bargaining contract that was \textit{already funded}, but only in situations in which it could justify its action by a compelling state interest and prove that no reasonable alternative was available—in other words, the funds must not be obtainable from any other possible

\(^{242}\) Id.

\(^{243}\) Id.

\(^{244}\) Chiles, 615 So. 2d at 672.

\(^{245}\) Id. See \textit{supra} note 28 for the language of article I, section 10.

\(^{246}\) Id.

\(^{247}\) Id.

\(^{248}\) Id.

\(^{249}\) Id. at 672–73.

\(^{250}\) Chiles, 615 So. 2d at 673 (citing FLA. CONST. art. I, § 10).

\(^{251}\) Id.
source. Otherwise, the abrogation of a collective bargaining contract is not permitted. In applying such a test to the facts of the case, the Court did not find a compelling state interest that required the legislature to modify the existing collective bargaining contract. The majority did not give a reason for that decision, but Justice Grimes in his concurring opinion shed some light by noting that the collective bargaining contract needed only $35.4 million for implementation—a small amount compared to the state's more than $28 billion budget. That situation, he reasoned, did not give rise to a compelling state interest requiring the repudiation of a binding contract.

3. The Standards of the Chiles & Florida PBA Tests

The Court's decisions from the Chiles and Florida PBA cases clarify the statutory method, pursuant to section 447.309(2), for public entities to unilaterally—and constitutionally—underfund a collective bargaining agreement or underfund or alter the terms of a collective bargaining agreement once it has become a binding contract. Basically, the Florida PBA test regulates a situation in which the legislature's appropriations power, granted in article VII, section 1(c) of the Florida Constitution, acts as an inherent limitation to a collective bargaining agreement to preserve the separation of powers doctrine. Alternatively, the Chiles test deals with a situation in which the legislature is not acting according to its appropriations power, in which case, the separation of powers doctrine is not threatened. Both of these tests apply to the state level of government because the state government follows a strong separation of powers doctrine where the executive, judicial, and legislative branches function independently of one another.

Essentially, local governments—which do not experience the same separation of powers issues as state governments—do not have the authority to

252. \textit{Id.}
253. \textit{Id.}
254. \textit{See id.}
255. \textit{Chiles,} 615 So. 2d at 674 (Grimes, J., concurring).
256. \textit{Id.}
257. \textit{See id.} at 673 (majority opinion); State v. Fla. Police Benevolent Ass'n (\textit{Fla. PBA}), 613 So. 2d 415, 419 (Fla. 1992); \textit{see also} \textit{Fla. Stat.} § 447.309(2) (2010).
259. \textit{See Fla. PBA,} 613 So. 2d at 419 n.6.
260. \textit{Chiles,} 615 So. 2d at 673.
261. \textit{See id.; Fla. PBA,} 613 So. 2d at 419.
act under *Florida PBA*. The *Chiles* test, however, applies to both local and state governments since the state government has the option to act outside of its appropriations power.

The *Florida PBA* test is based on the idea that the separation of powers doctrine imposes an inherent limitation on a collective bargaining agreement—restricting its ability to become a binding contract until the legislature has exercised its appropriations power. Accordingly, if the legislature chooses to underfund a collective bargaining agreement it may do so without violating fundamental rights to collectively bargain or contract. Similarly, in cases in which it has underfunded a collective bargaining contract it may impose conditions on the use of that funding even if the conditions conflict with the original terms of the agreement—resulting in a permissible unilateral change to that agreement.

Reflecting a standard opposite of that in *Florida PBA*, the *Chiles* test applies to situations that do not involve the separation of powers doctrine—when the legislature’s appropriations power is not at issue. In those instances, the Court affords a clear preference to employees’ constitutional rights to contract and collectively bargain. Once the legislature appropriates funds sufficient to support the negotiated agreement, the agreement

262. Citizens for Reform v. Citizens for Open Gov’t, Inc., 931 So. 2d 977, 989–90 (Fla. 3d Dist. Ct. App. 2006). The district court based its holding on the concept that the “constitutional separation of powers simply does not exist at the local government level.” *Id.* at 989. It concluded that a mayor and a county commission are not “mutually exclusive” entities; rather, both act as the “governing body.” *Id.* at 990. The court supported its holding with multiple decisions from other jurisdictions. *Id.* at 989–90; see also 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:3 (West 3d ed. 2006) (internal footnotes omitted) (“Historically, the constitutional principle of the separation of powers has not been applied to the government of cities. The rationale is that separation of powers reduces the threat of an unchecked governing body, but that threat is slight where the governing body is subordinated to the powers of a higher level of government.”) (footnotes omitted).

263. *See Chiles*, 615 So. 2d at 672–73.

264. *Fla. PBA*, 613 So. 2d at 421.

265. *Id.*

266. *Id.*

267. *Chiles*, 615 So. 2d at 673. Although enumerated in *Chiles*, the *Chiles* test is also supported by the holding in *Florida PBA*. The *Hillsborough County Governmental Employees Ass’n* holding that a public agency must show a compelling state interest before abridging employees’ right to collectively bargain

is inapplicable here, because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation. Of course, should the legislatively mandated change fall outside the appropriations power, it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test.

268. *See Chiles*, 615 So. 2d at 673–74.
becomes a binding contract that is enforceable under article I, section 10, as would be any other contract formed in the state.  

Once the agreement is funded and becomes a binding contract, the only way the legislature can unilaterally alter its provisions or rescind monies already provided is by demonstrating a compelling state interest and no viable alternative to abrogating the contract. Justice Kogan noted the Court’s commitment to such a standard:

The present case does not itself present a violation of separation of powers, nor are we attempting a judicial appropriation of public money. Here, the legislature acted pursuant to its powers, appropriated funds for collective bargaining agreements, and thereby created a binding contract. Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason. Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.

The Court’s decisions in Florida PBA and Chiles are significant because they draw distinctions between the two levels of government and how and when each may underfund or unilaterally change a collective bargaining agreement or contract. Two years following those decisions, the Florida Legislature amended the Underfunding Statute to apply to only the state government. The same bill proposed a new statute, section 447.4095—the Financial Urgency Statute—which seemingly provided local government flexibility in dealing with labor contracts during times of “financial urgency,” perhaps to compensate for its loss of access to the Underfunding Statute.
V. THE FINANCIAL URGENCY STATUTE

A. How It Was Created

The 1995 Legislature considered two bills, House Bill 1267 and Senate Bill 888, which proposed amendments to the Underfunding Statute in section 447.309(2) and recommended the creation of the Financial Urgency Statute in section 447.4095. The effect of either bill, in part, restricted application of the Underfunding Statute to only local-level government. Essentially, the modification would remove a local government’s ability under the statute to bypass the impasse procedure by engaging in a bargaining process façade with the union, “agreeing” to a collective bargaining agreement, and then simply underfunding or unilaterally changing anything in that agreement with which it did not agree. Additionally, the bills’ effects would remove from local governments the protection against unions’ unfair labor practice charges for governments’ conduct pursuant to the statute.

Teachers’ unions and public safety unions like the PBA supported the bills and applauded the legislature’s recognition of local government’s misuse of the Underfunding Statute. On the other hand, non-supporters like the Florida League of Cities, Florida Public Employer Labor Relations Association, and the Florida Association of Counties complained that the proposed changes would expose local public employers to unfair labor practice charges if they underfunded their collective bargaining agreements for any reason.

278. See id.; Govtl. Ops. Comm. HB 1267 Staff Analysis, supra note 275, at 1.
279. See Govtl. Ops. Comm. HB 1267 Staff Analysis, supra note 275, at 1. See, e.g., Holmes Cnty. Teachers’ Ass’n, 9 F.P.E.R. ¶ 14207, at 397 (1983). In Holmes County Teachers’ Ass’n, the employer and legislative body had an understanding that pursuant to section 447.309(2), it would not have to pay a contracted pay raise if the legislative body determined at the time the pay raise was due that there was not adequate funding. Id. Based on the understanding, the employer agreed with the bargaining agent to provide teachers with a contractual pay raise. Id. But when the time came to pass the respective budget, the legislative body failed to appropriate an amount necessary to fund the contractual pay raise. Id.
282. Id.
LABOR RELATIONS IN FLORIDA'S PUBLIC SECTOR

reason. That could result in an independent third-party forcing a public employer to fund the contract by raising taxes or cutting services. For example, some local governments, like sheriffs' departments, have independent entities acting as their "public employers" and "legislative bodies," similar to the state. Those public employers have no control over how their legislative bodies appropriate funds, and so changing the Underfunding Statute to apply to only state-level government would make those employers liable to the union for decisions made by separate entities.

The proposed bills also ruffled some practicing labor attorneys—unexpectedly from the union side—who were wary of the bills' practical implications. Up until then, some labor attorneys had figured out how to bypass the local government's misuse of the Underfunding Statute: Under section 447.309(2), the union could not use evidence of underfunding to support an unfair labor practice charge against the employer, but the statute's silence as to grievances presupposed permission to proceed to arbitration. 287

---

284. Id.
286. See Govtl. Ops. Comm. HB 1267 Staff Analysis, supra note 275, at 3. This problem was not remedied in the final version of the adopted Financial Urgency statute. As such, constitutional officers like a sheriff fall through the cracks in the statute's language, as is common with several of the statutes found in chapter 447. For instance, a sheriff's department is granted its budget from the county commission, yet the sheriff is the "public employer" that negotiates and enters into contracts with its employees, not the commissioners. Under the Financial Urgency statute, then, is a sheriff authorized to declare a "financial urgency" when it is not the body with the power to increase or decrease its budget? This topic is addressed here only in a footnote because the issues and questions created therefrom are too many to list and discuss here.

None of the opinions addressing on [s]ection 447.309(2) offer a definitive reading of the legislative intent, in particular with regard to contract liability as determined in arbitration. The last sentence in the [s]ection 447.309(2) paragraph does clarify the purpose of the provision, however. . . . [I]t appears to have been designed to keep . . . [PERC] out of the business of second guessing the legislative judgments of local municipalities. It does not free the [c]ity from its contract obligations that might be perfected in another forum, such as arbitration.

The [c]ity argues that [s]ection 447.309(2) cannot be limited to unfair labor practice cases because otherwise it would be a nullity. . . . The argument ignores issues of institutional competence, allocation of decisional power, and the intent of the negotiating parties. The [l]egislature might have wanted to keep PERC out of intragovernmental funding disputes. It might have thought that arbitrators were better able to resolve these types of disputes. It might have allowed the parties' intentions to control with regard to the appropriate forum for resolution. In any case, the [s]ection talks about unfair labor practice liability. That was the
That silence, paired with the fact that arbitration awards are very difficult to overturn, resulted in a successful arbitration strategy: an arbitrator who had occasion to decide whether a legislative body could legally underfund a collective bargaining agreement issued decisions overwhelmingly in favor of bargaining agents.

The proposed bills would ultimately put that strategy in jeopardy and force labor attorneys back to their drawing boards.

Despite the negative attention, the legislature passed Senate Bill 888 effective as of July 1, 1995. The bill includes two sections and encompasses two statutes, each granting a different level of government the opportunity to make unilateral changes to collective bargaining agreements or contracts—and each under a different set of standards.

Section 1 of the bill split the Underfunding Statute, section 447.309(2), into two parts. The first part, now designated as subsection (2)(a), kept the language that required the chief executive officer to request funds from the designated legislative body sufficient to implement the negotiated agreement. Subsection (2)(a) still applies to both levels of government. Subsection (2)(b) also kept the general language of the original statute but made it applicable to only the Florida Legislature. Subsection (2)(b) concludes with a statutory adoption of the Court's holding in Florida PBA, mandating that "all collective bargaining agreements entered into by the state are subject to the appropriations powers of the Legislature."

In section 2 of the Bill, the Legislature created section 447.4095—the Financial Urgency Statute—in order to provide local governments a similar opportunity to make unilateral changes to a collective bargaining contract in

---

*[legislature's plain intention, even if it did not totally free municipalities from fulfilling their promises]*

Id. Mr. Abrams is a highly respected arbitrator in the Florida labor community.


292. See id. §§ 1-2, 1995 Fla. Laws at 1943-44.

293. See id. § 1, 1995 Fla. Laws at 1943.

294. See id.

295. See id. § 1, 1995 Fla. Laws at 1943.


cases of financial emergencies. The language of the Financial Urgency Statute, as adopted in 1995, remains the same today:

In the event of a financial urgency requiring modification of an agreement, the chief executive officer . . . and the bargaining agent . . . shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed [fourteen] days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of section 447.403 [which regulates the procedures of impasse]. An unfair labor practice charge shall not be filed during the [fourteen] days during which negotiations are occurring pursuant to this section.

The language in that statute is vague, particularly in the expression “financial urgency”—a problem identified by a senate committee for Senate Bill 888 prior to its enactment. The committee considered the term so vague that it could not clarify whether it applied to employers, employees, the Florida Legislature, legislative bodies—or to them all. Additionally, if it did apply to employers, could the committee unilaterally declare it did without the support of its legislative body? Furthermore, the committee struggled with whether “urgency” meant an employer could use it when facing an adverse emergency situation, or whether “urgency” envisioned a situation in which a bargaining agent could act in response to an unexpected windfall to the public employer. Regardless of the identified flaws, the legislature passed Senate Bill 888 without correction or clarification and

302. Id.
303. Id.
explicitly left the interpretation of the statute "to practice."\textsuperscript{304} After several years of lying dormant, "in practice" is just where the statute is today.\textsuperscript{305}

**B. Case One: Communications Workers of America v. Indian River School Board**

Several years went by after the passage of Senate Bill 888 without much attention to the new Financial Urgency Statute.\textsuperscript{306} Then, in 2002, the statute popped up before the Fourth District Court of Appeal in *Communications Workers of America v. Indian River County School Board.*\textsuperscript{307} This case centered on an arbitrator’s award that opined the school board violated the terms of an existing collective bargaining agreement by unilaterally changing its employees’ health insurance benefits.\textsuperscript{308} The school board argued that its action was permissible under section 447.4095 of the *Florida Statutes* and appealed the lower court’s finding that the arbitrator exceeded his authority.\textsuperscript{309} The district court agreed, reasoning that the board’s reliance on the Financial Urgency Statute removed the issue from the arbitrator’s jurisdiction and into PERC’s.\textsuperscript{310}

*Communications Workers* did not discuss the merits of the Financial Urgency Statute, but instead proposed that a union’s remedy for a public employer’s action, pursuant to the Financial Urgency Statute, is through PERC as an unfair labor practice and not through the courts as a contract violation.\textsuperscript{311} The decision essentially terminated the potential for labor attorneys to treat the Financial Urgency Statute as they used to treat the Underfunding Statute.\textsuperscript{312} An attorney would not be able to resurrect his or her once successful strategy of treating unilateral action as a contract violation settled

\textsuperscript{304} Id.
\textsuperscript{305} Id.; see generally Commc’ns Workers v. Indian River Cnty. Sch. Bd., 888 So. 2d 96 (Fla. 4th Dist. Ct. App. 2004) (citing FLA. STAT. § 447.4095 (2005), but failing to define “urgency”).
\textsuperscript{306} See Ruby, *supra* note 13, at 10.
\textsuperscript{307} 888 So. 2d 96 (Fla. 4th Dist. Ct. App. 2004).
\textsuperscript{308} Id. at 98.
\textsuperscript{309} Id. at 99.
\textsuperscript{310} Id. at 100. Here, the court based its decision largely on a 1976 Fourth District Court of Appeal decision that conferred upon PERC preemptive jurisdiction if the activities alleged in the complaint “are ‘arguably’ covered by the provisions of Part II, Chapter 447,” *Florida Statutes.* Id.; Maxwell v. Sch. Bd. of Broward Cnty., 330 So. 2d 177, 179 (Fla. 4th Dist. Ct. App. 1976) (interpreting part II, chapter 447, *Florida Statutes*).
\textsuperscript{311} Commc’ns Workers, 888 So. 2d at 101.
\textsuperscript{312} Id. (holding that “PERC has preemptive authority, retains jurisdiction and has the exclusive decision-making power to defer to arbitration”).
through arbitration, but would now have to face the risk of an unfavorable statutory interpretation by PERC. 313

C. Case Two, PERC’s Interpretation: Manatee Education Ass’n v. School District of Manatee County

1. Facts

The case of Manatee Education Ass’n v. School District of Manatee County 314 came before PERC in 2009, presenting the opportunity to issue a decision of first impression regarding the Financial Urgency Statute. 315 The union in this case, Manatee Education Ass’n (MEA), represented teachers and paraprofessionals working within the Manatee County School District (the District). 316 In 2007, those parties entered into a three year collective bargaining agreement set to expire in 2010. 317 The contract contained a “reopener clause for salary issues effective on or before June 1 of each year.” 318 At the beginning of 2008, the District learned that it would face a severe revenue deficit for the 2008–09 fiscal year. 319 To make matters worse, in order to meet its contract obligations for the current fiscal year, the District had to withdraw money from its reserve fund, which left the fund unlawfully inadequate. 320 Ultimately, the District faced a $21.5 million dollar deficit for the 2008–09 fiscal year. 321

The provisions of the collective bargaining contract between the parties obliged the District to provide those represented employees pay steps for the 2008–09 fiscal year at a cost of $8 million dollars, which it could not afford. 322 The District concluded that in lieu of layoffs it would implement an across-the-board salary reduction in order to maintain its level of service and balance its budget, and it wanted to do so quickly before the new school year began. 323 Otherwise, the pay steps would automatically take place and the pursuing retroactive salary reduction would result in loss of paychecks for

---

313. See id.
315. Id.
316. Id. at 87.
318. Id.
320. Id. at 92.
321. Id.
322. Id.
323. Id.
many teachers—a disruption the District sought to avoid. Accordingly, the District sent a notification to MEA declaring a financial urgency under section 447.4095 of the Florida Statutes and requested a date to begin the fourteen day bargaining process.

The MEA declined to bargain under the Financial Urgency statute. It opined that the District’s act was premature since the governor had yet to sign the budget and because it presented no proof to the union that it was in such a dire state. After fourteen days passed, the District put in writing its proposal to eliminate the teachers’ pay raises and notified the MEA that it was moving forward with the impasse procedure, pursuant to the terms of the statute. MEA continued to oppose the District’s actions and refused to attend the special magistrate hearing. On July 1, 2008, the special magistrate recommended that the District’s proposal be accepted. But the District rejected the special magistrate’s decision, citing that it wanted to give MEA one more chance to make its argument before the legislative body at the impasse hearing.

Meanwhile, MEA and the District began Interest Based Bargaining (IBB) under the contract reopener clause, for issues other than the elimination of pay raises. Before the process began, the District made clear the fact that negotiations under the reopener were separate and did not replace the necessary bargaining under the Financial Urgency statute. Nonetheless, during IBB negotiations, MEA ended up proposing a “quick fix” solution that would save the District the necessary amount of money without having to eliminate pay raises. The District then petitioned the superintendent to delay the financial urgency impasse so that it could have a chance to present its solution to its member-employees for ratification in a contract.

325. Id.; see generally Fla. Stat. § 447.4095 (2010). The District also notified the American Federation of State, County and Municipal Employees (AFSCME)—a union representing other school board employees—of the declared financial urgency. Manatee Educ. Ass’n, 35 F.P.E.R. ¶ 46, at 92. The AFSCME immediately agreed to negotiations, which led to an agreement with the District within the fourteen-day period. Id.
326. Id.
327. Id.
328. Id. at 93.
330. Id.
331. Id. at 93–94.
332. Id. at 94.
333. Id.
335. Id.
By this point, however, the District felt it was too risky to wait for ratification of the "quick fix" provisions because if the MEA members failed to ratify that contract, it would be too late for the District to impose the changes before the start of the school year. The District continued with the impasse hearing in which it adopted its own proposals. However, the District agreed that it would nullify the agreement adopted at impasse and consider MEA's solution if submitted in a timely manner and in a ratified contract.

On August 7, 2008, MEA filed an unfair labor practice charge against the District and refused to continue the IBB negotiations. MEA's charge included several allegations. Most notably, though, MEA asserted that the District improperly invoked the Financial Urgency statute by failing to meet the standards set forth by the Supreme Court of Florida in Chiles; it should have demonstrated a compelling state interest with no viable alternatives to abrogating the contract before demanding to bargain under section 447.4095. In his recommended order, the hearing officer found that the District did not commit an unfair labor practice. Both parties filed timely exceptions to PERC.
2. PERC's Holding

PERC's decision hinged on whether the District properly invoked and employed the Financial Urgency Statute. In its unusually short analysis, the majority of the commission opined that the District's actions complied with its interpretation of the statute. Based on its express language, PERC found that the statute functioned simply to "provide public employers and bargaining agents an opportunity to engage in abbreviated impact bargaining when faced with a financial urgency requiring modification of an agreement." Here, the District notified MEA that it was declaring a financial urgency under section 447.4095 and MEA thereafter was required to engage in negotiations over the impact of the District's financial urgency. The District then, after fourteen days, was entitled to declare an impasse and modify the collective bargaining agreement based on the impasse resolution. In concluding, PERC struck down MEA's argument that there were prerequisites to acting under the statute. Instead, it decided that a public employer was not required to demonstrate a compelling state interest or the absence of viable alternatives before proceeding under the statute to the fourteen-day negotiation period.
3. Analysis

PERC's reasoning in *Manatee Education Ass'n* was a clear deviation from its past decisions, in which it heavily scrutinized employers' abilities to unilaterally change mandatory subjects of bargaining.\(^{351}\) Most notably, PERC failed to apply its usual strict interpretation to a statute that has the potential to abridge public employees' rights to collectively bargain or to contract.\(^{352}\) For instance, in *Sarasota Classified-Teachers Ass'n I*, PERC explicitly found the Underfunding Statute to be an abrogation of a public employee's constitutional right to collectively bargain, because it allowed the employer to bypass the statutory collective bargaining process and instead unilaterally change a mandatory subject of bargaining.\(^{353}\) The Financial Urgency Statute functions in the same way in that it, too, allows an employer to avoid its obligation to collectively bargain over a mandatory subject of bargaining.\(^{354}\) But PERC obviously disregarded that discussion and, in fact, failed to mention the rights of public employees even once in its opinion.\(^{355}\)

And, if that decision was not strange enough, the commission in closing declared that the Financial Urgency Statute functioned to "promote harmonious and cooperative relationships between public employers and their employees"—a remark that, arguably, misses the point completely.\(^{356}\)
Amidst the vagueness of PERC’s interpretation of the Financial Urgency Statute was its disapproval for MEA’s contention that the Chiles test should apply to situations in which a public employer seeks to justify its abridgment of a fundamental right under the statute.\textsuperscript{357} According to PERC, an employer acting under section 447.4095 is not required to show a compelling state interest, or prove a lack of viable alternatives to breaking the contract.\textsuperscript{358} The commission reasoned that since the Chiles decision pre-dated the execution of section 447.4095, the Florida Legislature must have known of and considered the Chiles principles when it created the statute.\textsuperscript{359} And since the commission’s interpretation of the statute revealed no sign of Chiles, the legislature must have purposely left out the Court’s holding.\textsuperscript{360} But that simply cannot be the case.

D. The Constitutional Interpretation: Reconciling Financial Urgency with Chiles

1. The Problem

If a public employer were allowed to proceed under the Financial Urgency Statute, as it was interpreted by PERC in Manatee Education Ass’n, an employer would be permitted to abridge a binding contract and undermine employees’ rights to collectively bargain under article I, section 6, simply by declaring that a “financial urgency” existed and then engaging in abbreviated impact bargaining. However, the Supreme Court of Florida has already ruled that a public entity can abridge those rights only in cases where it can demonstrate a compelling state interest and no viable alternatives to breaking the contract.\textsuperscript{361} Any interpretation of section 447.4095 that removes it from the command of Chiles would create two different standards for state and local governments. It would render the statute unconstitutional.\textsuperscript{362} Therefore, the statute would be unenforceable—a result that the legislature certainly did not intend.

\textsuperscript{357} Id.
\textsuperscript{358} See id.
\textsuperscript{359} Id.
\textsuperscript{360} See id.
\textsuperscript{361} Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993); see also State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004). The Court’s holding in J.P. lent significant support to its holding in Chiles, finding:

When a statute or ordinance operates to . . . impair[ ] the exercise of a fundamental right, then the law must pass strict scrutiny. . . . It is settled law that each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right. . . . To
Fortunately for the legislature, the law in Florida relating to statutory interpretation supports a reading of section 447.4095 that rectifies it with the Chiles holding. Florida looks to the plain meaning of a statute, "unless this leads to an unreasonable result or a result contrary to legislative intent." The long standing rule is that courts should always construe a statute as constitutional, when possible. A statute should not be interpreted on its face alone, but in the context of its history and purpose, and in a way that makes the law meaningful.

2. The Context

As noted earlier, the legislature pondered at least two potential bills to facilitate those changes. Even though it passed only Senate Bill 888, House Bill 1267, too, had been subject to analysis by legislative committees. But it was the Supreme Court of Florida’s opinion in Florida PBA that first prompted the legislature to create those bills, and the language from its staff analyses aids in understanding the legislature’s intention for the financial urgency statute.

First, the staff analysis for Senate Bill 888 makes a direct reference to its reconciliation with the Court’s holding in Florida PBA, which evidences

withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest.

J.P., 907 So. 2d at 1109–10 (citations omitted).

363. Cherry v. State, 959 So. 2d 702, 713 (Fla. 2007) (per curiam) (citing Daniels v. Fla. Dep’t of Health, 898 So. 2d 61, 64–65 (Fla. 2005)).
364. Id.

This court must interpret statutes by the well-established norms of statutory construction which require rendering the statutory provision meaningful. To properly determine the scope of a statutory term, it is necessary to consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence on the subject.

Id. (citation omitted).
369. See State v. Fla. Police Benevolent Ass’n (Fla. PBA), 613 So. 2d 415, 420 n.8 (Fla. 1992).
that the legislature created the Bill at least partly in response to that case.\textsuperscript{371} But the legislature incorporated more principles from that case than just the holding—it also included the Court’s reasoning that the parties should renegotiate the contract provisions at issue instead of allowing the legislature to unilaterally change them.\textsuperscript{372} The Court noted in a footnote that:

\begin{quote}
While such a solution would certainly be preferable to unilateral changes, we refuse to impose renegotiation on our own prerogative. Although some courts have ordered renewed negotiations after a legislature fails to fund a provision, this remedy has only been imposed where the legislature itself mandated it. Accordingly, such a solution would be completely without precedent as a judicially-imposed remedy, in addition to being administratively untenable.\textsuperscript{373}
\end{quote}

In that sense, the Florida PBA opinion acts as the foundation of the Financial Urgency Statute. And, since that case and Chiles go hand-in-hand to provide precedent for public agencies’ conflicts between fiscal emergencies and collective bargaining obligations, it is essentially the law from each of those cases that underlies the functioning of that statute.\textsuperscript{374}

Besides that case law, the staff analysis of Bill 1267 is particularly helpful.\textsuperscript{375} In the staff analysis, the House Governmental Operations Committee addressed the impact of Bill 1267 on government costs: “If local governments underfund an existing contract then some costs will be incurred to provide evidence regarding financial urgency and negotiate the impact of the

\begin{footnotesize}
\begin{enumerate}
\item Id. ("The effect of this change is to provide that it is not an unfair labor practice for the [s]tate [l]egislature to fail to appropriate funds sufficient to meet its contractual obligations in the bargaining agreement. This change would be consistent with... [the Florida PBA case."]") (internal citations omitted); see also Govtl. Ops. Comm. HB 1267 Staff Analysis, supra note 275, at 3–4 (noting that per the Florida PBA case the Florida Legislature, in contrast to local governments, has the authority "to determine the level of funding for a collective bargaining agreement"). The House Committee analyzing Bill 1267 explained well how the proposed amendment would affect local governments:

This bill amends [the Underfunding Statute] to effectively repeal, as to local legislative bodies the requirement that if insufficient funds are appropriated to fund a collective bargaining agreement, then the agreement must be administered on the basis of the amount appropriated, and the protection provided that failure to fully fund a collective bargaining agreement shall not constitute an unfair labor practice. Accordingly, if this bill passes, local legislative bodies that fail to fully fund a collective bargaining agreement will be subject to charges of unfair labor practice.

HB 1267 Staff Analysis, supra note 275, at 3.
\item Id. at 4 (citing Fla. PBA, 613 So. 2d at 418–19).
\item Fla. PBA, 613 So. 2d at 420 n.8 (citations omitted).
\item See generally id.; Chiles v. United Faculty of Fla., 615 So. 2d 671 (Fla. 1993).
\item See generally Govtl Ops. Comm. HB 1267 Staff Analysis, supra note 275.
\end{enumerate}
\end{footnotesize}
financial urgency or defend any unfair labor practice complaint filed by the employees with [PERC]."376 This description provides two major impressions of legislative intent to make the financial urgency statute compliant with the law from Florida PBA and Chiles.377

First, the committee’s language suggests that at least one purpose of the statute is to provide local governments an alternative to the Underfunding Statute in which they can underfund collective bargaining contracts in cases of “financial urgency”—but only after providing evidence of a financial urgency.378 The requirement of that showing is not applied to the state government pursuant to the Underfunding Statute; the legislature imposed it only on local governments based on the fact that those governments cannot depend on alternate sources of constitutional power with which to justify unilateral changes to collective bargaining contracts.379 Instead, it is the required proof of a financial urgency that justifies their unilateral changes to collective bargaining contracts—unlike the state legislature, which can justify its action pursuant to its power to appropriate public funds.380 Thus, since a local government, acting under this statute, is not acting pursuant to a constitutional power, and will be attempting to abrogate one or more fundamental rights of its employees, it must abide by the guidelines set forth in Chiles.381

Second, the legislature did not condition the showing of the proof of a financial urgency on any affirmative acts by the union.382 For example, it did not specify that “some costs will be incurred [to the employer] to provide evidence regarding financial urgency” in response to an unfair labor practice.383 Instead, the legislature’s inclusion that a public employer show proof of a financial urgency independent of any conditions implies that a public employer must make that showing in any circumstance in which it seeks to act under the Financial Urgency Statute, and not only when mandated to do so by a hearing officer or judicial body.384 The static nature of that requirement strengthens the idea that the showing of proof is the justification through which a local government can underfund or unilaterally change a

---

376. Id. at 1 (emphasis added).
377. See generally Govtl. Ops. Comm. HB 1267 Staff Analysis, supra note 275; Chiles, 615 So. 2d 671; Fla. PBA, 613 So. 2d 415.
381. See generally Chiles, 615 So. 2d at 671.
383. Id.
384. See id.
collective bargaining contract—similar to the state’s justification to do the same through its appropriations power.\textsuperscript{385}

Reading the \textit{Chiles} and \textit{Florida PBA} cases along with the legislative history of Bills 888 and 1267 illustrates that the legislature created the Financial Urgency Statute to provide local governments a statutory means to deal with financial emergencies in the face of collective bargaining obligations, but that would not protect them from unfair labor practice charges if their actions do not comply with Florida law.\textsuperscript{386} It is local government’s substitute for the Underfunding Statute and should be interpreted and applied pursuant to the same standards.\textsuperscript{387}

3. The Language of Section 447.4095

Because a public employer acting under section 447.4095 of the Florida Statutes has the potential to impair two fundamental rights enjoyed by public employees, the statute must be given a strict construction.\textsuperscript{388} The statute can be split in two parts for easier analysis: the first phrase in part one, “[i]n the event of a financial urgency requiring modification of an agreement,” and the remainder of the statute, which governs the impact bargaining procedure.\textsuperscript{389} This section will analyze the statutory language step-by-step, beginning with part two and then moving along to part one.

\textbf{a. First, Part Two}

Underlying the \textit{Chiles} test is the idea that once a government entity has agreed to and funded a collective bargaining agreement, it cannot then change its mind and breach the contract it created absent a sufficient reason.\textsuperscript{390} That sufficient reason, the Court held, is a compelling state interest with no viable alternatives.\textsuperscript{391} However, the Financial Urgency Statute mandates only that the parties bargain the impact of the financial urgency even though that topic would be considered a mandatory subject of bargaining under Florida law, which requires \textit{collective bargaining}.\textsuperscript{392} In the context of

\textsuperscript{385} See id. at 3.
\textsuperscript{386} See generally Chiles, 615 So. 2d at 671; State v. Fla. Police Benevolent Ass’n (\textit{Fla. PBA}), 613 So. 2d. 415 (Fla. 1992).
\textsuperscript{388} State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004).
\textsuperscript{389} See FLA. STAT. § 447.4095 (2010).
\textsuperscript{390} See Chiles, 615 So. 2d at 673.
\textsuperscript{391} Id.
\textsuperscript{392} See FLA. STAT. § 447.309(1).
the Financial Urgency Statute, impact bargaining essentially allows public employers to unilaterally implement their changes after the fourteen-day session—a statutorily set "reasonable" period—of negotiating with their employees over only the impact of the changes. 393 And after the fourteen-day "reasonable" period, the employer can unilaterally enact its changes without proceeding to impasse. 394

One additional consequence of the requirement to impact bargain under the statute instead of collective bargain pertains to time limits. 395 Under section 447.309 of the Florida Statutes, there is no time imposition on the parties to reach an agreement over a mandatory subject of bargaining. 396 But in the case of the Financial Urgency Statute, the parties are required to reach an agreement within fourteen days over an otherwise mandatory subject of bargaining in order to prevent the employer's unilateral action. 397

It is true that under the Florida PBA case, the court contemplated a situation in which parties to a collective bargaining agreement could renegotiate one of its provisions in lieu of the employer's unilateral change to it. 398 But that reasoning was based on the parties return to the table to collectively bargain changes to mandatory subjects. 399 However, this deprives public emp-

---

393. See City of Jacksonville v. Jacksonville Supervisor's Ass'n, 791 So. 2d 508, 510 (Fla. 1st Dist. Ct. App. 2001). In Jacksonville Supervisor's Ass'n, the court notes that impact bargaining requires the employer to give "notice and a reasonable opportunity to bargain [with the bargaining agent] before implementing its decision," but... "does not require the employer to submit to an impasse in negotiations... prior to implementation" as collective bargaining does. Id. at 510 (quoting Jacksonville Supervisor's Ass'n, 26 F.P.E.R. 31140 at 246, 255 (2000) aff'd and rev'd in part by 791 So. 2d 508 (Fla. 1st Dist. Ct. App. 2001)). The court makes the distinction that impact bargaining is triggered only in cases that involve managerial rights and not for mandatory subjects of bargaining that require collective bargaining under section 447.309(1). Id. at 511.


396. See §§ 447.309(1), 403(1). Parties are required to negotiate only for a "reasonable" period of time, with the "reasonable" standard to be determined by the parties and not by statute, before proceeding through the impasse procedure to resolve the dispute. Id. § 447.403(1).

397. See id. § 447.4095.

398. State v. Fla. Police Benevolent Ass'n (Fla. PBA), 613 So. 2d 415, 420 n.8 (Fla. 1992).

399. Fla. PBA, 613 So. 2d at 420 n.8. The Court in Florida PBA offered that reasoning based on the renegotiation of annual leave times, which is a mandatory subject of bargaining under Florida law. Id.; St. Petersburg Ass'n of Fire Fighters, Local 747, 5 F.P.E.R. 10381, at 392 (1979) (finding that a public employer's vacation leave policies are required subjects of bargaining). Moreover, the Court based its reasoning on cases from two other jurisdictions, both of which supported the mandate for the parties to collectively bargain over the mandatory subjects in dispute. Fla. PBA, 613 So. 2d at 420 n.8.
ployees the right to *collectively* bargain under article I, section 6 of the Florida Constitution. It also acts to abridge their rights to contract under article I, section 10, since impact bargaining allows the public employer to implement its changes after bargaining for a "reasonable" period.

The sham bargaining process enumerated in the statute does not replace the *Chiles* standard. Only the collective bargaining process assures public employees the right to effective negotiations under article I, section 6. At the most, the impact bargaining merely supplements the *Chiles* procedures, perhaps reasoning that some negotiating was better than none at all.

b. *Next, Part One*

First, we know some things from the language used in the statute. We know that the term "modification" means to alter or change. We also know that the phrase "an agreement," in its strictest sense, could refer to a collective bargaining agreement that has not yet been funded, one that has been funded, or both. In *Chiles*, the Court held that a negotiated agreement does not become a binding contract until the legislature has accepted and funded it. But that decision was premised on the Court's holding in *Florida PBA* that collective bargaining agreements on the state level are inherently limited by and thus always subject to the legislature's appropriations power. But the legislature, by amending the Underfunding Statute to apply only to states, has put an end to the question of whether the separation of powers argument restricts a local government's ability to collectively bargain with their employees.

400. *Fla. PBA*, 613 So. 2d at 416.
401. See *id.* at 416–19.
402. See *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).
403. See *id.*
405. *Fla. Stat.* § 447.4095. In chapter 447 of the *Florida Statutes*, the legislature uses the terms "collective bargaining agreement" and "agreement" interchangeably to depict both funded and unfunded negotiated agreements. See § 447.309(1). Compare § 447.309(2)(a) ("Upon execution of the collective bargaining agreement, the chief executive shall . . . request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement.") (emphasis added) and § 447.309(4) ("If the agreement is not ratified by the public employer . . . [it] shall be returned to the chief executive officer and the employee organization for further negotiations.") (emphasis added), with § 447.401 ("[A]n arbiter . . . shall not have the power to add to, subtract from, modify, or alter the terms of an [existing] collective bargaining agreement.") (emphasis added).
406. *Chiles*, 615 So. 2d at 672–73.
407. *Id.*
The alternative, and more suitable, option regarding the time a negotiated agreement becomes a binding contract at the local level has been declared by PERC, pursuant to section 447.309(1), to be the time when an agreement’s terms are approved by the parties, reduced to writing, and then ratified by the bargaining unit members and the public employer.\(^{409}\) This timing can also be inferred from section 447.403(4)(e), which states that if the bargaining unit fails to ratify an agreement reached by way of impasse, then that agreement never reaches the status of a contract—even though it has been funded.\(^{410}\) This is the better position. In that context, a public employer may invoke the Financial Urgency Statute when it seeks to modify a collective bargaining agreement that has been ratified by both parties and thus made a binding contract, whether or not funded.\(^{411}\)

Applying a strict interpretation to the statute contemplates the term “an agreement” to relate to a contract that is presently in force.\(^{412}\) But the clear language of the statute fails to address whether the public employer can depend on it during the status quo period.\(^{413}\) While the status quo period is technically not regulated by the terms of an existing contract, the terms of the old contract remain “alive in spite of its expiration date” and regulate the parties until a new agreement is ratified.\(^{414}\) Interpreting the language of the statute to include the status quo period may seem like a stretch, but that distance is made up for with legislative intent.\(^{415}\)

In the absence of the Underfunding Statute, the legislature sought to provide public employers with an alternate means of relief for their fiscal emergencies.\(^{416}\) Public employers are not immune from those emergencies during the status quo period.\(^{417}\) In fact, employers arguably are even more vulnerable during that period because the terms of the old contract require funding not provided for in the new budget.\(^{418}\) Consequently, it would be illogical to conclude that the Legislature meant to restrict use of the statute to

\(^{410}\) See Fla. Stat. § 447.403(4)(e) ("If [the] agreement is not ratified by all parties . . . the legislative body’s action shall not take effect with respect to those disputed impasse issues [that] establish the language of contractual provisions [that] could have no effect in the absence of a ratified agreement, including, but not limited to, preambles, recognition clauses, and duration clauses.").
\(^{411}\) See id.
\(^{412}\) See Sarasota Classified-Teachers Ass’n II, 614 So. 2d 1143, 1147 (Fla. 2d Dist. Ct. App. 1993).
\(^{413}\) See id.
\(^{414}\) Id.
\(^{415}\) See id.
\(^{416}\) Id. at 1149.
\(^{417}\) See Sarasota Classified-Teachers Ass’n II, 614 So. 2d at 1148.
\(^{418}\) See id.
only the life of the contract, but instead intended to provide relief to employers during any time in which they are struggling to balance finances with bargaining obligations. Thus, “an agreement” applies to both the time under an existing contract and the time during the status quo period.

Moving on to the term “require.” There are three definitions for that word: 1) “to claim or ask for by right and authority;” and 2) “to call for as suitable or appropriate;” and 3) “to demand as necessary or essential: have a compelling need for.” Since the Financial Urgency statute is provided for times of financial emergency, the most suitable definition would be the third. Before invoking the statute, the employer should have a compelling, essential, or necessary need to modify an agreement. This term naturally goes along with the “financial urgency” phrase. For example, an employer may have a financial urgency, but if there are viable alternatives available that could defray its breaking of the contract, then the employer is not required to modify an agreement—his need is not compelling, essential, or necessary. On the other hand, the employer may have a compelling, essential, or necessary need to modify an agreement, but if it cannot prove the existence of a “financial urgency,” it will not qualify to use the statute. Therefore, the term “require” as used in the statute implies that the employer will only have a compelling, essential, or necessary need to modify an agreement if it can prove there is no viable alternative to its action.

This brings us to the last term, “financial urgency.” The legislature left this term “to practice” for interpretation. A financial urgency could mean a situation in which an employer cannot afford to fund both the labor contract and an essential service or function of its enterprise. For example, if a sheriff’s office is faced with the decision to either eliminate pay raises or layoff several hundred of its public safety employees, or if the school board is forced to either close down several schools or cut teachers’ pay, could

419. See id. at 1149.
420. See id.
422. Id.
423. Id.
425. Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).
426. See id. at 672.
427. See id. at 673.
428. See id.
429. See id.
430. FLA. STAT. § 447.4095 (2010).
432. Id.
constitute financial urgency.\textsuperscript{433} In either instance, the employer’s dire financial situation puts the public interest at risk. A public employer’s inability to comply with a statute could give rise to a financial urgency, such as where a school board is required to maintain a certain balance in reserve or the requirement of a balanced budget. This term, however, is something to be left to the courts to decide—perhaps even on a case-by-case basis.

VI. CONCLUSION

In whole, a financial urgency requiring modification of an agreement contemplates a situation in which the employer has a compelling state interest. It is in an emergency situation with no viable alternative to act under the statute. The employer faces such dire financial conditions that it has no choice but to underfund the labor contract or else risk a much more adverse result. That interpretation complies with legislative intent, \textit{Chiles} and the Constitution.\textsuperscript{434}

Interpreting the statute in a way that makes it enforceable is beneficial to both public employers and public employees. With any other interpretation, the statute may be thrown out, leaving public employees no statutory relief from labor contract obligations in times of financial emergency. Public employees will have their constitutional rights kept safe, a promise—at the very least—to which they are entitled after the drawn out and frustrating process they endured to achieve them.

The respected arbitrator Roger L. Abrams said it best in one of his opinions:

\begin{quote}
The term “to bargain collectively” has a well understood meaning. It means to give-and-take across the negotiation table, reach agreement—if you can, and then keep your promises. To read [the Financial Urgency Statute] to allow the public employer to escape from its promises in the absence of the most compelling circumstances would make a mockery of collective bargaining. As Lewis Carroll wrote in \textit{Alice in Wonderland}: “Everything’s got a moral, if you can only find it.” Here, the moral is: “When you make a deal, you live by it.”\textsuperscript{435}
\end{quote}

\textsuperscript{433.} Sarasota Classified Teachers Ass’n II, 614 So. 2d 1143, 1145 (Fla. 2d Dist. Ct. App. 1993); State v. Fla. Police Benevolent Ass’n (\textit{Fla. PBA}), 613 So. 2d 415, 416 (Fla. 1992).

\textsuperscript{434.} See FLA. CONST. art. I § 6; FLA. STAT. § 447.4095 (2010); Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).