SURVEYS AND PERSPECTIVES ON FLORIDA LAW

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I. INTRODUCTION

This survey will review major criminal cases decided by the Supreme Court of Florida and Florida District Courts of Appeal that cover substantive criminal issues published between the time period of July, 2004 through July, 2007. The time period begins where the last Criminal Law Review Survey created for this Law Review ended. It will discuss cases that interpret the provisions of statutes, as well as defenses, which deal with elements that constitute the definitions of the same. It will focus on cases that address provisions or issues for the first time, clarify areas that have created confusion, or change existing understandings. Therefore, this article will follow the conventions followed in selecting cases for discussion utilized in prior Criminal Law Survey articles.

2. As in past criminal law surveys, this article will not address criminal procedure issues such as search and seizure. Although significant to the practitioner, those issues raise constitutional concerns that extend beyond the substantive focus of this piece. Furthermore, consistent with past articles, this survey will not generally address the complex and specialized areas of death penalty convictions and the proper application of sentencing guidelines.
II. ASSAULT AND BATTERY

In *Miller v. State*, the Second District Court of Appeal decided an appeal that reviewed the fear element in an aggravated assault case. In this case, Ms. Miller was dismissed "from her job at a bank," and when she "attempted to collect her final paycheck," was escorted from the bank by its security officer, Trace Barnes. Miller became upset and "made an audible threat" as she got into her car. "She then drove her car" at Barnes and "another bank employee, Katherine Zevetchin." Zevetchin testified that she was frightened, but at least some evidence indicated that Barnes was not. The appellate court reversed the conviction because the trial court's instruction permitted the jury to find Miller guilty if either victim had a well-founded fear that violence was about to take place. As the appellate court correctly noted, section 784.011 of the *Florida Statutes* "requires that [a] person who is threatened ... fear that [the] violence is imminent."

The Third District Court of Appeal reviewed what constitutes a deadly weapon, in aggravated battery convictions, in *Zapata v. State*. Zapata battered his ex-girlfriend by beating her "head against a cement pillar wall and then ... against a car." He was "convicted of aggravated battery with a deadly weapon, the wall, and battery as a lesser included offense of [the charged] aggravated battery [with a deadly weapon], the car." The court reversed the aggravated battery charge holding that a wall cannot be considered a weapon and, therefore, reduced that conviction to a battery. It also directed the trial court to vacate one of the battery convictions because "the two convictions [arose] from the same continuous criminal act or episode." Whether stationary objects such as walls or floors are considered weapons, especially when the defendant beats a part of the victim's body against it, has caused interpretational problems for courts; but this decision is consistent with that of other jurisdictions.

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3. 918 So. 2d 415 (Fla. 2d Dist. Ct. App. 2006).
4. *Id.* at 415–16.
5. *Id.* at 416.
6. *Id.*
7. *Id.*
8. *Miller*, 918 So. 2d at 416.
9. *Id.* at 416–17.
10. *Id.* at 417.
12. *Id.* at 945.
13. *Id.*
14. *Id.* (citing *State v. Houck*, 652 So. 2d 359, 360 (Fla. 1995)).
15. *Id.* (citing *Olivard v. State*, 831 So. 2d 823, 824 (Fla. 4th Dist. Ct. App. 2002)).
In *Munoz-Perez v. State*, the Fourth District Court of Appeal also interpreted an element of aggravated battery—this time what constituted "use[] of a deadly weapon." The defendant argued that his conviction should be overturned because "he never touched the victim with the knife," rather "he . . . held it near her throat" during the burglary. The court agreed, deciding that the *Florida Statutes* reference to "uses [of] a deadly weapon" requires that the weapon commit the touching in order to constitute a battery.

In *Jones v. State*, the Fourth District considered another battery case, but this time the issue was what constitutes a deadly weapon. Jones was "convicted of sexual battery with a deadly weapon." Jones entered "the apartment of the victim" by displaying a stun gun and pulling the trigger. "[T]he device . . . emitted a blue light and a buzzing sound." The court reversed the conviction because it deemed "that [a] stun gun was [not] a deadly weapon [in] its ordinary use or in the manner in which it was used on the victim."

### III. Homicides

The Supreme Court of Florida reversed a felony murder conviction pursuant to the merger doctrine in *Brooks v. State*. This case involved the stabbing to death of a woman and her daughter, by Brooks. Although Brooks' murder convictions and death sentence were upheld on other grounds, the Court, in a per curiam opinion, found that it was erroneous to use the underlying felony of aggravated child abuse as the predicate felony crime in a first-degree felony murder charge. The Court relied on its prior decision in *Mills v. State* in finding that, because the child was killed by a single stab, the felonious conduct that constituted the child abuse was the  

16. 942 So. 2d 1025 (Fla. 4th Dist. Ct. App. 2006).
17. *Id.* at 1028 (emphasis added).
18. *Id.* at 1027.
19. *Id.* at 1026.
22. 885 So. 2d 466 (Fla. 4th Dist. Ct. App. 2004).
23. *Id.* at 467.
24. *Id.*
25. *Id.*
26. *Id.* at 467–68.
27. *Jones*, 885 So. 2d at 468.
28. 918 So. 2d 181 (Fla. 2005) (per curiam).
29. *Id.* at 186.
30. *Id.* at 199.
31. 476 So. 2d 172 (Fla. 1985).
same that caused the death and, thus, the felony merged into the homicide.\footnote{The Court distinguished the case of \textit{Mapps v. State},\footnote{Brooks, 918 So. 2d at 198.} in which the defendant's felony murder conviction was upheld where "the underlying felony [was] aggravated child abuse,"\footnote{Brooks, 918 So. 2d at 198.} but "there were separate acts of striking, shaking, or throwing" the child.\footnote{Id. (citing \textit{Mapps}, 520 So. 2d at 93).} Justice Lewis, dissenting in part and concurring in part, argued that \textit{Mills} is inapposite because Brooks was not separately charged and convicted of felony child abuse,\footnote{Brooks, 918 So. 2d at 218 (Lewis, J., dissenting).} and because the felony murder statute had been amended since \textit{Mills} to "include 'aggravated child abuse' [amongst] the felonies that would invoke ... felony murder."\footnote{Id. at 219.} As a result, it could be a predicate felony for felony murder.\footnote{Compare \textit{FLA. STAT.} § 782.04(1)(a) (1979), with \textit{FLA. STAT.} § 782.04(1)(a)2h (Supp. 1984) (indicating that "aggravated child abuse" constitutes felony murder "[w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate").} Although the statute does indicate that the crime of child abuse is a predicate felony,\footnote{Brooks, 918 So. 2d at 218; \textit{see also} \textit{FLA. STAT.} § 782.04(1)(a)2h (Supp. 1984).} the majority opinion is defensible and consistent with what some courts would deem an appropriate application of the merger doctrine.

The Second District Court of Appeal addressed the intent requirements concerning a homicide inflicted by a single blow to the head in \textit{Hall v. State}.\footnote{FLA. STAT. § 782.04(1)(a)2h (2002).} The victim in the case "threw a large rock toward the deck of [a restaurant, which] struck an innocent bystander in the back, causing her to fall to the ground."\footnote{Hall, 951 So. 2d at 93.} Hall, who did not know the victim or the bystander, happened upon the scene.\footnote{Id.} After asking the bystander and other witnesses who threw the rock, he began to chase the victim.\footnote{Id. at 93.} The defendant struck the victim with a single blow to the jaw.\footnote{Hall, 951 So. 2d at 93.} Unfortunately for both the victim and the defendant, this single punch caused a fatal brain hemorrhage.\footnote{See \textit{id}.} Expert testimony indicated that this outcome was "a very unusual occurrence" as a result of a single punch because of its placement.\footnote{See \textit{id}.} In addressing this tragedy, the court first rejected the defendant's argument that it was an excusable
homicide "in the heat of passion . . . [or] sudden combat."\textsuperscript{47} The court noted that these arguments had "been rejected in [other] single-punch-to-the-head cases."\textsuperscript{48} Further, this case involved a situation in which the victim did not demonstrate aggression towards the defendant, who "chased [the victim] down and dodged intervention attempts by" a security guard and deputy sheriff.\textsuperscript{49} Furthermore, the fatal blow was landed while the victim was otherwise distracted.\textsuperscript{50} The court also rejected defendant's argument that he could not be convicted of manslaughter by an act where he lacked the intent to kill.\textsuperscript{51} The defendant argued that because homicide is considered a result crime, the defendant needed to intend the result—the death of the victim.\textsuperscript{52} The court held that the intent to commit the act that caused the death was sufficient.\textsuperscript{53} Although the intent to kill is not required for manslaughter, it is usually required that the defendant's state of mind concerning the death is an element.\textsuperscript{54} However, it could easily be argued here that the defendant had the required state of mind with regard to the death, for this crime.\textsuperscript{55}

The Second District Court of Appeal also considered an appeal of a single-punch manslaughter conviction in \textit{Acosta v. State}.\textsuperscript{56} This case involved two teens who got into an argument and decided to meet after school to settle their disagreement with a fight.\textsuperscript{57} A number of friends accompanied them, and while the victim argued with one of the other students, Acosta punched him in the face at the moment the victim was distracted and "unprepared to defend himself."\textsuperscript{58} Similar to the case discussed above, the medical examiner determined that the victim died from a rare, but well documented, vertebral artery hemorrhage caused by a single blow.\textsuperscript{59} The court noted the tragedy of committing this young man to prison.\textsuperscript{60} However, it did not accept the defendant's argument that he could not be found guilty of manslaughter in the case of a brief disagreement where the death was not caused by a dan-

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\textsuperscript{47} \textit{id.} at 94 (citing \textit{Acosta v. State}, 884 So. 2d 112, 114 (Fla. 2d Dist. Ct. App. 2004)).
\textsuperscript{48} \textit{id.}
\textsuperscript{49} \textit{id.} at 95.
\textsuperscript{50} \textit{Hall}, 951 So. 2d at 93.
\textsuperscript{51} \textit{id.} at 95.
\textsuperscript{52} \textit{id.}
\textsuperscript{53} \textit{id.} at 96.
\textsuperscript{54} \textit{id.} at 95–96.
\textsuperscript{55} See \textit{Hall}, 951 So. 2d at 96.
\textsuperscript{56} 884 So. 2d 112, 113 (Fla. 2d Dist. Ct. App. 2004).
\textsuperscript{57} \textit{id.}
\textsuperscript{58} \textit{id.}
\textsuperscript{59} \textit{id.} at 114.
\textsuperscript{60} \textit{id.} at 115.
\end{flushleft}
gerous weapon or involve an act done in a cruel or unusual manner.\textsuperscript{61} The court also rejected the claim that it was the result of sudden combat.\textsuperscript{62}

The Third District Court of Appeal overturned a “motion to dismiss the . . . prosecution of a vehicular homicide charge” in \textit{State v. Gensler}.\textsuperscript{63} Gensler was a police officer, who proceeded through an intersection with a flashing yellow light, on her way to a call.\textsuperscript{64} She was traveling at “approximately ninety miles per hour” in an area “where the posted speed limit was forty-five miles per hour.”\textsuperscript{65} She struck the victim who was crossing the road “just north of the crosswalk.”\textsuperscript{66} “At the time of the collision, the victim had alcohol and cocaine in her body.”\textsuperscript{67} The defendant argued that she was not the proximate cause of the death.\textsuperscript{68} The appellate court held that it was not appropriate to remove this case from the jury where the facts presented an issue of whether the harm that occurred was within the scope of the risk of the danger created by defendant’s speed while going through an intersection, in a business district, at three o’clock in the morning.\textsuperscript{69} In the dissent, Judge Schwartz argued that insufficient facts were presented to demonstrate that the defendant was the legal “but for” cause of the death.\textsuperscript{70}

The Fourth District Court of Appeal reversed a conviction for solicitation to commit second degree murder in \textit{Jones v. State}.\textsuperscript{71} While incarcerated, Jones reportedly told another inmate that he wanted someone to make sure that David Hunt did not show up in a courtroom, or otherwise make sure he did not testify against Jones.\textsuperscript{72} However, “Jones did not actually use the word ‘kill’” in this exchange.\textsuperscript{73} The inmate reported this conversation to law enforcement.\textsuperscript{74} A sting operation was initiated in which a meeting with Jones was set up with an undercover detective.\textsuperscript{75} During the meeting with the detective, Jones made some statements that could be interpreted as him wanting Hunt killed, and others that indicated “that he wanted Hunt beaten

\begin{itemize}
  \item\textsuperscript{61} \textit{Acosta}, 884 So. 2d at 114.
  \item\textsuperscript{62} \textit{Id.} at 115.
  \item\textsuperscript{63} 929 So. 2d 27, 29 (Fla. 3d Dist. Ct. App. 2006).
  \item\textsuperscript{64} \textit{Id.}
  \item\textsuperscript{65} \textit{Id.}
  \item\textsuperscript{66} \textit{Id.}
  \item\textsuperscript{67} \textit{Id.}
  \item\textsuperscript{68} \textit{Gensler}, 929 So. 2d at 30.
  \item\textsuperscript{69} \textit{Id.}
  \item\textsuperscript{70} \textit{Id.} at 32 (Schwartz, J., dissenting).
  \item\textsuperscript{71} 908 So. 2d 615, 617 (Fla. 4th Dist. Ct. App. 2005).
  \item\textsuperscript{72} \textit{Id.}
  \item\textsuperscript{73} \textit{Id.}
  \item\textsuperscript{74} \textit{Id.}
  \item\textsuperscript{75} \textit{Id.}
\end{itemize}
so bad[ly]” that he needed a wheelchair. Under the facts of the case, the court held that the jury could find that he either committed a “solicitation to commit first degree murder or solicitation to commit aggravated battery.” While the court would not go so far as to say “the crime of solicitation to commit second degree murder . . . does not exist,” it did acknowledge that it could not envision a contract killing that was not premeditated, and held that it was not present in this case. It did indicate that some Florida cases have stated that such a crime does exist, and it also noted that both conspiracy and “attempt to commit second degree murder are crimes” in Florida.

In Dorsey v. State, the Fifth District Court of Appeal held that the defendant could be found guilty of both aggravated child abuse and first degree felony murder where the child abuse claim constituted the underlying felony. It distinguished the case from Brooks, discussed above. The Fifth District noted that Brooks involved a single act of stabbing, unlike the case before it where Dorsey shook the baby to death. There was other evidence to indicate that the abuse occurred over more than a single moment in time. Like the Supreme Court of Florida, the District Court also noted that Florida’s felony murder statute includes aggravated child abuse as one of the enumerated felonies.

IV. RESISTING ARREST

The Supreme Court of Florida reversed the Third District Court of Appeal in a case involving a conviction for resisting arrest in Polite v. State. In this case, an undercover officer in plain clothes attempted to arrest the defendant who attempted to hit the officer and also fled the scene. The defendant appealed the refusal of the trial court to instruct the jury “that the state must prove that [he] knew that [the undercover officer] was an offi-
The Third District had held that since the statute requires a person to "knowingly and willfully resist[], obstruct[], or oppose[] any officer," the adverb "knowingly" only modified the verbs and not the noun "officer." That court also stated that the resistance with violence statute was a general intent offense and, therefore, the intent requirement only applied to committing the proscribed act. The Supreme Court of Florida rejected this interpretation as being contrary to the statute's plain language, a potential violation of due process, and contrary to a proper construction when compared to lesser included offenses.

The Second District Court of Appeal addressed the element of "lawful execution of any legal duty" in Yarusso v. State. Yarusso was approached by plain clothes officers in an auto dealership parking lot at three quarters past ten in the evening, while the dealership was closed and in a "high-burglary area." The officers asked the defendant to produce identification. The defendant proceeded to return to his truck. After entering his truck, the defendant proceeded to lock the doors and drive away, hitting one of the officer's hands with his rearview mirror. The parties agreed that the encounter was initially consensual. The court stated that a citizen has a right to terminate a consensual encounter with law enforcement officers at any time, and that Yarusso unequivocally expressed this intention when he entered "his truck, locked the door, and started the ignition." Thus, the officer was not "engaged in the lawful" exercise of duty when his hand was hit. The court also held that fleeing from the officers did not constitute resistance because the officers lacked a sufficient basis for detaining him.

The Fifth District Court of Appeal considered the required elements for Florida's lewd and lascivious acts statutes in State v. Kees. Undercover
officers went to the Red Horse Saloon and arrested the defendants after observing "women exposing their breasts and men kissing them, men inserting their fingers into women's exposed vaginas, and a man lifting the skirt of a woman and performing cunnilingus on her." The county court held that "an essential element of the crime[]" was that someone be offended. The appellate court disagreed, and distinguished the Supreme Court of Florida case of Schmitt v. State, which stated that a lewd act required a lewd "act of sexual indulgence or public indecency." The court argued that the latter case required intentionality because the act occurred in a private place.

V. KIDNAPPING

The Second District Court of Appeal reviewed an armed kidnapping charge in Cole v. State. Cole appealed his conviction for his actions at a Dollar Store in which he pulled a handgun and ordered the cashier to "get in the bathroom [of the store] and to stay there." The movement only required the victim to move a few feet and was confined for only a few minutes. This occurred at the end of the robbery. The court noted that courts in Florida have held that "simply moving a robbery victim" to another room, "even if [the] door is closed and the victim is ordered not to [leave], is insufficient as a matter of law to sustain" a kidnapping conviction. The court determined that such confinement was "likely to naturally accompany [the] robbery." The court found that the evidence was sufficient to uphold a false imprisonment conviction, however.

The Third District Court of Appeal reached the same conclusion in a similar case, Frederick v. State. Frederick broke into a McDonald's restaurant with two other men. While the robbers proceeded to rob the safe, two of the restaurant's employees were ordered into the freezer and "told to

107. 919 So. 2d 504 (Fla. 5th Dist. Ct. App. 2005).
108. Id. at 504.
109. Id. at 506.
110. 590 So. 2d 404 (Fla. 1991).
111. Id. at 410.
112. Kees, 919 So. 2d at 506.
113. 942 So. 2d 1010, 1011 (Fla. 2d Dist. Ct. App. 2006).
114. Id.
115. Id.
116. Id.
117. Id. at 1012.
118. Cole, 942 So. 2d at 1013.
119. Id.
120. 931 So. 2d 967 (Fla. 3d Dist. Ct. App. 2006).
121. Id. at 968–69.
stay there." After the robbers fled, the manager of the restaurant opened the door and let them out. Similar to the Second District, the court held that this confinement was of the type that naturally accompanied the crime. Both cases correctly applied a test established by the Supreme Court of Florida in *Faison v. State*.

VI. CRIMINAL MISCHIEF

The Second District Court of Appeal reversed a criminal mischief conviction in *Stinnett v. State*. The defendant shot his gun at another patron at a bar that he had visited, but instead, hit a parked car. The court held that the defendant's intent to cause harm to a person could not be transferred to satisfy the specific intent to harm property required for criminal mischief.

The Third District Court of Appeal, in *M.H. v. State*, was asked to determine if criminal mischief required specific intent, and found that it did not. The court reasoned that the statute does not use specific intent language, which it apparently believed requires use of the word "intent."

The Fifth District Court of Appeal also decided a case involving criminal mischief in *Sanchez v. State*. Sanchez "attempted to purchase merchandise with a credit card that did not belong to him." When the clerk refused to return the card, Sanchez tried to forcibly retrieve it. A struggle ensued in which the defendant ended up biting the clerk. Also, during the

122. *Id.* at 969.
123. *Id.*
124. *Id.* at 970.
125. 426 So. 2d 963, 965 (Fla. 1983) (citing State v. Buggs, 547 P.2d 720, 723 (1970)). In *Faison*, the Supreme Court of Florida applied the following test to establish whether a confinement is deemed as kidnapping:

[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

- (a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and
- (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or lessens the risk of detection.)

*Id.*

126. 935 So. 2d 632, 634 (Fla. 2d Dist. Ct. App. 2006).
127. *Id.* at 633.
128. *Id.* at 634.
129. 936 So. 2d 1 (Fla. 3d Dist. Ct. App. 2006).
130. *Id.* at 2.
131. *See id.* at 3.
132. 909 So. 2d 981 (Fla. 5th Dist. Ct. App. 2005).
133. *Id.* at 982–83.
134. *Id.* at 983.
135. *Id.*
struggle, "the clerk dropped the telephone, [which] broke." Because Florida's criminal mischief statute requires an intent to damage or destroy the property, the court held that the malice directed towards the clerk could not be transferred to the telephone. The court also held that the defendant's robbery conviction could be upheld, even though the force used by Sanchez, the bite, occurred prior to the taking, because acts prior to the taking could be considered in the course of the taking, if the act and the taking constituted a "continuous series of acts or events."

VII. THEFT

The First District Court of Appeal addressed the requirements of Florida's "[r]obbery by sudden snatching" statute in Nichols v. State. The court reversed the conviction of a thief who "grabbed a purse from a shopping cart being pushed" by the victim where no force was used against her, nor did any touching occur. The court held that the crime requires that the "taking [be] from the victim's person" as opposed to her custody. Therefore, it would not permit a conviction where the property was not taken from the victim's "embrace." This is consistent with decisions from the Second and Fourth District Courts.

The Fourth District Court of Appeal reviewed an abandonment claim in a grand theft conviction in Longval v. State. Michelle Longval accompanied her boyfriend, Anthony Hile, to Wal-Mart. Hile testified that while Longval was obtaining cigarettes from the cashier, he decided that he could steal some items. Hile told Longval to take the shopping cart that he was pushing and pick out a couple of items for herself, indicating that he would purchase the items. When he later asked her to "push the cart out of the

136. Id.
137. FLA. STAT. § 806.13 (2002).
138. Sanchez, 909 So. 2d at 985.
139. Id. at 984.
140. FLA. STAT. § 812.131(1) (2004).
141. 927 So. 2d 90 (Fla. 1st Dist. Ct. App. 2006).
142. Id. at 90.
143. Id. at 91.
144. Id.
146. 914 So. 2d 1098 (Fla. 4th Dist. Ct. App. 2005).
147. Id. at 1099.
148. Id.
149. Id.
store,” she refused. Hile also “testified that he had no plan with Longval to distract the cashiers.”

“The trial court denied [Longval’s] request” for an “instruction on the ‘common law defense of abandonment.’”

The appellate court then discussed the issue, which has arisen in Florida, of whether the defense of abandonment or renunciation, recognized in Florida Statutes, only applies to inchoate crimes. It noted that the First District Court of Appeal held that it did apply. This court disagreed. It noted that the statute expanded the defense beyond the common law defense, which did not apply if the defendant had proceeded far enough to be guilty of attempt. Then, it reasoned that Florida’s grand theft statute includes “endeavors to obtain or . . . use,” including within its scope acts that constitute an attempt to commit grand theft. By so defining the substantive crime, Florida does not recognize attempted grand theft as a separate crime. Therefore, the court concluded that abandonment as a defense applies to substantive crimes “that include attempts within their definition[s].” It also noted that the language of the abandonment statute had been changed since Dixon v. State, and the conclusion that abandonment could be raised as a defense to theft was in accord with the reasoning of a theft case decided by the Third District.

The Fifth District addressed the breadth of coverage of the state’s theft statute in Isenhour v. State. Isenhour co-founded a private academy that provided distance education to students who had been unsuccessful in public school. He also formed a nonprofit Scholarship Funding Organization

150. Id.
151. Longval, 914 So. 2d at 1100.
152. Id.
153. Id.
155. Longval, 914 So. 2d at 1101–02.
156. Id. (discussing Dixon v. State, 559 So. 2d 354, 356 (Fla. 1st Dist. Ct. App. 1990)).
157. Id. at 1100.
158. Id. at 1101.
159. FLA. STAT. § 812.014(1) (2004).
160. Longval, 914 So. 2d at 1101.
161. See id.
162. Id.
163. 559 So. 2d 354 (Fla. 1st Dist. Ct. App. 1990). The language of the abandonment statute since Dixon has since been amended to broaden the scope of substantive crimes “that include attempts within their definition.” Longval, 914 So. 2d at 1101.
165. 952 So. 2d 1216 (Fla. 5th Dist. Ct. App. 2007).
166. Id. at 1217.
(SFO) pursuant to Florida statutes that could seek corporate donations but required 100 percent of the donations be given to "children in the form of scholarships." He, unsuccessfully, attempted to get the academy to identify eligible students. The academy eventually experienced serious financial difficulties. Eventually, Isenhour used funds for administrative costs, which he knew was prohibited, but before he did so, he had telephoned both the Department of Education and the Department of Revenue (DOR), seeking advice as to what to do with the funds. Because the statute was new, he failed to receive helpful advice. He also called the corporate donor seeking to return the funds, but was rejected. The court held that the defendant lacked the intent to steal required by the statute. Additionally, the donor had relinquished its right to the funds. The DOR had no right to the funds during the dates alleged, and would not have been out any funds—tax credits given to the corporate donor—had the scholarships been awarded. Thus, the State failed to prove that the defendant possessed the required intent, or that anyone had a superior interest in the funds during the time periods alleged.

VIII. MEDICAID FRAUD

The Supreme Court of Florida reversed the Fifth District Court of Appeal decided a Medicaid patient brokering and fraud case in State v. Rubio. The defendant dentists had successfully argued to the Fifth District that the anti-kickback portion of the Florida statute was unconstitutional. At the time of the alleged acts, this part of Florida's statute defined "knowingly" to mean "a person who is aware or should be aware of the nature of his or her conduct." The controlling federal statute for Medicaid fraud required that the person make or cause to be made false statements "knowingly and will-

167. Id. at 1217–18.
168. Id. at 1218.
169. Id.
170. Isenhour, 952 So. 2d at 1219.
171. Id.
172. Id.
173. Id. at 1222.
174. Id.
175. Isenhour, 952 So. 2d at 1223.
176. Id. at 1223–24.
177. 2007 WL 2002586 (Fla. 2007).
178. 917 So. 2d 383, 387 (Fla. 5th Dist. Ct. App. 2007) (referencing Fla. Stat. § 409.920 (2002)).
The appellate court agreed that the statute violated the Supremacy Clause by permitting conviction on a lesser intent requirement. The Supreme Court argued that the statute could be salvaged by severing the "should be aware" language from 409.920(1)(d) as it pertains to 409.920(2)(a).

The Third District also considered a Medicaid fraud case in State v. Wolland. Wolland, who was charged with 115 counts of filing false claims, argued that the statute was unconstitutional because it was "preempted by federal law." This court addressed the difference between the two statutes, noting that Florida required that the acts be done knowingly, while the federal statute required knowingly and willfully. It had also previously held that this subsection was preempted. It held that there was no preemption in this case because the knowledge element implicitly included willful behavior, and the court distinguished State v. Harden by saying that the latter case dealt with a conflict in which the federal statute had a safe harbor provision lacking in the Florida statute. The Florida statute has since been amended to indicate that the knowledge requirement includes a willful state of mind.

IX. CONSPIRACY

The Third District Court of Appeal decided an appeal, in Campbell v. State, involving a dispute concerning the requirements for "attempted trafficking in cocaine." Campbell was caught in an undercover sting opera-

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181. See Rubio, 917 So. 2d at 392.
182. See Rubio, 2007 WL 2002591.
183. 902 So. 2d 278, 279 (Fla. 3d Dist. Ct. App. 2005).
184. Id. at 279–80.
185. Compare Fla. Stat. § 409.920(1)(d), with 42 U.S.C. § 1320a-7b(a)(1) (indicating that because the Florida statute omits the term "willfully" as a requirement, conduct that would otherwise be lawful under the federal statute will be deemed unlawful under Florida law).
186. Wolland, 902 So. 2d at 280.
188. Id. at 352.
189. Wolland, 902 So. 2d at 286.
190. Compare Fla. Stat. § 409.920 (2003), with Fla. Stat. § 409.920 (2004) (indicating a change in the knowingly requirement through the addition of "willfully" or "willful" in the statute's definition of "knowingly").
191. 935 So. 2d 614 (Fla. 3d Dist. Ct. App. 2006).
192. Id. at 615.
tion designed to target persons involved "in drug-related 'rip-offs.'" Because there was no cocaine actually involved in the sting operation, the defendant argued that he could not be guilty of attempted trafficking. The court rejected this argument, despite the fact that trafficking would require the existence of the drug, because attempt is satisfied if there is an intent to commit a crime and an overt act taken towards commission—both of which were clearly met in this case.

X. CONSTITUTIONAL CLAIMS

The Second District Court of Appeal considered a Due Process challenge to amendments of the Florida statutes regarding possession of controlled substances in *Wright v. State.* Following the Supreme Court of Florida decisions in *Scott v. State* and *Chicone v. State,* the Florida legislature found that the Court’s holdings in those cases, which required “that the state must prove that the defendant knew of the illicit nature of [the] controlled substance . . . [were] contrary to legislative intent.” Thus, the statute was amended to remove “knowledge of the illicit nature” as an element, but to still permit the defendant to assert lack of knowledge as an affirmative defense. However, if the defendant raises lack of knowledge as an affirmative defense, “a permissive presumption that the [defendant] knew of the illicit nature” is raised. The court argued that the statute does not improperly shift the burden of proof of the knowledge element to the defendant because the defendant is not required to disprove knowledge; instead, it leaves it as an option to raise it as a defense. It also held that there was a rational relationship between eliminating the element of knowledge because of its difficulty to prove, and because of the legitimate governmental interest of addressing the drug problem.

193. *Id.* at 615–16.
194. *Id.* at 617.
195. *Id.* This is consistent with other rulings in Florida. *E.g.,* Brooks v. State, 762 So. 2d 879, 897 (Fla. 2000); State v. Cohen, 409 So. 2d 64, 64–65 (Fla. 1st Dist. Ct. App. 1982).
197. 920 So. 2d 21, 23 (Fla. 4th Dist. Ct. App. 2005).
198. 808 So. 2d 166 (Fla. 2002).
199. 684 So. 2d 736 (Fla. 1996).
200. FLA. STAT. § 893.101; *Wright,* 920 So. 2d at 24.
201. FLA. STAT. § 893.101(2).
202. *Id.* § 893.101(3).
203. *Wright,* 920 So. 2d at 25.
204. See *id.*
205. *Id.*
The Second District Court of Appeal again considered Due Process and First Amendment challenges to the Florida statute criminalizing receipt of computer transmissions of information about a minor for purpose of sexual conduct with a child in *Wegner v. State.* The defendant argued that the statute is unconstitutional for failing to require that the offender know that the person from whom the transmission is received is a minor. By including this element, the court also rejected the claimant’s overbreadth argument, which was based upon the lack of a mental element in the statute.

XI. MISCELLANEOUS

In *Czapla v. State,* the First District Court of Appeal addressed the defendant’s claim that he raised a complete defense because he was administering non-excessive corporal punishment in a child abuse case. In the case, the defendant punched his son in the head and pushed him onto the floor where he kicked him in the side. The defendant argued that the conviction could not be sustained because the state did not prove that his son had sustained injuries more significant than bruises or welts. The court rejected this argument, however, because intentionally kicking a child lying on the ground is not reasonable corporal discipline as a matter of law.

The First District also considered the definition of a convenience business in a Florida statute in *Baker v. State.* Baker was “convicted of sale, manufacture, delivery, or possession of cocaine with the intent to sell, manufacture or deliver cocaine within 1,000 feet of a convenience business.” The relevant statute defines a convenience business to be one “that is open for business at any time between the hours of 11 p.m. and 5 a.m.” The store at issue in this case usually closed at ten o’clock in the evening, but sometimes stayed open past eleven o’clock in the evening. The court recognized that the statute was ambiguous and could be read to either include

207. 928 So. 2d 436, 437 (Fla. 2d Dist. Ct. App. 2006).
208. Id.
209. Id. at 440.
210. 957 So. 2d 676 (Fla. 1st Dist. Ct. App. 2007).
211. Id. at 679.
212. Id. at 677.
213. Id. at 679.
214. Id. at 680.
215. 951 So. 2d 78, 78 (Fla. 1st Dist. Ct. App. 2007).
216. Id.
218. *Baker,* 951 So. 2d at 79.
stores that are regularly open between the stated hours, or those that have at some point opened between the listed times.\textsuperscript{219} It held that the first reading was more logical, and the appropriate interpretation under the Rule of Leniency.\textsuperscript{220}

The Third District Court of Appeal decided two companion cases, \textit{Cloyd v. State}\textsuperscript{221} and \textit{Hughes v. State (Hughes III)},\textsuperscript{222} which attracted some notoriety because they involved two intoxicated commercial airline pilots.\textsuperscript{223} After a late night of drinking, the pilots got into a dispute with security personnel when they arrived at the airport for duty.\textsuperscript{224} The personnel noticed the odor of alcohol and reported the same to the Transportation Security Administration (TSA) and the pilots' airline.\textsuperscript{225} The TSA notified the police, who responded to the airport.\textsuperscript{226} By the time the police arrived, the pilots were in the cockpit of the plane that they were to fly, "the jet way had been pulled . . . from the [airplane], and the [plane] was connected to the tug that pushes it . . . from the gate."\textsuperscript{227} The police officers ordered the "tug driver to return the [plane] to the gate."\textsuperscript{228} The aviation expert testified that "the captain [was] in actual control of the aircraft" at that point in time and that the plane could not be pushed back until the pilot so instructed.\textsuperscript{229} The driver of the tug testified that the engines were not on, and that "the pilot [could not] steer the aircraft" while "hooked up to the tug."\textsuperscript{230} The State's expert testified that the pilots had activated and checked systems, and entered critical data into the computer by this time.\textsuperscript{231}

After the trial court denied the defendants' motion to dismiss based upon federal preemption,\textsuperscript{232} they petitioned the federal district court for a writ of habeas corpus, which was granted.\textsuperscript{233} The Eleventh Circuit Court of Appeals reversed, holding that the District Court should have abstained be-

\begin{itemize}
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} 943 So. 2d 149 (Fla. 3d Dist. Ct. App. 2006).
\item \textsuperscript{222} 943 So. 2d 176 (Fla. 3d Dist. Ct. App. 2006).
\item \textsuperscript{223} \textit{Id.} at 182; \textit{Cloyd}, 943 So. 2d at 156.
\item \textsuperscript{224} \textit{Cloyd}, 943 So. 2d at 156; \textit{Hughes III}, 943 So. 2d at 182.
\item \textsuperscript{225} \textit{Cloyd}, 943 So. 2d at 156; \textit{Hughes III}, 943 So. 2d at 182–83.
\item \textsuperscript{226} \textit{Cloyd}, 943 So. 2d at 156; \textit{Hughes III}, 943 So. 2d at 183.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Cloyd}, 943 So. 2d at 157; \textit{Hughes III}, 943 So. 2d at 184.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Cloyd}, 943 So. 2d at 158; \textit{Hughes III}, 943 So. 2d at 185.
\item \textsuperscript{233} \textit{Hughes v. Eleventh Jud. Cir. of Fla. (Hughes I)}, 274 F.Supp. 2d 1334, 1335–36 (S.D. Fla. 2003), rev'd, 377 F.3d 1258 (11th Cir. 2004).
\end{itemize}
cause the preemption claim was not facially conclusive.\textsuperscript{234} The Third District rejected the preemption argument,\textsuperscript{235} and also rejected arguments that Florida’s statute is vague, and that it unconstitutionally incorporated federal standards.\textsuperscript{236} Finally, the court found that the defendants could be found guilty of operating the aircraft while intoxicated even though the engines had not yet been started.\textsuperscript{237}

Statutes outlawing loitering frequently cause courts and law enforcement officers difficulties in application because of the indeterminacy of the terms. Such statutes, in fact, frequently raise constitutional concerns. The Fourth District Court of Appeal, sought to clarify the requirements for Florida’s loitering statute in \textit{G.G. v. State.}\textsuperscript{238} This case involved an officer observing juveniles at three forty-five in the morning behind a shopping plaza, one of whom, not the defendant, was carrying a piece of brick.\textsuperscript{239} The juveniles claimed "they were looking for their dog," and the defendant originally gave the officer a fictitious name.\textsuperscript{240} The defendant then advised her of his real name, and was arrested for loitering and prowling.\textsuperscript{241} Although the court felt that the State had properly shown that the defendant was "loitering and prowling in a manner not usual for law-abiding citizens,"\textsuperscript{242} it did not think that the facts supported a finding that a "breach of the peace [was] imminent or the public safety [was] threatened,"\textsuperscript{243} and therefore, reversed the conviction.\textsuperscript{244}

The Fourth District Court of Appeal reviewed the requirements for a duress or necessity defense in \textit{Pflaum v. State.}\textsuperscript{245} Ryan Pflaum was convicted of perjury for "false statements [that he made] in a deposition and at a subsequent trial."\textsuperscript{246} Pflaum, Conrad Urbanowski, and others "were involved in a fight with [Leonard] Albritton."\textsuperscript{247} "Albritton was . . . charged with aggravated battery, and his defense was based upon presentation of" a video-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{234} Hughes v. Att’y Gen. of Fla. (\textit{Hughes II}), 377 F.3d 1258, 1260 (11th Cir. 2004), \textit{cert. denied}, 543 U.S. 1051 (2005).
\item\textsuperscript{235} \textit{Cloyd}, 943 So. 2d at 158; \textit{Hughes III}, 943 So. 2d at 185.
\item\textsuperscript{236} \textit{Cloyd}, 943 So. 2d at 161, 164; \textit{Hughes III}, 943 So. 2d at 188, 190.
\item\textsuperscript{237} \textit{Cloyd}, 943 So. 2d at 175; \textit{Hughes III}, 943 So. 2d at 198–99.
\item\textsuperscript{238} 903 So. 2d 1031, 1032 (Fla. 4th Dist. Ct. App. 2005).
\item\textsuperscript{239} \textit{Id.}
\item\textsuperscript{240} \textit{Id.}
\item\textsuperscript{241} \textit{Id.}
\item\textsuperscript{242} \textit{Id.} at 1033 (quoting \textit{Von Goff v. State}, 687 So. 2d 926, 928 (Fla. 2d Dist. Ct. App. 1997)).
\item\textsuperscript{243} \textit{G.G.}, 903 So. 2d at 1033.
\item\textsuperscript{244} \textit{Id.} at 1034.
\item\textsuperscript{245} 879 So. 2d 93 (Fla. 4th Dist. Ct. App. 2004).
\item\textsuperscript{246} \textit{Id.} at 94.
\item\textsuperscript{247} \textit{Id.}
\end{enumerate}
\end{footnotesize}
Pflaum falsely testified that the video did not exist and that "Urbanowski did not have a reputation as a fighter or bully." At his perjury trial, Pflaum admitted that the statements were false, but that he made them because of threats made by Urbanowski. Pflaum testified that Urbanowski told him to deny the existence of the videotape and threatened him several times before his deposition if he did not. Included in the threats was at least one in which Urbanowski threatened to kill him. Pflaum introduced "ample evidence of Urbanowski's cruel and violent character," and his knowledge of it. The court accepted the State's argument that duress cannot be proven with "[a] threat of future harm," and that the harm must be imminent and impending. It rejected Pflaum's argument that such a requirement is appropriate in self-defense cases, but not for perjury where "it would be absurd to think that anyone could ever have a gun held to one's head while they testify." The court reasoned that official proceedings are not always private, and that imminent and impending danger could be directed to a close family member, so that duress could apply to some testimonial situations. The court correctly noted that the requirement for imminent harm is in accord with case law on the duress defense.

The Fourth District Court of Appeal interpreted the statute criminalizing the deprivation of an "officer of means of protection or communication" in Rodriguez v. State. The Deputy involved in this case responded to a call of "domestic disturbance between [the defendant] and his father." The defendant continued to yell and scream at his father after the officer's arrival, and Deputy Keegan decided to handcuff the defendant. Rodriguez grabbed the handcuffs. The defendant argued "that [the] handcuffs [were] not a means of defending oneself as required by the statute" applying the

248. Id.
249. Id.
250. Pflaum, 879 So. 2d at 94.
251. Id.
252. Id.
253. Id.
254. Id.
255. Pflaum, at 94-95.
256. Id. at 95.
257. Id.
258. Id.
259. 931 So. 2d 991, 991 (Fla. 4th Dist. Ct. App. 2006).
260. Id.
261. Id.
262. Id.
263. Id. at 992.
The court declined to apply the rule to limit the statute to only apply to weapons as "'means' to defend oneself." The Fifth District Court of Appeal considered the common law privilege to prevent escape as it applies to bail bondspersons in Buchanan v. State. Buchanan was a bail bondsman who was attempting to apprehend Kevin Brinson, a "client[] who had jumped bail." "Brinson attempted to [escape] a car by climbing over the driver's seat, at which time Buchanan shot [him] in the buttocks. . . ." The defendant argued that he was "privileged to 'use whatever [force] necessary to affect . . . surrender.'" The court first acknowledged "that a person 'under bail is in the vicarious custody of his bondsman,'" who may apprehend him. "Having found no Florida case law . . . [supporting an] unfettered privilege [for a bondsperson] to use deadly force," it refused to find that one existed.

XII. CONCLUSION

As the preceding discussion indicates, Florida courts have interpreted a number of statutes, defenses, and common law doctrines since the last review article. The decisions seem to uniformly recognize existing criminal doctrines and theories—rather than attempt to establish controversial or novel concepts. The courts also seem to have provided clarification in some areas of confusion.

264. Rodriguez, 931 So. 2d at 992.
265. Id.
266. 927 So. 2d 209, 211 (Fla. 5th Dist. Ct. App. 2006).
267. Id.
268. Id.
269. Id. (citing Register v. Barton, 75 So. 2d 187, 188 (Fla. 1954)).
270. Id. (citing Register v. Barton, 75 So. 2d 187, 188 (Fla. 1954)).
271. Buchanan, 927 So. 2d at 211.
272. Id. at 212.

Barbara Landau*

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I. INTRODUCTION

This survey reviews Florida appellate court decisions and legislation enacted during 2006 and 2007 of potential, immediate interest to business owners and their counsel. A quick glance at the table of contents reminds the reader of a few of the many distinct areas of the law that have a direct, or at least a significant peripheral impact, on doing business in Florida.

The survey does not include every case decided by the Supreme Court of Florida and the five District Courts of Appeal that could be said to affect business owners. Only those cases that appear to be of special interest, have
unusual facts, involve conflicts certified to the Supreme Court of Florida by the District Courts of Appeal, clarify or expand existing principles of law, or address matters of first impression made the cut. Several federal court decisions have also been included, the first case in the survey being a decision of the United States Supreme Court.¹

There were also important legislative developments that persons engaging in business in Florida will need to consider. Therefore, an overview of some of the legislation enacted in 2006 and 2007 has been included. The reader’s own in-depth analysis of the statutes is strongly suggested.

II. ALTERNATIVE DISPUTE RESOLUTION

A. Arbitration

In Buckeye Check Cashing, Inc. v. Cardegna (Cardegna I),² Mr. Cardegna (Cardegna) entered into an agreement with Buckeye Check Cashing, Inc. (Buckeye) that purported to require submission of all controversies to binding arbitration pursuant to the Federal Arbitration Act (FAA), if a party to the agreement (or certain third parties) elected arbitration.³ The agreement also provided that the FAA would apply.⁴ Cardegna sued Buckeye in Florida state court claiming that “Buckeye charged usurious interest rates.”⁵ He also alleged that the agreement violated various other Florida laws and was “criminal on its face.”⁶ Buckeye asked the court to order arbitration.⁷ The trial court ruled that a court, not an arbitrator, decides if “a contract is illegal and void ab initio.”⁸ The Fourth District Court of Appeal reversed the trial court, but the Supreme Court of Florida reversed the Fourth District Court of Appeal.⁹ The Supreme Court of Florida, ruling in favor of Cardegna, concluded that it would violate Florida public policy and contract law to enforce an arbitration clause in a contract challenged as unlawful.¹⁰ The United States Supreme Court granted Buckeye’s petition for certiorari.¹¹

². Id.
³. Id. at 442–43 (citing 9 U.S.C. §§ 1–16 (2000)).
⁴. Id.
⁵. Id. at 443.
⁶. Cardegna I, 546 U.S. at 443.
⁷. Id.
⁸. Id.
⁹. Id.
¹⁰. Id. at 446.
¹¹. Cardegna I, 546 U.S. at 443.
Justice Scalia stated the issue as, "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality."12 The United States Supreme Court, relying on its decisions in Prima Paint Corp. v. Flood & Conklin Manufacturing Co.13 and Southland Corp. v. Keating,14 reversed the Supreme Court of Florida.15 The United States Supreme Court reaffirmed its position that an arbitration clause in a contract involving a transaction subject to the FAA is severable from the contract as a whole.16 This is so even if the contract is alleged to be void and illegal under state law.17 Under the FAA, the issue of the validity of the contract itself is to be heard in the first instance by the arbitrator, and this applies in both state and federal courts.18 Had the challenge been to the validity of the arbitration clause, a court would have been the proper forum in the first instance.19

The Court noted that there is also a distinction between the issue of the validity of the contract, which is to be determined by the arbitrator, and the issue of the existence of a contract in the first place.20 Included in the latter category are determinations such as whether the person against whom the contract was sought to be enforced ever signed the contract, whether the person signing had the authority to sign on behalf of an alleged principal, and issues of capacity.21 The Court declined to rule on whether the courts or the arbitrator should decide questions regarding the existence of contract.22 Justice Thomas dissented, stating that it remains his position that the Federal Arbitration Act (FAA) does not apply in state court proceedings.23

In light of the United States Supreme Court’s decision in Cardegna I, Florida’s appellate courts reviewed some of their decisions under the FAA.24

12. Id. at 442.
15. Cardegna I, 546 U.S. at 448–49.
16. Id. at 445.
17. Id. at 446.
18. Id. at 445–46.
19. Id. at 445.
20. Cardegna I, 546 U.S. at 444.
21. Id. at 444 n.1.
22. Id.
23. Id. at 449 (Thomas, J., dissenting).
24. See, e.g., Betts v. Fastfunding the Co. (Betts I), 950 So. 2d 379 (Fla. 2006) (remanding to the Fifth District Court of Appeal in light of Cardegna I, 546 U.S. 440); Cardegna v. Buckeye Check Cashing, Inc. (Cardegna II), 930 So. 2d 610 (Fla. 2006) (on remand from the United States Supreme Court); Fastfunding the Co. v. Betts (Betts II), 951 So. 2d 116 (Fla. 5th Dist. Ct. App. 2007) (on remand from the Supreme Court of Florida, remanding to the trial court to refer to arbitration pursuant to Cardegna I). The Supreme Court of Florida in turn
In addition, several important decisions involving the Florida Arbitration Code were rendered. The Supreme Court of Florida, in O'Keefe Architects, Inc. v. CED Construction Partners, Ltd., addressed the issue of whether the arbitrator or the trial court should have ruled on a statute of limitations defense to arbitration. The case was before the Supreme Court of Florida based on conflict certified by the Fifth District Court of Appeal with the Fourth District Court of Appeal's decision in Reuter Recycling of Florida, Inc. v. City of Dania Beach. O'Keefe Architects, Inc. involved a claim by CED, a contractor, against O'Keefe, an architect, for damages arising from alleged negligent design and construction. The arbitration clause in question provided in part that, "[i]n no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations."

CED filed a demand for arbitration with the American Arbitration Association. O'Keefe objected, arguing that arbitration was barred by the

remanded Cardegna II to the Fourth District Court of Appeal. Cardegna II, 930 So. 2d at 611. The Fourth District Court of Appeal remanded the matter to the trial court, which entered an order compelling arbitration and staying proceedings. Order Granting Defendant Buckeye Check Cashing, Inc.'s Motion For An Order Compelling Arbitration And Staying Proceedings at 1, Cardegna v. Buckeye Check Cashing, Inc., No. 502001CA001162XXXXOCAJ (Fla. 15th Cir. Ct. June 23, 2006); see also Reuter v. McKenzie Check Advance of Fla., L.L.C., 825 So. 2d 1070 (Fla. 4th Dist. Ct. App. 2002), rev. denied, 930 So. 2d 610 (Fla. 2006).

25. See, e.g., O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So. 2d 181 (Fla. 2006); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263 (Fla. 4th Dist. Ct. App. 2006); see also infra notes 27, 39, 61.

26. 944 So. 2d 181 (Fla. 2006).

27. Id. at 183.


29. O'Keefe Architects, Inc., 944 So. 2d at 183. CED fixed certain problems on a construction project upon demand of the property owners and the property owners assigned to CED their claim against O'Keefe, the architect. Id. The Supreme Court of Florida declined to address O'Keefe's contention that the claim was not assignable, since the issue was not included in the conflict certified by the Fifth District Court of Appeal. Id. at 183 n.2.

30. Id. The arbitration clause was contained in two contracts between O'Keefe Architects, Inc., the architect, and Vero Club Partners Ltd. and Clearwater Phase I Partners Ltd., the property owners who had assigned their claims against O'Keefe to CED Construction Partners, Ltd. Id. at 183. CED Construction Partners, Ltd. was not a party to the agreements that contained the arbitration clauses. O'Keefe Architects, Inc., 944 So. 2d at 183.

31. Id. at 184. The parties agreed, and the Court confirmed, that the Florida Arbitration Code, not the Federal Arbitration Act, applied, there being no interstate commerce involved. Id.; see also Fla. Stat. §§ 682.01–22 (2005).

32. O'Keefe Architects, Inc., 944 So. 2d at 183.
statute of limitations, but the arbitrator disagreed.33 O’Keefe then filed a complaint in the Circuit Court, seeking a ruling that the trial court, not the arbitrator, was required to decide the statute of limitations issue.34 The trial court declined to grant the requested relief and O’Keefe appealed.35 The Fifth District Court of Appeal agreed with the trial court, but certified conflict with Reuter Recycling of Florida, Inc.36 The Supreme Court of Florida, interpreting the Florida Arbitration Code and citing Stinson-Head, Inc. v. City of Sanibel,37 upheld the decision of the Fifth District Court of Appeal.38 In resolving the conflict, the Court noted that both cases involved arbitration provisions with “similar language regarding timelines,”39 and concluded that under the broad clauses in question, the arbitrator was the proper arbiter of the statute of limitations defense.40

Alterra Healthcare Corp. v. Bryant41 arose from Mrs. Bryant’s residency at Alterra Healthcare Corp’s (Alterra) Vero Beach facility and later, another Alterra facility in Vero Beach.42 Mrs. Bryant’s husband, acting under a durable power of attorney given to him by Mrs. Bryant, checked her into both facilities.43 Mr. Bryant signed a residency agreement on Mrs. Bryant’s behalf when she entered the first facility, but no agreement was signed when she moved to the second facility.44 Mr. Bryant, as his wife’s attorney-in-fact, sued Alterra, alleging violation of the Assisted Living Facilities Act and negligence.45 The residency agreement contained arbitration provisions,

33. Id. The arbitrator ruled against O’Keefe on another issue as well as the statute of limitations defense. Id. at 184.
34. Id. O’Keefe also argued that CED could not demand arbitration “because the contracts were not assignable.” Id.
35. O’Keefe Architects, Inc., 944 So. 2d at 184.
36. Id.
38. O’Keefe Architects, Inc., 944 So. 2d at 185–86, 188.
39. Id. at 184.
40. Id. at 188. The Court noted that there were three threshold issues that a court has to consider with respect to a motion to compel arbitration. Id. at 185. First, is there “a valid written agreement to arbitrate”; second, is there an arbitrable issue; and third, was the right to arbitrate waived. Id. (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)). The Court noted that there was agreement between CED and O’Keefe that all of these requirements were satisfied. O’Keefe Architects, Inc., 944 So. 2d at 185 n.4.
41. 937 So. 2d 263 (Fla. 4th Dist. Ct. App. 2006).
42. Id. at 265.
43. Id.
44. Id. at 270. The trial court also found that the residency agreement applied to Mrs. Bryant’s stay at the second facility as well as the first facility. Id. at 271. See infra note 398–401 and accompanying text.
45. Alterra Healthcare Corp., 937 So. 2d at 265.
and Alterra moved to compel arbitration.\textsuperscript{46} The arbitration provisions purported to prohibit punitive damages, limit non-economic damages, prohibit attorney’s fees, waive the right to appeal, and limit discovery.\textsuperscript{47} The trial court found that these provisions were void as against public policy under chapter 400 of the \textit{Florida Statutes} and the Nursing Home Resident’s Rights Act, and were “egregiously unconscionable.”\textsuperscript{48} However, the residency agreement had a severance clause that essentially provided that the invalidity of some parts of the agreement would not affect the validity of other parts.\textsuperscript{49} The trial court severed the unenforceable provisions from the enforceable portions of the arbitration clause and ordered that the parties proceed to binding arbitration.\textsuperscript{50} Alterra appealed and Mrs. Bryant cross-appealed.\textsuperscript{51} The Fourth District Court of Appeal stated that the remedial nature of the Assisted Living Facilities Act was a matter of first impression for the Florida appellate courts.\textsuperscript{52} Analogizing the Assisted Living Facilities Act to the Nursing Home Residents Act, sections 400.022 and 400.023 of the \textit{Florida Statutes}, the court held that the former was also a remedial statute designed to protect its subjects.\textsuperscript{53} As a remedial statute, it had the effect of voiding, as against public policy, the arbitration agreement’s punitive damages prohibition, limit on non-economic damages, attorney’s fee award limitation, and restrictions on discovery.\textsuperscript{54} In addition, the Florida Arbitration Code was expressly made applicable by the agreement.\textsuperscript{55} The Florida Arbitration Code allows “a limited right of appeal.”\textsuperscript{56} Thus, prohibiting the appeal was also void as against public policy.\textsuperscript{57}

Alterra argued that the arbitrator, not the court, should have decided the validity of the limitations contained in the contract.\textsuperscript{58} The Fourth District Court of Appeal stated that limit of liability provisions are proper for the arbitrator, not the trial court, unless they are part of the arbitration clause

\begin{thebibliography}{99}
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} \textit{Id.} at 265–66.
\bibitem{49} \textit{Id.} at 270.
\bibitem{50} \textit{Alterra Healthcare Corp.}, 937 So. 2d at 265–66.
\bibitem{51} \textit{Id.} at 265.
\bibitem{52} \textit{Id.} at 266.
\bibitem{53} \textit{Id.} The Nursing Home Resident’s Act was held to be remedial in \textit{Romano ex rel. Romano v. Manor Care, Inc.}, 861 So. 2d 59, 62, 63 (Fla. 4th Dist. Ct. App. 2003).
\bibitem{54} \textit{Alterra Healthcare Corp.}, 937 So. 2d at 265.
\bibitem{55} \textit{Id.} at 267.
\bibitem{56} \textit{Id.}
\bibitem{57} \textit{Id.}
\bibitem{58} \textit{Id.} at 267–68.
\end{thebibliography}
The Fourth District Court of Appeal concluded that the limit of liability provisions were part of the arbitration clause itself, and therefore, the trial court’s consideration of the clauses in the first instance, even before severing them, was proper. In an attempt to convince the court to rule to the contrary, Alterra argued that the United States Supreme Court’s decision in *Cardegna I* applied, and under *Cardegna I*, a challenge to the validity of the contract had to go to the arbitrator. The Fourth District distinguished *Cardegna I* since Mrs. Bryant’s challenge was to the provisions of the arbitration clause itself.

The Fourth District Court of Appeal’s comments regarding *Cardegna I* are interesting. Before distinguishing the facts of Alterra from those of *Cardegna I*, a case that had been before the Fourth District Court of Appeal and whose opinion was affirmed by the United States Supreme Court, the Fourth District Court of Appeal said that “[i]n [*Cardegna I*], the Supreme Court of the United States reaffirmed the principle that ‘regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.’”

However, in *Cardegna I*, the United States Supreme Court had before it an agreement subject to the FAA. The agreement in *Alterra* expressly provided that the Florida Arbitration Code applied. Did the Fourth District Court of Appeal in *Alterra* hold that the principle of *Cardegna I* applies to proceedings in Florida state courts subject to the Florida Arbitration Code? Or was the implication that even if *Cardegna I* applied, the facts were distinguishable because the challenge, in the court’s view, was to the arbitration clause itself.
clause itself rather than the contract? The issue of severability was also considered by the Second District Court of Appeal in *Reeves v. Ace Cash Express, Inc.* Mary Reeves, alleging violations of the Florida Consumer Collection Practices Act (FCCPA), sued Ace Cash Express, Inc. The trial court required her to arbitrate her dispute with Ace Cash Express, Inc. and she appealed. She argued on appeal that enforcement of the arbitration clause violated public policy, claiming that the arbitration clause failed to afford her all of the rights and remedies provided under the FCCPA. The Second District Court of Appeal first noted that under *Seifert v. U.S. Home Corp.*, a court, before compelling arbitration, must determine that: 1) there is a valid written agreement to arbitrate; 2) there is an arbitrable issue; and 3) the right to arbitration has been waived. With respect to prong two of the test, Ms. Reeves contended that the issues were not arbitrable because of the alleged failure to provide the rights available under the FCCPA, which caused the arbitration agreement to be against public policy.

The court, before considering the public policy argument, addressed the question of whether, as a matter of law, claims under the FCCPA are not arbitrable. The court drew an analogy to its reasoning in *Orkin Exterminating Co. v. Petsch*, a case involving arbitration under the Florida Deceptive and Unfair Trade Practices Act. There, as in *Reeves*, the Second District Court of Appeal concluded that there was no express provision in the applicable statute that would demonstrate the legislature’s intent to preclude arbitration. Having so determined, the court in *Reeves* noted that the question of whether arbitration of FCCPA claims was against public policy was an issue of first impression.

The court concluded that the arbitration agreement did not, with one exception, prevent Reeves from asking for relief otherwise available under the

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66. 937 So. 2d 1136, 1138 (Fla. 2d Dist. Ct. App. 2006), rev. denied 952 So. 2d 1191 (Fla. 2007).
67. *Id.* at 1137.
68. *Id.*
69. *Id.*
70. 750 So. 2d 633 (Fla. 1999).
71. *Reeves*, 937 So. 2d at 1137 (citing *Seifert*, 750 So. 2d at 636).
72. The Second District Court of Appeal affirmed the trial court’s determination under prong one of the test that there was a valid written agreement to arbitrate. *Reeves*, 937 So. 2d at 1137.
73. *Id.*
74. *Id.*
75. 872 So. 2d 259 (Fla. 2d Dist. Ct. App. 2004).
76. *Id.* at 261; see also FLA. STAT. §§ 501.201-.213 (2007).
77. *Petsch*, 872 So. 2d at 261; see also *Reeves*, 937 So. 2d at 1137.
78. *Reeves*, 937 So. 2d at 1137.
The exception related to the portion of the arbitration clause that precluded class actions, which provision was contrary to the FCCPA. Since the arbitration agreement contained a severability clause, the class action prohibition could be severed, leaving the remaining portions of the arbitration agreement intact. With respect to all of the other forms of relief that Reeves claimed were not available in arbitration, the court observed that although the arbitration clause did not specifically state the types of relief an arbitrator may grant, an arbitrator generally has the power to fashion equitable remedies. The court rejected the public policy argument and affirmed.

The Third District Court of Appeal, in Roth v. Cohen, in determining if a party had waived arbitration, considered both prong two and prong three of the Seifert test. Mr. Roth entered into a contract with Mr. Cohen’s company pursuant to which Mr. Cohen would provide home decoration services and obtain design items for Mr. Roth. The design items were to be provided at cost. The contract contained an arbitration clause. After Mr. Cohen and Mr. Roth had a falling out, Mr. Roth and his wife, who was not a party to the contract, met with, and later sent a letter to, the third-party who had recommended Mr. Cohen. At the meeting and in the letter, the Roths questioned both Mr. Cohen’s billing practices and the continued referral of Mr. Cohen’s services by the third person to others in their community. Mr. Cohen then sued the Roths for libel, slander, and tortious interference. The Roths filed a counterclaim against Mr. Cohen, alleging, among other claims,
breach of contract, fraud, and fraud in the inducement. The Roths also
filed a third-party complaint on these grounds against Mr. Cohen's com-
pany.

Mr. Cohen and his company moved to compel arbitration of the Roths' counterclaim and third-party complaint. The trial court ordered the parties to arbitration on the counterclaim and third-party complaint, and the Roths appealed. Mr. Cohen argued on appeal that under Seifert, his libel and slander claims against the Roths were not subject to arbitration. Therefore, he could not, by filing suit with respect to those claims, be said to have waived arbitration of the counterclaim and third-party complaint. The Third District Court of Appeal quoted the Supreme Court of Florida in Sei-

fert, where the court stated that even if there are "broad arbitration provi-
sions, the determination of whether a particular claim must be submitted to arbitration . . . depends on the existence of some nexus between the dispute and the contract containing the arbitration clause." The Third District Court of Appeal allowed that under Seifert, for a tort claim to be subject to an arbitration clause, there has to be at least an issue "the resolution of which requires reference to . . . the contract itself." The court found that Mr. Cohen's claims against the Roths had sufficient nexus with the contract to bring it within the provisions of the arbitration clause. Further, by filing suit against the Roths, Mr. Cohen waived his right to arbitration. Mr. Cohen could not insist that the Roths arbitrate the counterclaim and third-party complaint and at the same time proceed to court for resolution of his claims against the Roths. The Third District Court of Appeal reversed the trial court's order compelling arbitration.

92. Roth, 941 So. 2d at 499.
93. Id.
94. Id.
95. Id.
96. Id. at 500.
97. See Roth, 941 So. 2d at 500.
98. Id. at 499 (quoting Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999)).
99. Id. (quoting Seifert, 750 So. 2d at 638).
100. Id. at 500.
101. Id. at 501.
102. Roth, 941 So. 2d at 501.
103. Id. The appellate court reversed only as to the counterclaim against Mr. Cohen, not the arbitrability of the third-party complaint against his company, since the Roths did not argue this issue on appeal. Id. at 498 n.1.
B. **Mediation**

An agreement reached in mediation was reduced to writing and signed by the parties and their attorneys in *Raho of Pass-A-Grille, Inc. v. Pass-A-Grille Beach Motel, Inc.* A consent order adopting the mediation agreement was signed by the trial judge. However, when presented with motions by both parties to enforce the agreement, the trial judge held that there was no agreement because there was no "real meeting of the minds." The Second District Court of Appeal found that while the agreement was ambiguous in certain respects, it was not void. The parties were in agreement as to the essential terms and intended that the agreement bind them. The parties’ subsequent disagreement about the meaning of the terms and what was required under the agreement did not warrant the conclusion that there was no meeting of the minds. The trial court should have resolved any ambiguities based on the evidence introduced rather than concluding that there was no agreement. Therefore, the decision was reversed and remanded for the court to consider the evidence and resolve the ambiguity.

The First District Court of Appeal held that the party seeking to enforce a mediation settlement agreement failed to meet its "strict burden" of proof that the other party’s attorney had "clear and unequivocal authority to settle" the case in *Fivecoat v. Publix Super Markets, Inc.* In this workers’ compensation case, the Judge of Compensation Claims (JCC) concluded that a valid settlement agreement had been reached during mediation between the claimant and her employer. The JCC ordered the claimant to sign the settlement papers. The claimant appealed. The appellate court found that the record showed both a misunderstanding between the claimant and her attorney and that the attorney did not have the requisite authority to settle. The First District Court of Appeal, did, however, observe that "[a]dherence

104. 923 So. 2d 564, 565 (Fla. 2d Dist. Ct. App. 2006).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
110. *Id.*
111. *Id.* at 565–66.
112. 928 So. 2d 402, 403 (Fla. 1st Dist. Ct. App. 2006) (quoting Sharick v. Se. Univ. of Health Servs., Inc., 891 So. 2d 562, 565 (Fla. 3d Dist. Ct. App. 2004)).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 403–04.
to this rule does not preclude the application of principles of equity when a party has relied to its irreparable detriment on the representations of the opposing attorney." The First District Court of Appeal reversed and remanded.

In *DVDPlay, Inc. v. DVD 123 LLC*, the Third District Court of Appeal held that a mediation clause in a franchise agreement survived the termination of the agreement. The agreement contained a survival provision that expressly referred by section number to the mediation clause. DVD 123 LLC requested mediation of issues involving alleged breaches of performance under the franchise agreement. DVDPlay, Inc. refused to mediate, taking the position that as the result of DVD 123 LLC’s breach of the agreement and DVDPlay, Inc.’s termination of the agreement, there was nothing to mediate. The Third District Court of Appeal disagreed with that argument, but concluded that mediation had been waived by DVD 123 LLC. By not seeking judicial assistance in compelling the mediation, and filing suit instead, DVD 123 LLC waived mediation.

C. Enforcement of Settlement Agreements

In *Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd.*, the trial court was asked to enforce a purported settlement agreement. Architectural Network, Inc. alleged that its attorney did not have the authority to settle on its behalf. The trial court did not hold an evidentiary hearing before it ruled that there was a valid settlement agreement and entered an order enforcing the agreement. On appeal, Gulf Bay Land Holdings II, Ltd. argued that the existence of the contract was undisputed. The Second District Court of Appeal cited *Fivecoat*, noting that the transcript failed to show that Gulf Bay Land Holding II, Ltd. had demonstrated that the exis-

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117. *Fivecoat*, 928 So. 2d at 404. The court noted that application of this exception would require factual determinations and therefore “is appropriately raised” at the trial level. *Id.*

118. *Id.*

119. 930 So. 2d 816 (Fla. 3d Dist. Ct. App. 2006).

120. *Id.* at 819.

121. *Id.*

122. *Id.* at 817.

123. *Id.*

124. *DVDPlay, Inc.*, 930 So. 2d at 818.

125. See *id.* at 818–19.

126. 933 So. 2d 732 (Fla. 2d Dist. Ct. App. 2006).

127. *Id.* at 733.

128. *Id.*

129. *Id.* at 733–34.

130. *Id.* at 733.
tence of a valid settlement agreement was undisputed. Architectural Network, Inc. was entitled to an evidentiary hearing on the issue of its attorney’s authority to settle.132

In *Masztal v. City of Miami*,133 the trial court set aside a settlement based upon breach by the original plaintiffs in what was to be a class action, and their attorneys, of the fiduciary duty owed by them to Mr. Masztal and the others in the class.134 The Third District Court of Appeal agreed with the trial court that the attorneys breached their fiduciary duty to those other class members.135 This was true even though the class had not been certified at the time the settlement agreement was concluded.136 The trial court found that this “was an implied class action.”137 The original lawsuit had been brought as a class action and certification was certain; it was a mere ministerial act.138

III. BUSINESS ENTITIES AND AGREEMENTS

A. Franchises

In addition to the waiver of mediation issue discussed earlier in the survey, the Third District Court of Appeal, in *DVDPlay, Inc.* was called upon to determine if a forum selection provision survived the termination of a franchise agreement.139 The principal places of business of DVDPlay, Inc., the franchisor, and DVD 123 LLC, the franchisee, were California and Florida, respectively.140 The franchise agreement between DVDPlay, Inc. and DVD 123 LLC provided that any legal action instituted under the agreement must be brought in California.141 The agreement also stated that disputes between the parties were “first . . . subject to non-binding mediation.”142 Disputes arose and the parties accused each other of breach of contract.143 DVDPlay, Inc. refused to go to mediation and declared that the agreement was terminated.144 DVD 123 LLC, alleging breach of contract, sued DVDPlay, Inc. in

131. *Architectural Network, Inc.*, 933 So. 2d at 733.
132. *Id.* at 733–34.
134. *Id.* at D1881, D1883.
135. *Id.* at D1884.
136. *Id.* at D1883.
137. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *DVDPlay, Inc.*, 930 So. 2d at 817.
Florida. DVDPlay, Inc. moved to dismiss the complaint alleging improper venue based on the forum selection clause. The trial court denied the motion holding that because DVDPlay, Inc. "had repudiated the agreement, it could not enforce the forum selection clause." The trial court, in ruling for DVD 123 LLC, relied on *Aberdeen Golf & Country Club v. Bliss Construction, Inc.* for the proposition that when the contract was terminated, the forum selection clause was also terminated. The Third District Court of Appeal distinguished *Aberdeen* by noting that the arbitration clause involved was intended to function during the term of the agreement. Furthermore, the court noted how the *Aberdeen* court stressed the lack of a survival clause in the agreement. The Third District Court of Appeal reversed. The forum selection provision will survive unless it is expressly or implicitly provided in the agreement that the forum selection clause is not intended to survive termination of the agreement. The trial court must enforce a mandatory forum selection clause absent a showing that it would be unreasonable or unfair, as the result of unequal bargaining positions of the parties to enforce the provision—an argument the Third District Court of Appeal noted had not been raised by DVD 123 LLC.

**B. Limited Liability Companies**

The operating agreement of a limited liability company specified as an event of dissolution the "sale or other disposition of all or substantially all of [the company's] property and assets." The agreement also provided that the company's "net cash flow" after taxes would be reinvested or, at the election of the members, distributed to them. The company purchased some real estate, and then it sold the real estate at a profit. As a result, the company then held only cash. A member sought to have the sale declared a

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145. *Id.*
146. *Id.*
147. *Id.*
148. 932 So. 2d 235 (Fla. 4th Dist. Ct. App. 2005).
149. *DVDPlay, Inc.*, 930 So. 2d at 818.
150. *Id.* at 819.
151. *Id.*
152. *Id.* at 820.
153. *Id.* at 819–20.
154. *DVDPlay, Inc.*, 930 So. 2d at 818.
156. *Id.*
158. *See id.* at 426.
dissolution event, alleging there were no assets.\textsuperscript{159} The other parties asserted that the cash was being held for reinvestment, was an asset, and was a substantial asset.\textsuperscript{160} The trial court, on motion for summary judgment, ruled, as a matter of law, that the cash was not a company asset and the sale was a dissolution event.\textsuperscript{161} The First District Court of Appeal reversed.\textsuperscript{162} The operating agreement was ambiguous on the issue of whether cash would be excluded from the definition of assets for purposes of triggering a dissolution event, and therefore summary judgment was inappropriate.\textsuperscript{163} Judge Benton concurred in the reversal, but observed that after considering all evidence on the point, the trial judge might very well again rule the same way.\textsuperscript{164}

Recent legislation modified the method of identifying limited liability companies.\textsuperscript{165} The only approved abbreviation or designation is now "LLC" or "L.L.C." used as the last words of the name of every limited liability company.\textsuperscript{166} "L.C." and "limited company" are no longer approved.\textsuperscript{167} "Limited Liability Company" and "Ltd. Liability Co."—or some combination of the words and abbreviations—may still be used as the last words.\textsuperscript{168} "The name of the limited liability company must be distinguishable on the records of the . . . Department of State" except they do not have to be distinguishable from 1) "fictitious name registrations filed pursuant to [section] 865.09" of the Florida Statutes, and "general partnership registrations filed pursuant to [section] 620.8105" of the Florida Statutes; or 2) when use of an indistinguishable name is consented to in writing by the "owner entity" and "filed with the Department of State" at the time the limited liability company registers its name.\textsuperscript{169} Except for names falling within those exceptions, the Department of State may no longer disregard other recorded names.\textsuperscript{170}

For limited liability companies formed before July 1, 2007, the distinguishability of names requirement will not apply unless and until that limited liability company files documents after June 30, 2007, that affect its name.\textsuperscript{171}

\textsuperscript{159} Id.
\textsuperscript{160} O'Neal, 950 So. 2d at 426.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. (Benton, J., concurring).
\textsuperscript{165} Id. (amending Fla. Stat. § 608.406(1)(a)).
\textsuperscript{166} Id. § 1, 2007 Fla. Sess. Law Serv. at 1116 (amending Fla. Stat. § 608.406(1)(a)).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. (amending Fla. Stat. § 608.406(2)).
\textsuperscript{170} Ch. 2007-134, § 1, 2007 Fla. Sess. Law Serv. 1117 (amending Fla. Stat. § 608.406(3)).
\textsuperscript{171} Id. (amending Fla. Stat. § 608.406(4)).
A conforming amendment was made to section 608.407 of the *Florida Statutes* with respect to the name of the limited liability included in the articles of incorporation.172

C. Partnerships

The Fourth District Court of Appeal, in the context of a partnership dissolution, considered the issue of modification of the terms of a partnership agreement by the subsequent conduct of the partners.173 Rhodes entered into a partnership agreement with BLP Associates, Inc.174 The written general partnership agreement provided that if money, in addition to the initial capital contributions, was necessary for partnership operations, "then such additional sums . . . may be (but shall not be required to be) advanced as loans from the Partners."175 Rhodes, as managing partner, requested more money from the partners, but he described his requests as "capital calls" and "capital contributions."176 The partners, including Rhodes, sent money, with one of the other partners referring to the payment as a capital contribution.177 No partner referred to these payments as loans, and no one objected to Rhodes’ characterization of the payments.178 In addition, the partnership’s federal income tax returns for the pertinent years classified the additional contributions as capital contributions.179 The partnership was eventually dissolved, a receiver was appointed, and the receiver submitted a final accounting.180 The trial court determined that for the purpose of distributing partnership funds, the additional contributions were capital contributions, not loans.181

Rhodes appealed, alleging that these contributions were loans.182 The Fourth District Court of Appeal had no difficulty confirming the trial court’s ruling on the characterization of the payments as capital contributions.183 The court observed that a written agreement can "be modified by the [later] conduct or course of dealing of the parties," provided there is mutual consent and consideration for the modification, even when the agreement purports to

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172. *Id.* § 2, 2007 Fla. Sess. Law Serv. at 1117 (amending *FLA. STAT.* § 608.407 (2007)).
174. *Id.* at 528.
175. *Id.* at 529.
176. *Id.*
177. *Id.*
178. Rhodes, 944 So. 2d at 529.
179. *Id.*
180. *Id.* at 528.
181. *Id.*
182. *See id.* at 528–29.
183. *See Rhodes,* 944 So. 2d at 530.
allow only written modification. The court disagreed with Cox v. CSX Intermodal, Inc. and Flagship National Bank v. Gray Distribution Systems, Inc. to the extent that those cases suggested "that a written contract cannot be modified by the subsequent course of conduct of the parties" if the conduct is inconsistent with the terms of the agreement. Furthermore, the court noted that even if Cox stated the law correctly, the rule would be inapplicable. There was nothing inconsistent between the language of the partnership provision at issue and the parties' subsequent conduct treating the additional funds as capital contributions.

A second issue in the case involved a loan by the other partners to Rhodes that enabled Rhodes to make his initial capital contribution. The promissory note given by Rhodes to the other partners provided that the obligation matured when "capital contributions were 'paid in full.'" The other partners persuaded the trial court to retain Rhodes' share of the partnership capital distributions until their suit against him on the note was concluded. The Fourth District Court of Appeal reversed on this issue, finding that neither the promissory note nor the partnership agreement provided for this hold back.

D. Corporations and Shareholder/Buy-Sell Agreements

In Alvarez v. Rendon, two pathologists formed a professional association for the practice of medicine. Dr. Rendon owned a slight majority of the stock. The employment contract Dr. Alvarez subsequently signed provided that he could be terminated for cause and specified what would constitute cause. His employment could also be terminated without cause, but in that event, Dr. Alvarez would be entitled to notice and compensation during

184. Id.
186. 485 So. 2d 1336 (Fla. 3d Dist. Ct. App. 1986).
187. Rhodes, 944 So. 2d at 531.
188. Id.
189. Id.
190. Id. at 529.
191. Id.
192. Rhodes, 944 So. 2d at 531.
193. Id. at 532.
194. Id.
195. 953 So. 2d 702 (Fla. 5th Dist. Ct. App. 2007).
196. Id. at 705.
197. Id. Rendon owned 51% and Alvarez owned 49% of the stock. Id.
198. Id.
the notice period.\textsuperscript{199} The doctors also entered into a buy-sell agreement under which Dr. Alvarez would be paid a specified sum for his shares in the event of termination without cause, but would only receive half of that amount in the event of termination for cause or his voluntary termination.\textsuperscript{200} The buy-sell agreement contained a noncompete provision effective upon redemption of shares, but not conditioned on the reason for termination of employment.\textsuperscript{201}

Dr. Rendon, acting as the professional association’s president, terminated Dr. Alvarez’s employment and attempted to begin making “for cause” buy-out payments.\textsuperscript{202} Dr. Alvarez did not accept the payments because he claimed he was improperly fired for cause and therefore entitled to the larger—without cause—buy-out amount.\textsuperscript{203} After Dr. Alvarez left the practice, he began working in South Florida for a medical laboratory that had clients in the geographic area specified in the noncompete clause.\textsuperscript{204}

Dr. Alvarez sued Dr. Rendon and the professional association alleging breach of the employment contract based on alleged improper termination for cause and improper reduction of his salary.\textsuperscript{205} He also claimed that they breached the buy-sell agreement.\textsuperscript{206} Dr. Rendon and the professional association counterclaimed, alleging breach of the noncompete provision by Dr. Alvarez.\textsuperscript{207} The jury found that Dr. Rendon was not justified in terminating Dr. Alvarez for cause.\textsuperscript{208} Dr. Alvarez was awarded the difference in the amount Dr. Rendon tendered and the amount Dr. Alvarez would have received for the buy-out without cause, plus damages based on the wrongful termination for cause.\textsuperscript{209} The jury also found that Dr. Alvarez was bound by, and violated, the restrictive covenant.\textsuperscript{210} The trial court awarded damages to Dr. Rendon and granted her motion for a permanent injunction.\textsuperscript{211} Dr. Alvarez appealed, and Dr. Rendon and the professional association cross-appealed.\textsuperscript{212}

\textsuperscript{199} Alvarez, 953 So. 2d at 705.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. (internal quotations omitted).
\textsuperscript{203} Id.
\textsuperscript{204} Alvarez, 953 So. 2d at 705.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 706.
\textsuperscript{208} Id.
\textsuperscript{209} Alvarez, 953 So. 2d at 706.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 707. The effect of the monetary awards was a net judgment to the professional association of $602,970.48. Id.
\textsuperscript{212} Id. at 708.
The Fifth District Court of Appeal reversed and remanded, concluding that the jury’s verdict was inconsistent.213 The jury could not have found that Dr. Alvarez violated the noncompete clause if they also found that Dr. Rendon’s termination for cause was improper.214 Since Dr. Alvarez was not terminated for cause, he was entitled to a greater payment for his shares under the agreement, and since that amount was not paid, and his shares were not redeemed, his obligations under the noncompete clause could not have arisen.215 The proper remedy for the inconsistent verdict was a new trial.216 However, in order to preserve the issue of inconsistency in the verdict for review on appeal, the party alleging the inconsistency must have raised it before the jury was discharged, which the Fifth District Court of Appeal concluded that Dr. Alvarez did.217

In an unusual case, Henao v. Professional Shoe Repair, Inc.,218 it was the buyer of a business who was prohibited from soliciting business from existing customers of the business he was buying.219 The buyer and the seller had been in business together, and their corporation had a very lucrative contract with a customer.220 It was that relationship that formed the basis for the restrictive covenant and the litigation.221 The seller sold his equal share of the business to the buyer, and the buyer assigned to the seller all of the buyer’s interest in the contract with the customer.222 The buyer also agreed that he would not solicit that customer for ten years.223 The seller sought an injunction, alleging that the Buyer breached the covenant not to compete.224 The trial court found that the covenant was void and unenforceable.225 The Fifth District Court of Appeal was called upon to determine if the provisions of section 542.335 of the Florida Statutes, with respect to enforcement of restrictive covenants against a “seller,” also apply to enforce restrictive covenants against a buyer.226 Based on the purpose stated in the statute to construe restrictive covenants in a manner that will provide “rea-

213. Alvarez, 953 So. 2d at 707, 713.
214. See id. at 710.
215. See id.
216. Id. at 712.
217. Id. at 711.
218. 929 So. 2d 723 (Fla. 5th Dist. Ct. App. 2006).
219. Id. at 725.
220. Id. at 724.
221. See id.
222. Id.
223. Henao, 929 So. 2d at 724.
224. Id. at 724–25.
225. Id. at 725.
sonable protection to all legitimate business interests," the court concluded that the provisions apply to buyers as well as sellers.227 Furthermore, although the duration of the restrictive covenant was in excess of seven years and therefore presumptively unreasonable under section 542.335 of the Florida Statutes, the seller showed that the noncompete provision protected a legitimate interest of the seller and the provision was therefore not void or unenforceable.228 The court had the authority to cut the agreement back to a reasonable period of time.229 Another issue arose because the agreement only gave the buyer the right to enforce the covenant, and it was the buyer who was subject to the covenant.230 The court noted that was an obvious misnaming of the parties and the seller could enforce the agreement.231

IV. CHOICE OF LAW AND CONFLICT OF LAWS

A. Actions Based on Contract

Mr. and Mrs. Hodges were Indiana residents.232 They purchased a second home in Florida in 1993 where they spent about five and one-half months each year.233 Their automobile insurance was issued to them by State Farm Mutual Automobile Insurance (State Farm) in Indiana.234 During their 2001 stay in Florida, Mr. and Mrs. Roach, the Hodges' neighbors, while passengers in the Hodges' car, were involved in a crash with another car.235 Mr. and Mrs. Roach were injured and they sued both Mr. Hodges, who was driving the car, and the driver of the other car.236 They also claimed uninsured motorist benefits under the Hodges' Indiana insurance policy.237 Because the Indiana and Florida uninsured motorist laws differed, the Roaches could receive compensation under Florida law that they could not receive under Indiana law.238 The Second District Court of Appeal ruled that Florida law could apply to the Indiana policy, provided that Florida had a "significant connection" to the insurance policy, and State Farm had "reasonable

227. Henao, 929 So. 2d at 727 (quoting FLA. STAT. § 542.335(1)(h)).
228. Id. at 728.
229. Id.
230. Id.
231. Id.
233. Id. at 1162.
234. Id.
235. Id. Mrs. Hodges died in the accident. Id.
236. Roach, 945 So. 2d at 1162.
237. Id.
238. See id.
notice” of the Hodges’ Florida connection.239 The Second District Court of
Appeal remanded the case to the trial court to make this determination,240
and the question certified to the Supreme Court of Florida was restated by
the Supreme Court of Florida as follows: “Where residents of another state
who reside in Florida for several months of the year execute an insurance
contract in that state, may they invoke Florida’s public policy exception to
the rule of *lex loci contractus* to invalidate an exclusionary clause in the pol-
icy?”241

The Supreme Court of Florida said no, holding that the rule providing
that the law of the place where the contract was made—*lex loci contractus*—
governs the insurance contract unless the public policy exception applies.242
In other words, *lex loci contractus* is the law in Florida, but a departure from
this rule can be made to enforce some paramount public policy with respect
to Florida citizens.243 The Hodges were not Florida citizens and that res-
solved the matter.244 Therefore, it was not necessary to determine if Indiana
law offended some paramount rule of Florida public policy.245 The court did
note, however, that in the context of insurance contracts, the exception ap-
plies only if the insurer had “reasonable notice that the insured is a Florida
citizen.”246 The Hodges’ Indiana citizenship made that question moot.247

Justice Pariente concurred, but stated that “if [she] were to write on a

*clean slate, [she] would apply the ‘significant relationship’ test.”248 Justice
Pariente agreed that the result reached by the majority was required, absent
receding from the Court’s precedent.249 She concluded, however, that even
under the “significant relationship” test, Indiana law would have applied.250

Although this case did not arise in a business context, the Supreme
Court of Florida’s continued rejection of the “most significant relationship”
test of the Restatement (Second) of Conflict of Laws, in contract cases, in-

239. *Id.* at 1163.
240. *Id.*
242. *Id.* at 1164–65, 1168.
243. *Id.* at 1164–65.
244. *Id.* at 1168.
245. *Id.* at 1168–69.
247. *Id.* at 1168. The opinion did not state if the Roaches were Florida citizens, or, if they
were, if that would have changed the result. *See id.* at 1168. It would seem that the Hodges
were third-party beneficiaries under the contract between the Hodges and State Farm Insur-
ance Company. *See id.* at 1162.
248. *Id.* at 1169 (Pariente, J., concurring).
250. *Id.* at 1169–70.
urance related, and otherwise, is significant. Justice Lewis, concurring in the result only, noted that the majority was applying "the doctrine of *lex loci contractus* in Florida more rigidly than ever before." Justice Lewis' discussion regarding *Decker v. Great American Insurance Co.*, a case involving a Georgia business with a Florida traveling salesman, makes a compelling argument for adopting the "significant relationship" test.

B. *Tort Actions*

The First District Court of Appeal was asked to determine whether the "modified" comparative negligence law of Georgia or the "pure" comparative negligence rule of Florida applied to a car accident in Georgia between residents of Florida and Georgia. The Florida resident, Mr. Connell, was commuting from his home in Florida to a project on which he was working in Georgia when his truck collided in Georgia with a compact car driven by Caleb Riggins, the Georgia resident. Mr. Riggins was injured and he brought an action in Florida against Mr. Connell. Mr. Connell filed a motion seeking a ruling that Georgia law applied with respect to all questions related to negligence and damages. Under the Georgia rule, if the defendant and plaintiff are found to be equally negligent, or the defendant's negligence is less than the plaintiff's, then the plaintiff cannot recover from the defendant. Mr. Riggins argued that Georgia law applied to some issues, but that Florida's comparative negligence law applied. If Florida law applied, then liability would have been divided "according to each party's percentage of negligence." The trial court found that Florida law applied to those issues. After final judgment was entered in favor of Mr. Riggins, Mr. Connell appealed, alleging, among other errors, that the trial court improperly applied Florida law to the issues of comparative negligence and damages.

251. *Id.* at 1163–64; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).
253. 392 So. 2d 965 (Fla. 2d Dist. Ct. App. 1980).
256. *Id.* at 1176.
257. *Id.* Mr. Connell's employer was also named as a defendant. *Id.*
258. *Id.* at 1178.
259. *Connell*, 944 So. 2d at 1177.
260. *Id.* at 1178.
261. *Id.* at 1177.
262. *Id.* at 1180.
263. *Id.* at 1176.
The First District Court of Appeal relied heavily on *Bishop v. Florida Specialty Paint Co.* in concluding that Georgia law applied. The court observed that the Supreme Court of Florida, in *Bishop*, rejected the old *lex loci delicti* rule in favor of the "significant relationship" test found in sections 145 and 146 of the Restatement (Second) of Conflict of Laws. Under the "significant relationship" test of the Restatement (Second), the question is which state's law "has the most significant relationship to the occurrence and the parties under the principles" set forth in the Restatement (Second). In making the choice of law, *Bishop* advises consideration of: "1) 'the place where the injury occurred,' 2) 'the place where the conduct causing the injury occurred,' 3) 'the domicile, residence, nationality, place of incorporation and place of business of the parties,' and 4) 'the place where the relationship, if any, between the parties is centered.'"

Applying the four-factor test, the First District Court of Appeal held, "[a]s a matter of law, Florida [did] not have a more significant relationship than Georgia to the [event] and to the parties" and certainly not enough to overcome the consideration that had to be given to Georgia as the place where the injury occurred.

V. CONSUMER RIGHTS

A. Telephone Solicitation and Telemarketing

In 2000, Cricket's Termite Control, Inc. (Cricket's) leased an automated telemarketing system to use in offering pest control services to potential customers. After Cricket's began using the system, it received a notice from the Florida Department of Agriculture and Consumer Services that complaints had been received that Cricket's was making automated sales solicita-

264. 389 So. 2d 999 (Fla. 1980).
265. See *Connell*, 944 So. 2d at 1180.
266. *Id.* at 1177; see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145–46 (1971).*
267. *Connell*, 944 So. 2d at 1176.
268. *Id.* at 1177 (quoting *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)).
269. *Id.*
270. *Id.* at 1180.
tion calls in violation of section 501.059 of the Florida Statutes. Cricket’s was ordered to stop making calls in violation of the statute and advised that failure to do so could result in an injunction against it and civil penalties of as much as $10,000 per call. Cricket’s not only immediately stopped making such calls, it stopped making lease payments to the lessor of the system, De Lage Landen Financial Services, Inc. (DLL). DLL sued Cricket’s to collect the lease payments. Cricket’s defense was that the lease was illegal and unenforceable because the intended use of the leased property turned out to be illegal. The trial court agreed, refusing to enforce the lease, and awarded Cricket’s attorney’s fees. DLL appealed and the Fifth District Court of Appeal framed the issue as “whether the lease agreement is an enforceable contract, or if it is void for violating Florida Statutes or Florida public policy.” The court determined that the lease violated neither. The lease agreement was purportedly governed by Oregon law. The court noted that Oregon’s automated call statute is similar to the Florida statute. Both statutes contain exceptions to the prohibition of automated calls so that automated calling systems can be put to legal uses.

The court, in reaching its decision, looked to a case with similar facts in which the Supreme Court of Arkansas concluded that just because an item subject to a sales contract can be put to illegal uses does not render the contract void. There are, however, two similar, although not identical, exceptions to this rule. Under the first exception, if a seller knows of the buyer’s illegal purpose and that illegal purpose involves the commission of a serious crime or an act of great moral turpitude, the seller cannot enforce

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272. Id. at 1002–03; see also Fla. Stat. § 501.059 (2007).
273. Cricket’s Termite Control, Inc., 942 So. 2d at 1003.
274. Id. The lease, originally between Cricket’s and U.S. Bancorp, was assigned to De Lage Financial Services, Inc. Id. at 1002.
275. Id. at 1003.
276. Id.
277. Cricket’s Termite Control, Inc., 942 So. 2d at 1003.
278. Id.
279. Id. at 1005–06.
280. Id. at 1004 n.1.
283. Cricket’s Termite Control, Inc., 942 So. 2d at 1004; see also Potomac Leasing Co. v. Vitality Centers, Inc., 718 S.W.2d 928 (Ark. 1986).
284. Potomac Leasing Co., 718 S.W.2d at 929.
285. Cricket’s Termite Control, Inc., 942 So. 2d at 1005–06. One exception is mentioned in the body of the Cricket’s decision, and the other is in a footnote. Id. at 1005, 1006 n.3.
the contract. The second exception applies when the seller of the product knows that the buyer's use of the product will be a "'flagrant violation of the fundamental rights of man and society.'" The court in Cricket's found that there was no indication that either "DLL or U.S. Bancorp, [the original lessor,] knew of Cricket's planned use of the System." Even if they had, Cricket's use of the automated call system would have to have constituted a "'flagrant violation of the fundamental rights of man and society'" to void the lease.

The court found additional reasons to reverse the trial court. Section 680.1031(1)(g) of the Florida Statutes and section 72A.1030 of the Oregon Revised Statutes do not permit a finance lessee to refuse payments to the finance lessor if the goods in question turn out not to be as expected. The lessor's covenants to the finance lessee are also irrevocable and independent of any defense the lessee may have against a third-party seller. Finally, the court noted, with apparent approval, the finance lessor's broad boiler plate liability disclaimers set out in the lease agreement.

TSA Stores, Inc. v. Department of Agriculture and Consumer Services, also decided by the Fifth District Court of Appeal, raised several questions of first impression. As in Cricket's, section 501.059 of the Florida Statutes was involved. The Department alleged that TSA violated the automated calling provisions and the do-not-call list rules. The parties agreed that all of the calls originated from California. TSA had its princi-
pal place of business in Broward County, Florida, and the calls were made to people in Orange County, Florida, inviting them to a sale at TSA stores in Orange County. 299 TSA raised several defenses, including that the Federal Telephone Consumer Protection Act (TCPA) preempted section 501.059 of the Florida Statutes. 300 The court easily dismissed this argument because the TCPA expressly provides that it does not preempt state law. 301 Another issue was the interpretation of an exception to the do-not-call list rules that allow a telephone solicitor to call persons on the list with whom the solicitor "has a prior or existing business relationship," a phrase not defined by the statute. 303 TSA argued that the persons who were alleged to have been improperly called all consented to telephone solicitations by providing a telephone number to the sales clerks. 304 The court found that this did not constitute express consent, which is required by the statute, although it might be implied consent. 305 The court looked for guidance to the definition applicable under the TCPA of "established business relationship." 306 Relying on that definition, the Fifth District Court of Appeal concluded that if a person made a purchase from TSA within eighteen months prior to the telephone solicitation, solicitation was permissible, even to persons on the do-not-call list. 307

With respect to the automated calls, TSA argued that Florida had no authority to regulate interstate calls that originated in California. 308 The court concluded that it did not need to address the issue of jurisdiction over calls emanating from outside of Florida, since these calls were otherwise covered by section 501.059 of the Florida Statutes. 309 The Florida provisions prevent a person from simply taking the automated machines out of Florida and calling consumers in Florida, as a way of avoiding the statute. 310 The Fifth District Court of Appeal held that the causation underlying this statutory violation involved a business in Orange County, Florida, Orange County consum-

299. Id. at 26.
300. Id.
301. TSA Stores, Inc., 957 So. 2d. at 28 (citing 47 U.S.C. § 227(e)(1) (2000)).
302. Id. at 27.
303. Id. at 29.
304. Id.
305. Id.
306. TSA Stores, Inc., 957 So. 2d at. at 29–30 (citing 47 C.F.R. § 64.1200(f)(4) (2006)).
307. Id. at 30.
308. Id.
309. Id.
310. Id.
ers, and a sale being held in Orange County. The court concluded that the place from which the calls originated was irrelevant "in this context."

There were two prohibitions added to Florida’s telephone solicitation statute in 2006. The first prohibition makes it unlawful, with limited exceptions, for telephone sales solicitors to fail to disclose their names and telephone numbers. The second prohibition makes it unlawful to alter voices with intent to defraud or confuse.

B. Deceptive Trade Practices

In South Motor Co. of Dade County v. Doktorczyk, Doktorczyk brought an action against South Motors under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). He claimed that when he purchased a used car, "South Motors misrepresented that the factory warranty . . . had expired" and persuaded him to buy an extended warranty. The alleged misrepresentations were made almost six years before Doktorczyk filed his action. Section 95.11(3)(f) of the Florida Statutes imposed a four year statute of limitations for FDUTPA claims and other statutory causes of action.

Doktorczyk claimed that under section 95.051(1)(f) of the Florida Statutes, the statute of limitations was tolled by the installment payments he made for five years on the auto extended warranty purchase. This section states that the statute of limitations is tolled by "payment of any part of the principal or interest of any obligation or liability founded on a written instrument." The Third District Court of Appeal held that Doktorczyk’s claim was founded on a statutory cause of action, not on a written instrument, and therefore his action was filed too late.

311. *TSA Stores, Inc.*, 957 So. 2d at 31.
312. *Id.*
313. *Id.* § 501.059(7)(c), (d) (2007).
314. *Id.* § 501.059(7)(c).
315. *Id.* § 501.059(7)(d).
316. 957 So. 2d 1215 (Fla. 3d Dist. Ct. App. 2007).
317. *Id.* at 1216.
318. *Id.*
319. *Id.*
320. *Id.* at 1216–17 (citing *Fla. Stat.* § 95.11(3)(f) (Supp. 1996)).
321. See *Doktorczyk*, 957 So. 2d at 1217.
323. *Doktorczyk*, 957 So. 2d at 1217–18.
In another FDUTPA case, the Florida Attorney General, on behalf of small businesses, sued several leasing companies.\(^{324}\) The trial court found that certain telecommunications equipment leases were not "consumer leases" because under the Florida Uniform Commercial Code, section 680.1031(e) of the Florida Statutes, they were not considered "consumer leases."\(^{325}\) The First District Court of Appeal reversed, holding that it was error for the trial court to have relied on a statute other than the FDUTPA, since the FDUTPA contains its own definition of consumer, which is not limited to "personal, family or household purposes."\(^{326}\)

C. Warranties

The Supreme Court of Florida was asked if an automobile lessee is entitled, under the Magnuson-Moss Warranty Act (Magnuson-Moss),\(^{327}\) to enforce auto warranties.\(^{328}\) The Second District Court of Appeal, having said yes, certified conflict between its decision and the First District Court of Appeal's decision in Sellers v. Frank Griffin AMC Jeep, Inc.,\(^{329}\) to the contrary.\(^{330}\) In Cerasani, Jennifer Cerasani leased a Honda Civic on a long-term lease basis.\(^{331}\) She had problems with the automobile.\(^{332}\) Unsuccessful attempts were made to repair the car, and Cerasani eventually sued the manufacturer, American Honda, under Magnuson-Moss for breach of written warranty and breach of implied warranty.\(^{333}\) The trial court dismissed her complaint finding that the written warranty defined in Magnuson-Moss applied to automobile purchasers only, not to lessees.\(^{334}\) The trial court also found "that Cerasani was not in privity of contract with Honda, as required" for an implied contract claim.\(^{335}\) Cerasani appealed and the Second District Court of Appeal affirmed the dismissal of her claim with respect to the implied warranty, but reversed the dismissal of the express new-car warranty claim under

\(^{324}\) State v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253, 1255 (Fla. 1st Dist. Ct. App. 2007).

\(^{325}\) Id. at 1258.

\(^{326}\) Id.


\(^{328}\) Am. Honda Motor Co., v. Cerasani, 955 So. 2d 543, 544 (Fla. 2007).

\(^{329}\) 526 So. 2d 147 (Fla. 1st Dist. Ct. App. 1988).

\(^{330}\) Cerasani, 955 So. 2d at 544.

\(^{331}\) Id. at 545.

\(^{332}\) Id.

\(^{333}\) Id.

\(^{334}\) Id.

\(^{335}\) Cerasani, 955 So. 2d at 545.
Magnuson-Moss. It was the reversal that conflicted with Sellers. The Supreme Court of Florida held that an automobile lessee is entitled to enforce auto warranties under Magnuson-Moss. The court also held that the narrow definition of "written warranty" contained in Magnuson-Moss yields to the broader definition under state law, specifically section 681.102(23) of the Florida Statutes, the Lemon Law.

Magnuson-Moss, according to the Supreme Court of Florida, was designed "to enhance the enforceability of warranties on consumer products and protect the 'ultimate user of the product.'" Nevertheless, only a "consumer" may sue under Magnuson-Moss. The court noted that three categories of consumers are identified in Magnuson-Moss. They are: 1) a buyer, as long as not bought for resale; 2) anyone to whom the consumer product is transferred while the warranty or service contract is in effect; or 3) "any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)."

The court placed Cerasicani in the third category finding that under Florida’s Lemon Law, auto lessees are entitled to enforce auto warranties.

D. Consumer Report Security Freeze

In 2006, Florida enacted a "consumer report security freeze" statute, section 501.005 of the Florida Statutes, to allow a consumer to place a "security freeze" on his or her credit report. The term "security freeze" refers to "a notice placed in a consumer report that prohibits a consumer reporting agency" from releasing specified consumer information without express authorization of the consumer. A consumer’s request for a security freeze is made by a request in writing sent by certified mail to a consumer credit reporting agency. Except as otherwise provided by the numerous exceptions

336. Id.
337. Id. at 549.
338. Id. at 548-49 (citing Fla. Stat. § 681.102(23) (2006)).
339. Id. at 545.
340. Cerasicani, 955 So. 2d at 546.
341. Id.
343. Cerasicani, 955 So. 2d at 548-49.
346. Id. § 501.005(2)(a).
contained in the statute, the consumer’s credit report cannot be released without the consumer’s consent. The freeze can last indefinitely. The reporting agency can make it known to a third-party that a freeze has been put on the information. The reporting agency may charge a fee of not more than ten dollars for the initial freeze, for a temporary freeze or removal of the freeze, and for the permanent removal of the freeze. However, no fee for an initial placement or for removal of a freeze may be charged to a consumer who is at least sixty-five years old. Violation of this law may result in an award of actual damages, costs, and attorneys fees, and in certain cases, punitive damages.

E. Gift Certificates

In 2007, legislation was enacted that affects credit memos and gift certificates. Under the new section 501.95 of the Florida Statutes, gift certificates and credit memos sold in Florida generally “may not have an expiration date, expiration period, or any type of post-sale charge or fee . . . [such as] service charges, dormancy fees, account maintenance fees, or cash-out fees.” Definitions of “credit memo” and “gift certificate” are provided. If there is no consideration provided, the rule does not apply. Some exceptions are provided. For example, gift certificates that are charitable contributions may have an expiration date (of at least three years) provided “the expiration date is prominently disclosed in writing to the consumer.” An expiration date is also permitted where a gift certificate is issued as part of an event of limited duration, such as a conference or vacation, provided that most of the consideration paid by the recipient of the gift certificate is

347. E.g., id. § 501.005(8), (12).
348. Id. § 501.005(1).
349. See id. § 501.005(11).
350. FLA. STAT. § 501.005(1).
351. Id. § 501.005(13).
352. Id. § 501.005(13)(b)(1).
353. Id. § 501.005(16)(a)–(c), (e).
354. Id. §§ 501.95, 717.1045. Section 717.1045 of the Florida Statutes deals with gift certificates and credit memos from the standpoint of the unclaimed property statute. FLA. STAT. § 717.1045 (2007).
355. Id. § 501.95(2)(a).
356. Id. § 501.95(1)(a), (b).
357. See id. § 501.95(2)(a).
358. Id.
359. FLA. STAT. § 501.95(2)(a).
for the event, not the gift certificate. There are also exceptions to these prohibitions for certain state-chartered banks and credit unions.

VI. CONTRACTS

A. Formation

Hammond owned real estate in Indian River County. He and DSY Developers, LLC., having its principal place of business in Miami-Dade County, negotiated for several months over the sale and purchase of Hammond’s land. There were offers and counteroffers and on November 11, 2004, DSY made another counteroffer and tendered a $25,000 deposit that required acceptance by Hammond by November 25, 2004. Hammond changed the acceptance date for the contract to December 10, 2004, and mailed his counteroffer back to DSY on December 15, 2004. On January 12, 2005, DSY faxed its acceptance in the form of an executed contract to Hammond. Hammond refused to proceed with the deal on the grounds that the contract was void because DSY did not accept by December 10, 2004. DSY sued Hammond in the Circuit Court in Miami-Dade County seeking specific performance. The trial court ruled that a contract had been formed and ordered Hammond to convey title to the property to DSY. The trial court’s order also provided that the order would convey title if Hammond did not comply with the contract.

On Hammond’s appeal, the Third District Court of Appeal noted that the case presented an issue of first impression of “whether a deadline for accepting an offer may be waived by delivering the offer after the deadline has passed.” The question presented to the Third District Court of Appeal was whether Hammond, by not mailing the offer (counteroffer) until December 15, 2004,—after the date he had provided in his counteroffer for acceptance—

360. Id.
361. See id. § 501.95(2)(b).
363. See id.
364. Id.
365. Id.
366. Id.
367. Id.
368. Hammond, 951 So. 2d at 987.
369. Id.
370. Id.
371. Id. at 988.
tance had passed—waived the requirement that the contract be accepted by a certain date. The Third District Court of Appeal said yes and found, as a matter of law, that Hammond’s late mailing of the offer was an “implied waiver” of the provision. Furthermore, since the offer was then without an acceptance deadline, a “reasonable time” for acceptance would be implied. The Third District Court of Appeal found as a matter of law, based on the undisputed dealings between the parties, that acceptance by January 12, 2005, was within a reasonable time, considering the Christmas holidays.

The trial court’s order granting summary judgment in favor of DSY and directing specific performance by Hammond was approved, but only to the extent it did not operate as a mandate transferring title. The Third District Court of Appeal noted that the trial court had in personam jurisdiction over the parties in a suit for specific performance under a real estate contract. However, the trial court did not have in rem jurisdiction over the property located in Indian River County. Citing the “local action rule,” the Third District Court of Appeal stated that if a court does not have in rem jurisdiction over the real property involved in the action, then the court does not have jurisdiction to convey title. Therefore, if court action became necessary to enforce the order and to transfer title, then it would be necessary to transfer the case to the court having in rem jurisdiction, that court being the Circuit Court for Indian River County.

In another offer and acceptance case, Polk v. BHRGU Avon Properties, LLC, the Second District Court of Appeal considered whether offers, overlapping counteroffers, counter-counteroffers, counter-counter-counteroffers, a failure to reject counteroffers, and an alleged option contract resulted in the formation of a contract. The facts were that Polk listed real estate for sale and on January 24, 2005, BHRGU Avon Properties, LLC. (Avon), offered to purchase Polk’s real estate. Polk made counteroffers on February 2, 2005, and February 3, 2005. The counteroffers both provided that Avon’s dead-
line for acceptance of Polk’s counteroffer and delivery of the acceptance was 5:00 p.m. on February 7, 2005.\textsuperscript{385} Another offer was made by Avon to Polk on February 4.\textsuperscript{386} That offer changed the material terms of Polk’s counteroffers.\textsuperscript{387} However, before the February 7, 2005, deadline, Avon signed and delivered both of Polk’s counteroffers, and a $25,000 check was provided to Polk’s attorney as a deposit.\textsuperscript{388} Although the attorney took the check, it was not deposited, and, eventually, the attorney marked it “VOID.”\textsuperscript{389} Polk refused to perform under the terms of her February 2 and February 3 counteroffers, and Avon sought and was granted an order of specific performance.\textsuperscript{390}

Polk appealed, arguing that there was never a contract formed for the court to enforce.\textsuperscript{391} Avon argued that Polk’s two counteroffers were, in fact, options to purchase the property, and the options were duly and timely exercised.\textsuperscript{392} The Second District Court agreed with Polk and reversed the trial court.\textsuperscript{393}

An option contract requires consideration and there was none.\textsuperscript{394} The $25,000 check was clearly consideration for the purchase of the property, not for the purchase of an option.\textsuperscript{395} The sequence of events as seen by the Second District Court of Appeal was: 1) offer by Avon; 2) counteroffers by Polk which served to reject Avon’s offer; and 3) a second offer by Avon which served to reject Polk’s counteroffers.\textsuperscript{396} Since Avon’s second offer was not accepted, there was no contract.\textsuperscript{397}

In \textit{Alterra Healthcare Corp.}, the arbitration case discussed earlier in this survey, Betsy Bryant argued that there was no signed written agreement that required arbitration with respect to her stay in the second facility.\textsuperscript{398} Apparently the residency agreements for the second facility were virtually identical to the residency agreement for the first facility that had been signed by Betsy Bryant’s husband, as her attorney-in-fact.\textsuperscript{399} The Fourth District Court of

\textsuperscript{385} Id.
\textsuperscript{386} Polk, 946 So. 2d at 1122.
\textsuperscript{387} Id.
\textsuperscript{388} Id.
\textsuperscript{389} Id.
\textsuperscript{390} Id.
\textsuperscript{391} Polk, 946 So. 2d at 1122.
\textsuperscript{392} See id. at 1123.
\textsuperscript{393} Id. at 1125.
\textsuperscript{394} Id. at 1122–23.
\textsuperscript{395} Id. at 1123.
\textsuperscript{396} See Polk, 946 So. 2d at 1122–23.
\textsuperscript{397} Id. at 1125.
\textsuperscript{398} Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 270 (Fla. 4th Dist. Ct. App. 2006); see also supra note 45 and accompanying text.
\textsuperscript{399} See Alterra Healthcare Corp., 937 So. 2d at 270–71.
Appeal noted that Mr. Bryant had been given a residency agreement to sign for the second facility, but he did not get around to signing it. Nevertheless, the Fourth District Court of Appeal did not disturb the trial court's finding that the Bryants and Alterra performed under the terms of one signed agreement at both facilities; therefore, the first residency agreement was applicable to the second residence as well.

The First District Court of Appeal, in *De Vaux v. Westwood Baptist Church*, was called upon to determine if a contract existed after the trial court dismissed with prejudice, the purported purchaser's complaint for specific performance. The facts showed that by letter dated May 19, 2005, De Vaux offered to purchase certain real estate from Westwood for $535,000. The letter set out several terms and conditions including Westwood taking back a mortgage from De Vaux with interest at a specified sum to be paid quarterly. The letter stated that "[t]his contract will take precedent until a more detailed legal contract can be drawn up stating terms, conditions, dates and financing." A church meeting was held six days later. At the meeting, the sale of the property to De Vaux was approved. The minutes noted the approval and also stated that the church trustees were "authorized to work out all the details" with De Vaux. The First District Court of Appeal noted that the plaintiff did not allege that the church trustees communicated to him its "acceptance of his offer or the terms of the 'details' [of the deal still] to be worked out." The First District Court of Appeal held that there was no contract to enforce. It is fundamental that "acceptance of the offer must be communicated to the offeror." Furthermore, even if acceptance had been communicated, the essential terms of the agreement had not been negotiated and there was "no meeting of the minds." The court af-

400. *Id.* at 271. It is not stated in the opinion if the second residency agreement was signed by a representative on behalf of Alterra. See generally *id.*
401. *Id.*
402. 953 So. 2d 677 (Fla. 1st Dist. Ct. App. 2007).
403. *Id.* at 681.
404. *Id.* at 680.
405. *Id.*
406. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 682.
412. *De Vaux*, 953 So. 2d at 682 (citing *Kendel v. Pontious*, 261 So. 2d 167, 169–70 (Fla. 1972)).
413. *Id.* at 681.
firmed the trial court’s decision to dismiss the complaint with prejudice and remanded for a determination of appellate attorney’s fees to Westwood.\textsuperscript{414}

An interesting aspect of the case was Westwood’s motion on appeal for an award, pursuant to section 57.105 of the \textit{Florida Statutes}, of appellate attorney fees.\textsuperscript{415} The court stated that with respect to the new statutory “‘not supported by the material facts or would not be supported by application of then-existing law to those material facts’ standard” that replaced the old “‘frivolous’ standard, . . . an all encompassing definition . . . defies us.”\textsuperscript{416} However, the court found it clear that there has been a lowering of the statutory bar for the imposition of this sanction.\textsuperscript{417} The court determined that De Vaux’s complaint and appeal were “wholly without merit,” and thus, subject to sanction under either standard.\textsuperscript{418} The court observed that once the requirements of section 57.105 of the \textit{Florida Statutes} are satisfied, the court is required “to award fees to the prevailing party in equal amounts to be paid by the losing party and the losing party’s attorney.”\textsuperscript{419} The matter was remanded for determination of the amount of the award of appellate attorney fees.\textsuperscript{420}

B. \textit{Modification}

Hadden and the radio station WSOS made an agreement in 1998 giving Hadden the exclusive right to sell the radio station for a 5\% commission.\textsuperscript{421} The agreement provided for termination by either party on thirty days prior written notice to the other.\textsuperscript{422} The listing agreement provided that the agreement would remain in effect indefinitely absent such termination.\textsuperscript{423} Hadden was entitled to his commission not only if the radio station was sold during the term of the agreement, but also in two other situations.\textsuperscript{424} One situation was if Hadden presented an offer that satisfied the asking price and terms but the station declined the offer.\textsuperscript{425} The other situation would apply if WSOS

\textsuperscript{414} Id. at 685.
\textsuperscript{415} Id. at 682–85; \textit{see also} FLA. STAT. § 57.105 (2007).
\textsuperscript{416} \textit{De Vaux}, 953 So. 2d at 683 n.6.
\textsuperscript{417} Id.
\textsuperscript{418} Id. at 684.
\textsuperscript{419} Id.; \textit{see also} FLA. STAT. § 57.105(1).
\textsuperscript{420} \textit{De Vaux}, 953 So. 2d at 685.
\textsuperscript{421} WSOS-FM, Inc. v. Hadden, 951 So. 2d 61, 62 (Fla. 5th Dist. Ct. App. 2007).
\textsuperscript{422} Id. The termination provision could not be used for the first 180 days of the agreement. Id.
\textsuperscript{423} Id.
\textsuperscript{424} Id.
\textsuperscript{425} Hadden, 951 So. 2d at 62.
entered into an agreement to sell the station within twenty-four months after the termination of the agreement, if the sale was to a buyer solicited by Hadden. In September 2002, Hadden sent a fax to the WSOS station manager to advise him that Hadden had a potential buyer for $3,500,000. The station manager sent a letter to Hadden the day he received the fax in which he took the position that the listing agreement between Hadden and WSOS had been cancelled during a telephone conversation between Hadden and the manager two years earlier. Hadden wrote back that the agreement had not been cancelled two years earlier, but he would agree to treat the station manager's letter as a thirty day notice of termination of the agreement. WSOS was sold for $4,000,000 about nine months later. Hadden sued to collect his 5% commission. The trial court found in favor of Hadden and WSOS appealed.

The Fifth District Court of Appeal, like the Fourth District Court of Appeal in the Rhodes case, relied on Pan American Engineering Co. v. Poncho's Construction Co. in stating that written agreements prohibiting later oral modifications can nevertheless be modified orally. The Fifth District Court of Appeal noted that such agreements can be modified orally only when modification "has been accepted and acted upon in such a manner that refusing to enforce it would constitute fraud upon either party." The court reversed and remanded because it could not tell if the trial judge ruled that the oral modification was invalid due to the writing requirement or that there was no oral modification and termination in 2000.

426. Id.
427. Id.
428. Id.
429. Id. at 62-63.
430. Hadden, 959 So. 2d at 63. The opinion does not state that the sale was to a buyer Hadden had solicited or indicate upon which of the two grounds Hadden based his claim. See id.
431. Id. at 63.
432. Id.
433. See supra note 173 and accompanying text. In Rhodes, the Fourth District Court of Appeal considered whether a written agreement could "be modified by the subsequent conduct of the parties." Rhodes v. BLP Assocs., Inc., 944 So. 2d 527, 530 (Fla. 4th Dist. Ct. App. 2006). The court in Rhodes noted that mutual assent and consideration are required for such modification. Id.
434. 387 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1980).
435. Hadden, 951 So. 2d at 63 (citing Pan Am. Eng'g Co. v. Poncho's Constr. Co., 387 So. 2d 1052, 1053 (Fla. 5th Dist. Ct. App. 1980)).
436. Id. at 63-64 (citing Prof'l Ins. Corp. v. Cahill, 90 So. 2d 916, 918 (Fla. 1956)).
437. Id. at 64.
C. Remedies

In Ocean Communications, Inc. v. Bubeck, plaintiffs entered into a contract with defendant whereby defendant would provide advertising related services. Plaintiffs sought damages and restitution of amounts paid under the contract, alleging breach of contract. The trial court found there were breaches of contract by the defendant, but that restitution is an equitable remedy that is not available when there was an actual contract between the parties. The Fourth District Court of Appeal, in reversing and remanding the case, discussed damages, restitution, and specific performance, the three remedies the court noted are available for breach of contract. The first, damages, is intended to put the non-breaching party in as good a position as that party would have been in had the contract been performed. The second, restitution, requires the breaching party to give back what that party received because this tends to put the non-breaching party in as good a position as that party "occupied before the contract was made." Restitution is available as a remedy for breach of an express contract. However, in this case, because restitution was sought, plaintiff was required to return to defendant the value, if any, of defendant's part performance. The court, therefore, remanded the matter for an evidentiary hearing as to the value of defendant's services to be used to offset the restitution award to plaintiff.

In Key v. Trattmann, Key sought specific performance of an alleged oral agreement by Trattmann to convey real estate or the imposition of a resulting trust, and summary judgment was granted in favor of Trattmann. On appeal—for purposes of determining whether the motion was properly granted by the trial court—the First District Court of Appeal "[took] as true" the allegations that "to help Mr. Trattmann obtain United States' citizenship"

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438. 956 So. 2d 1222 (Fla. 4th Dist. Ct. App. 2007).
439. Id. at 1224.
440. Id. The claim for restitution was originally based on unjust enrichment, which the Fourth District Court of Appeal noted is not an available cause of action when there is an express contract. Id. But the trial court had permitted the plaintiff to amend its complaint to conform to the evidence by changing the claim from a claim for unjust enrichment seeking restitution to a claim for breach of contract seeking restitution. Id. at 1226.
441. Bubeck, 956 So. 2d at 1224.
442. Id. at 1225.
443. Id.
444. Id.
445. Id.
446. Bubeck, 956 So. 2d at 1226.
447. Id.
448. 959 So. 2d 339 (Fla. 1st Dist. Ct. App. 2007).
449. Id. at 341.
the following occurred: 1) Key purchased real estate in Tallahassee; 2) Key provided all of the consideration for the purchase and upkeep of the property; 3) Trattmann promised to convey the property to Key upon demand, but when demand was made, refused to convey; and 4) there was no written agreement between Key and Trattmann with respect to the property. In the trial court, Key argued that a resulting trust had arisen and that he was the beneficiary. The trial court found that Florida’s four year statute of limitations under section 95.11 of the Florida Statutes applied and that Florida’s statute of frauds contained in section 689.01 of the Florida Statutes also applied.

The First District Court of Appeal reversed, observing that a resulting trust arises by operation of law. Therefore, the statute of frauds does not apply to a resulting trust claim. A resulting trust claim involving real estate can be proven by oral testimony. The lack of a written contract was not fatal to Trattmann’s case. The court noted that with respect to the application of the statute of limitations, it was not clear from the record when the statute might first be said to have begun to run. That would have been when Trattmann repudiated the trust or held the property adversely with Key’s knowledge. The court found that Key’s allegations fit the definition of a resulting trust as set forth in Steigman v. Danese, where it was stated that “where a person furnishes money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property.” The First District Court of Appeal gave Key a chance to prove his allegations and, presumably gave the trial court the opportunity to revisit the statute of limitations defense.

450. Id. at 341–342.
451. Id. at 342.
452. Id. at 342, 344, 346 n.4; see also Fla. Stat. §§ 95.11, 689.01 (2007).
453. Key, 959 So. 2d at 345.
454. Id.
455. Id.
456. See id.
457. Id.
458. Key, 959 So. 2d at 345–46.
459. Id. at 346.
461. Key, 959 So. 2d at 342–43 (quoting Steigman v. Danese, 502 So. 2d 463, 467 (Fla. 1st Dist. Ct. App. 1987)).
462. Id. at 346.
The next three cases deal with liquidated damages. The first two involved real estate contracts and the third arose in the context of an alleged breach of a noncompete agreement.\(^\text{463}\)

In the first case, *Hot Developers, Inc. v. Willow Lake Estates, Inc.*,\(^\text{464}\) the Fourth District Court of Appeal reviewed a summary judgment that allowed a seller of commercial real estate to retain deposits of $550,000 as liquidated damages.\(^\text{465}\) The buyer claimed that allowing the seller to retain the deposit was improper because the forfeiture amounted to an unenforceable penalty and was unconscionable.\(^\text{466}\) Hot Developers, Inc., as purchaser, had entered into an agreement with Willow Lake to buy real estate for $5,700,000.\(^\text{467}\) The contract was not conditioned upon Hot Developers obtaining financing, and time was stated to be of the essence.\(^\text{468}\) Hot Developers made the first deposit of $100,000, which would be refunded if Hot Developers cancelled the contract for any reason within a "due diligence" period.\(^\text{469}\) After that period expired, Hot Developers, not having cancelled the contract, made a $200,000 deposit in accordance with the contract.\(^\text{470}\) It was apparently only then that Hot Developers had problems with an appraisal and asked for an extension of the original closing date.\(^\text{471}\) The contract also provided that if Hot Developers extended the closing date, it would pay "an additional non-refundable deposit" of $250,000.\(^\text{472}\) That amount was paid, and unlike the first two deposits, the contract called for immediate distribution of that money to Willow Lake to be credited against the purchase price.\(^\text{473}\) Hot Developers was unable to close on the first extended closing date.\(^\text{474}\) Because there was no provision in the agreement regarding another extension, the parties signed an addendum to the agreement for a short additional extension date, which provided that Hot Developers agreed to the release as non-refundable deposits of the first two deposits that were being held in escrow.\(^\text{475}\)


\(^{464}\). 950 So. 2d 537 (Fla. 4th Dist. Ct. App. 2007).

\(^{465}\). *Id.* at 539.

\(^{466}\). *Id.*

\(^{467}\). *Id.* at 538.

\(^{468}\). *Id.*

\(^{469}\). *Hot Developers, Inc.*, 950 So. 2d at 538.

\(^{470}\). *Id.* Unlike the initial deposit, apparently the contract was silent with respect to refund of the $200,000 deposit. See *id.*

\(^{471}\). *Id.*

\(^{472}\). *Id.*

\(^{473}\). *Hot Developers, Inc.*, 950 So. 2d at 538.

\(^{474}\). *Id.*

\(^{475}\). *Id.* at 538–39.
Hot Developers failed to close on the second extended date, and Willow Lake exercised its option under the contract to terminate the contract and retain the $550,000 as “liquidated and agreed damages.”\textsuperscript{476} The Fourth District Court of Appeal noted that it has been held that it is not unreasonable for a payment to be required in exchange for an extended closing.\textsuperscript{477} However, when that deposit will be forfeited if closing does not occur, forfeiture may amount to “an unenforceable penalty in certain circumstances.”\textsuperscript{478} The court agreed with Willow Lake that, as a matter of contract interpretation, the funds were not refundable.\textsuperscript{479}

The remaining issue was whether the forfeiture was a penalty.\textsuperscript{480} That required a \textit{Hyman v. Cohen}\textsuperscript{481} “liquidated damages analysis” based on the circumstances that existed when the contract was made.\textsuperscript{482} The provisions will be upheld under \textit{Hyman v. Cohen} if the damages were not then “readily ascertainable”\textsuperscript{483} and the amount of the liquidated damages were not “grossly disproportionate”\textsuperscript{484} to what seller’s damages might be, unless enforcement would be unconscionable.\textsuperscript{485} The court concluded that the deposit amount, being under 10% of the purchase price, was “well within the range of liquidated damages approved by Florida courts.”\textsuperscript{486} Both parties to the transaction were commercial entities with no apparent difference in bargaining power between them.\textsuperscript{487} The remaining question then was whether, based on circumstances existing at the time of the breach, equity required a finding that the liquidated damages, although not unenforceable penalties, were nevertheless unconscionable.\textsuperscript{488} The court concluded that there also was nothing to support a finding of unconscionability.\textsuperscript{489} This analysis included, in part, a comparison of the forfeiture amount to the contract price, similar to the test applied in determining if a forfeiture is an unenforceable penalty.\textsuperscript{490} The

\begin{itemize}
\item \textsuperscript{476} \textit{Id.} at 539.
\item \textsuperscript{477} \textit{Id.} (citing \textit{Waksman Enters., Inc. v. Or. Props., Inc.}, 862 So. 2d 35, 41 (Fla. 2d Dist. Ct. App. 2003)).
\item \textsuperscript{478} \textit{Hot Developers, Inc.}, 950 So. 2d at 539 (quoting \textit{Waksman Enters., Inc.}, 862 So. 2d at 42).
\item \textsuperscript{479} \textit{Id.} at 540.
\item \textsuperscript{480} \textit{See id.} at 539–40.
\item \textsuperscript{481} 73 So. 2d 393 (Fla. 1954).
\item \textsuperscript{482} \textit{Hot Developers, Inc.}, 950 So. 2d at 540.
\item \textsuperscript{483} \textit{Id.} (quoting \textit{Hutchison v. Tompkins}, 259 So. 2d 129, 132 (Fla. 1972)).
\item \textsuperscript{484} \textit{Id.} (quoting \textit{Hyman v. Cohen}, 73 So. 2d 393, 401 (Fla. 1954)).
\item \textsuperscript{485} \textit{Id.}
\item \textsuperscript{486} \textit{Id.} at 541.
\item \textsuperscript{487} \textit{Hot Developers, Inc.}, 950 So. 2d at 540–41.
\item \textsuperscript{488} \textit{Id.} at 541.
\item \textsuperscript{489} \textit{Id.}
\item \textsuperscript{490} \textit{Id.} n.2.
\end{itemize}
court cited cases where liquidated damages of 50% and 55% of the contract price were unconscionable, but others with forfeitures of 18.2% and 22% were upheld. The court also noted that the fact that the value of the property had appreciated in value over the relevant period did not make the liquidated damages unconscionable. In *Bruce Builders, Inc. v. Goodwin*, a seller was entitled to liquidated damages even though the seller found another buyer and made a net profit of about $2500.

In *Bradley v. Sanchez*, the Bradleys entered into a written agreement with Mr. Sanchez on December 4, 2002, to purchase a home from Mr. Sanchez for $10,500,000. The agreement was contingent on the Bradleys obtaining financing for 50% of the purchase price, with application to be made by December 9, 2002. The Bradleys paid a “deposit of $10,000 on November 27, 2002,” and were required to make an additional deposit of $500,000 on December 20, 2002. The closing was originally set for March 1, 2003, but at Mr. Sanchez’s request, the executed contract provided for a June 2, 2003, closing. The contract stated that binding modifications to it had to be written and signed.

The buyers delayed in applying for financing. They claimed that the seller’s agent told them on December 17, 2002, that they could wait until closer to closing to apply for a loan. The agent claimed she never said that, and denied having the authority to say that. “On December 12, 2002, the [buyers] were served with a federal search warrant” which they claimed made the requirement that they apply for a loan moot. They argued that they would have been required to disclose to the bank the facts of the federal investigation, which would have made it impossible for them to qualify “for a large home mortgage.” On December 20, 2002, the Bradleys tried to

491. *Id.* at 541–42.
492. *Hot Developers, Inc.*, 950 So. 2d at 542.
493. 317 So. 2d 868 (Fla. 4th Dist. Ct. App. 1975). The liquidated damages were 4.1% of the contract price. *Id.* at 870. It would seem that a combination of the forfeiture percentage and a profit on sale might lead to a different result in an appropriate case. See *id.*
494. *Id.*
495. 943 So. 2d 218 (Fla. 3d Dist. Ct. App. 2006).
496. *Id.* at 220.
497. See *id.*
498. *Id.*
499. *Id.*
500. *Sanchez*, 943 So. 2d at 220.
501. *Id.* As it turned out, they never applied. See *id.*
502. *Id.*
503. *Id.*
504. *Sanchez*, 943 So. 2d at 220.
505. *Id.*
cancel the contract and demanded the return of the $10,000 deposit.\textsuperscript{506} Mr. Sanchez refused and demanded the $500,000 additional deposit due that day.\textsuperscript{507} The Bradleys sued for the return of the $10,000.\textsuperscript{508} Mr. Sanchez filed a counterclaim alleging breach of contract.\textsuperscript{509} Mr. Sanchez asked to keep the $10,000 deposit and for payment of the $500,000 deposit.\textsuperscript{510} Mr. Sanchez moved for summary judgment on his breach of contract counterclaim.\textsuperscript{511} His motion was granted by the court and a final judgment was entered awarding him both the $10,000 and the $500,000 deposits plus pre-judgment interest.\textsuperscript{512} The Bradleys moved to amend their complaint before final judgment was entered to allege that Mr. Sanchez sold the house on April 18, 2005 for $10,400,000 and was therefore unjustly enriched.\textsuperscript{513} The trial court denied the motion, and the Bradleys appealed.\textsuperscript{514} The Third District Court of Appeal affirmed, finding that "there were no genuine issues of material fact."\textsuperscript{515} The events upon which the buyers relied to excuse their failure to apply for financing took place after the time to apply for the loan had passed.\textsuperscript{516} Any waiver of the financing provision was required to have been in writing.\textsuperscript{517} The court noted that it was aware that under certain circumstances, a later oral modification of a written contract would be upheld, but none of those circumstances were present.\textsuperscript{518} The court also found that the liquidated damages amount of 4.85\% of the contract price was neither an impermissible penalty nor unconscionable.\textsuperscript{519}

In Burzee v. Park Avenue Insurance Agency, Inc.,\textsuperscript{520} Ms. Burzee entered into a written noncompete agreement with her then employer, Park Avenue Insurance Agency, Inc.\textsuperscript{521} The agreement provided that for two years after her employment ended, she would not communicate with any customers of Park Avenue Insurance Agency, Inc. who were customers during her period

\textsuperscript{506} Id. at 220–21.
\textsuperscript{507} Id. at 221.
\textsuperscript{508} Id.
\textsuperscript{509} Sanchez, 943 So. 2d at 221.
\textsuperscript{510} Id.
\textsuperscript{511} Id.
\textsuperscript{512} Id.
\textsuperscript{513} Id. at 221–22.
\textsuperscript{514} Sanchez, 943 So. 2d at 220.
\textsuperscript{515} Id. at 221.
\textsuperscript{516} Id.
\textsuperscript{517} Id. at 222.
\textsuperscript{518} Id.
\textsuperscript{519} Sanchez, 943 So. 2d at 222.
\textsuperscript{520} 946 So. 2d 1200 (Fla. 5th Dist. Ct. App. 2006).
\textsuperscript{521} Id. at 1201. Her employment contract was not in writing. Id.
of employment. The agreement also contained an agreed measure of damages clause if Ms. Burzee breached the agreement. Park Avenue Insurance Agency, Inc. would be entitled to the sum of all commissions earned by it on the accounts sold or serviced by Ms. Burzee during the two years prior to her termination, plus $10,000. Ms. Burzee's employment was terminated by Park Avenue Insurance Agency, Inc. and she got a job with another insurance agency. Park Avenue Insurance Agency, Inc. claimed that Ms. Burzee breached the noncompet agreement. The trial court agreed, and based on the damages clause, awarded $161,572.88 in damages to Park Avenue Insurance Agency, Inc. On appeal, Ms. Burzee argued that the damages award amounted to an unenforceable penalty and the Fifth District Court of Appeal agreed. A liquidated damages clause that results in an amount "so grossly disproportionate to any damages that might reasonably be expected" will be deemed a penalty and unenforceable. The court, in addressing the proportionality issue, pointed out that the same damage amount would apply regardless of the number of customers with which Ms. Burzee communicated, even if none of those customers actually became customers of her new employer. The court concluded that "[t]he absence of proportionality is patent." In addition, even if this provision in some circumstances might be considered enforceable, it could not have been enforceable under the circumstances of this case. "[E]quity may 'relieve against [a] forfeiture'" if what might otherwise have been a proper liquidated damages provision "appears unconscionable . . . at the time of the breach." The court reversed insofar as the trial court had found that the damages clause was a valid liquidated penalty provision and remanded the matter.

522. Id.
523. Id. at 1201–02.
524. Burzee, 946 So. 2d at 1201–02.
525. Id. at 1202.
526. See id.
527. Id.
528. Id. The legal effect of this contractual provision is an issue of law reviewed de novo. Burzee, 946 So. 2d at 1202.
529. Id.
530. Id. at 1203.
531. Id.
532. Id. at 1203.
533. Burzee, 946 So. 2d at 1203 (quoting Hutchison v. Tompkins, 259 So. 2d 129, 132 (Fla. 1972)).
534. Id. Ms. Burzee also appealed the trial court's finding of civil contempt for violation of an injunction and the fine imposed. Id. at 1201. The Fifth District Court of Appeal affirmed these portions of the trial court's decision without discussion. Id. at 1203.
D. Right of First Refusal

In 1977, a right of first refusal had been granted to Old Port Cove Condominium Association One, Inc. (Association) with respect to land adjacent to Association's property, title to which had some time later vested in the developer, Old Port Cove Holdings, Inc. (Developer). The option agreement provided that the property would first be offered to Association on the same terms and conditions as it would be offered to the public. Association had thirty days to accept the offer. Failure to timely accept the offer would terminate the right of first refusal. Developer brought an action to have the right of first refusal declared void from the inception as being in violation of the common law rule against perpetuities. The trial court ruled in favor of Developer. On appeal, the Fourth District Court of Appeal in Old Port Cove Condominium Ass'n One, Inc. v. Old Port Cove Holdings, Inc., expressed doubt that the rule against perpetuities ever applied to this kind of right of first refusal. Nevertheless, the court went on to subject the grant to a rule against perpetuities analysis. The court held that in 2000 the legislature abrogated the common law rule against perpetuities when it amended section 689.225 of the Florida Statutes, and the abrogation of the rule clearly was meant to be retroactive. Therefore, by statute, the common law rule against perpetuities did not apply to the right of first refusal. The court acknowledged that its decision regarding the retroactivity of the 2002 amendment was in conflict with Fallschase Development Corp. v. Blakey, and certified conflict to the Supreme Court of Florida.

535. Old Port Cove Condo. Ass'n One, Inc. v. Old Port Cove Holdings, Inc., 954 So. 2d 742, 742–43. (Fla. 4th Dist. Ct. App. 2007). The grant was made by Developer's predecessor in interest. Id. at 742–43. The court noted that Developer was aware of the grant for more than a decade before it instituted this action. Id. at 744.
536. Id. at 742.
537. Id.
538. Old Port Cove Holdings, Inc., 954 So. 2d at 742.
539. Id. at 743.
540. Id.
541. 954 So. 2d 742 (Fla. 4th Dist. Ct. App. 2007).
542. Id. at 743.
543. Id. at 744–46.
544. Id. at 745 (citing FLA. STAT. § 689.225(7) (2005)).
545. Id. at 744. The Florida statutory rule against perpetuities excludes these types of restraints. Although there was a period of time during which the option existed that the law was otherwise, Developer failed to act under that statute to reform the option. Old Port Cove Holdings, Inc., 954 So. 2d at 744.
547. Old Port Cove Holdings, Inc., 954 So. 2d. at 746–47.
The court went on to say that the right of first refusal might be suspect as an unreasonable restraint on alienation.\(^{548}\) The court concluded that the Association’s option did not impose any burden on the sale of the property.\(^{549}\) In reversing and remanding, the court noted that Developer would either get its price from the Association or from some other buyer, but the price would be based upon market value, not a value fixed in the option.\(^{550}\) Therefore, the right of first refusal was not an unreasonable restraint on alienation.\(^{551}\) Had the right of first refusal allowed purchase at a fixed price for an unlimited period of time, the result would have been different.\(^{552}\)

VII. DEEDS AND MORTGAGES

A. Deeds

The Fifth District Court of Appeal was called upon to sort out the issue of superiority of title as between two purchasers of the same real estate from the same transferor, Virginia Schwartz (Seller).\(^{553}\) Seller’s husband, a resident of North Carolina, owned real estate in Marion County, Florida when he died in 1994.\(^{554}\) Seller’s husband devised all of his property to Seller, but according to the court’s opinion, the husband’s will was never probated.\(^{555}\) On June 25, 2004, Seller signed a contract to convey the Marion County real estate to Mr. Rice, and on August 4, 2004, Seller delivered a warranty deed to Mr. Rice.\(^{556}\) Almost two months later, Seller entered into another contract to sell the same real estate, only this time, to Mr. Greene.\(^{557}\) On October 28, 2004, Mr. Greene paid for the real estate and received a warranty deed from Seller.\(^{558}\) His deed was recorded on November 8.”\(^{559}\) Mr. Rice, however, did not get around to recording his deed until several weeks after Mr. Greene recorded his.\(^{560}\) So which purchaser had priority of title?

\(^{548}\) Id. at 746.
\(^{549}\) Id. at 743.
\(^{550}\) Id. at 746.
\(^{551}\) Id.
\(^{552}\) Old Port Cove Holdings, Inc., 954 So. 2d. at 746 (quoting Iglehart v. Phillips, 383 So. 2d 610, 615 (Fla. 1980)).
\(^{553}\) Rice v. Greene, 941 So. 2d 1230 (Fla. 5th Dist. Ct. App. 2006).
\(^{554}\) Id. at 1230.
\(^{555}\) Id.
\(^{556}\) Id. Apparently Mrs. Schwartz entered into the contract “on behalf of her deceased husband.” Id. (internal quotations omitted).
\(^{557}\) Rice, 941 So. 2d at 1231.
\(^{558}\) Id.
\(^{559}\) Id.
\(^{560}\) Id.
The trial court granted summary judgment to Mr. Greene, purchaser number two, declaring his rights superior as between the two purchasers, and Mr. Rice appealed. Mr. Rice argued that Seller did not have title to the real estate, and therefore, common law, not the recording statute applied. The Florida recording statute provides that, with respect to the rights of purchasers of the same property, a subsequent purchaser of property for value and without notice of the prior transaction has priority over an earlier purchaser when the subsequent purchaser's deed is recorded first. Mr. Rice's argument was grounded on section 733.103(1) of the Florida Statutes, which provides that a decedent's will is "ineffective to prove title . . . or the right to possession of" the decedent's property until the will is admitted to probate. The result, Mr. Rice concluded, was that Seller did not have title to convey to Mr. Greene, so she could not have conveyed anything to make the recording statute applicable; consequently, common law applied and Mr. Rice had priority under his purchase agreement.

The court looked instead to section 732.514 of the Florida Statutes which states that it is "'[t]he death of the testator . . . [that serves to] vest[] the right to devises'" in the devisees, unless the will provides otherwise. The court, reading those two sections of the Florida Probate Code in pari materia observed that because the will was never probated, Seller "lacked marketable title to the property." The Third District Court of Appeal, in affirming the trial court, stated "'[h]owever, she clearly acquired equitable title to the property upon her husband's death, assuming, as have the parties, that Mr. Schwartz's will, which was presented to the court below, is authentic.'"

Therefore, under the recording statute, as between Mr. Greene and Mr. Rice, Mr. Green had the priority claim to the property, which was the only question the court had before it.

561. Id. at 1230.
562. Rice, 941 So. 2d at 1232.
563. Id. (citing FLA. STAT. § 695.01(1) (2004)).
564. Id. at 1231 (quoting FLA. STAT. § 733.103(1) (2004)).
565. Id.
566. Id. (quoting FLA. STAT. § 732.514 (2004)).
567. Rice, 941 So. 2d at 1231.
568. Id. But what if the will was subsequently determined not to have been authentic? Would Seller still have had equitable title so that the recording statute could have applied? Some facts relevant to the court's determination may not have been recited in the opinion.
569. Id. at 1232. It is important to bear in mind that the court's ruling addressed only the claim of priority as between the two purchasers, not any issue of marketable title or breach of contract claims against seller. Id. at 1231.
B. Mortgages

The Third District Court of Appeal, in Feinstein v. New Bethel Missionary Baptist, held, as a matter of first impression, that an express provision that imposes a prepayment penalty in the event of acceleration of the mortgage and note by the payee is enforceable. New Bethel Missionary Baptist Church (New Bethel) defaulted on its payments on a mortgage and note. Feinstein, the holder of the note and mortgage, accelerated the debt pursuant to the terms of the promissory note and began foreclosure proceedings. The note not only imposed a prepayment fee if New Bethel prepaid the note, it provided that the prepayment fee would apply if the payments were accelerated by the mortgagee on default. The trial court entered a final judgment of foreclosure in favor of Feinstein, but denied Feinstein the prepayment fee on the accelerated amount, which he had also requested. On appeal, the Third District Court of Appeal observed that it could not find any Florida decisions directly holding "that an express provision of a promissory note . . . call[ing] for a prepayment fee" upon acceleration of debt payments is enforceable. The court noted that there were, however, cases including a Supreme Court of Florida case, Florida National Bank v. Bankatlantic, that opened the door for that result by "indicat[ing] that such would be [their] holding" if a case with these facts presented itself. On the invitation and authority of those cases, the Third District Court of Appeal reversed the trial court.

VIII. EMINENT DOMAIN

Three District Court of Appeal cases were similar because all of the land owners sought damages as a result of a change in traffic flow. The

570. 938 So. 2d 562 (Fla. 3d Dist. Ct. App. 2006).
571. Id. at 563; see also Feinstein v. Ashplant, 961 So. 2d 1074 (Fla. 4th Dist. Ct. App. 2007) (enforcing a prepayment on acceleration penalty sought by the same lender under a provision similar to that involved in, and referring to, the decision of the Third District Court of Appeal in Feinstein v. New Bethel Missionary Baptist).
572. Feinstein, 938 So. 2d at 563.
573. Id.
574. Id.
575. Id.
576. Id.
577. 589 So. 2d 255 (Fla. 1991).
578. Feinstein, 938 So. 2d at 563–64.
579. Id. at 564–65.
580. Dep't of Transp. v. Fisher, 958 So. 2d 586, 589 (Fla. 2d Dist. Ct. App. 2007); City of Jacksonville v. Twin Rests., Inc., 953 So. 2d 720, 720–21 (Fla. 1st Dist. Ct. App. 2007); City
first two—related, if not the same—cases were condemnation cases, while the third was an inverse condemnation case. A fourth case considered a tenant’s compensable interest and valuation.

In the first condemnation case, City of Jacksonville v. Twin Restaurants, Inc. (Twin), the City took some of the land owner’s property in connection with a road project. As part of the project, the City would build a median that would change the traffic flow to Twin’s property. Twin alleged that the change in traffic flow impeded its business. The jury awarded Twin $143,420 for the property taken plus $685,000 in “severance damages” for the change in traffic flow. The City appealed the severance damage award. The First District Court of Appeal reversed, citing Department of Transportation v. Capital Plaza, Inc. The court held that severance damages may not be awarded for a change in the traffic flow resulting from a median. It was the construction of the median, not the taking of the property, that caused the change of traffic flow.

In Department of Transportation v. Fisher, the Department of Transportation (DOT) was involved in a project to elevate part of U.S. 19 and building frontage roads on the elevated portion. The Fishers operated a carwash on U.S. 19 in Pinellas County. Before the project, the Fishers’ customers could get to the car wash from U.S. 19, but after the project, customers had to travel on a frontage road to get to the car wash. The Fishers alleged that this amounted to inverse condemnation and they sought compensation based on a taking of access. The court noted that “inverse condem-
nation [occurs] when governmental action causes a substantial loss of access to" the owner's property.\textsuperscript{598} A physical taking of the owner's property is not required to establish the right to compensation from the government.\textsuperscript{599} When there is a taking of property, plus a loss of access, money awarded for the access loss will be termed severance damages.\textsuperscript{600} To be compensable, the loss of access need not be total but at least "substantially diminished."\textsuperscript{601} Therefore, the question was whether DOT's actions on its property, as opposed to the Fishers' property, amounted to a taking of access.\textsuperscript{602} There was no question that the most convenient route to the car wash was eliminated.\textsuperscript{603} The issue, however, was whether or not access to the Fishers' property had been substantially diminished.\textsuperscript{604} Based on the record, the court found that access to the Fishers' property was not substantially diminished.\textsuperscript{605}

In \textit{Dames v. 926 Co.},\textsuperscript{606} the Fourth District Court of Appeal considered the relevant date for determining who the holders of compensable interests were for the property known as 910 West Atlantic Avenue, Delray Beach, which was taken by eminent domain.\textsuperscript{607} The compensable interest issue arose out the Dames' purchase in 1998 of Delray Coin Laundry, Inc. from the Millanises.\textsuperscript{608} As part of the purchase, the Dames gave the Millanises a $75,000 promissory note secured by a chattel mortgage.\textsuperscript{609} Delray Coin Laundry, Inc. was then the lessee of the subject property and 926 Company, Inc., the property owner, was the lessor.\textsuperscript{610} In connection with the purchase by the Dames, Delray Coin Laundry, Inc. assigned the lease to the Dames

\textsuperscript{598}. \textit{Fisher}, 958 So. 2d at 589 (quoting Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989)). Can construction of a median, with or without an actual taking ever support a claim for inverse condemnation? Although it did not use the term inverse condemnation, the court in \textit{Twin Restaurants} also concluded that the access of Twin's customers would not be "substantially diminished." City of Jacksonville v. Twin Rests., Inc., 953 So. 2d 720, 722–23 (Fla. 1st Dist. Ct. App. 2007) (citing \textit{Fisher}, 958 So.2d at 589)). It appears that the cite to \textit{Fisher} is to the original opinion, which was withdrawn and substituted with a later opinion after the denial of the motion for rehearing because Judge Isom dissented from the denial of the motion. \textit{See Fisher}, 958 So. 2d. at 593–94.

\textsuperscript{599}. \textit{Id.} at 589.
\textsuperscript{600}. \textit{See id.}
\textsuperscript{601}. \textit{Id.}
\textsuperscript{602}. \textit{Id.}
\textsuperscript{603}. \textit{Fisher}, 958 So. 2d at 591.
\textsuperscript{604}. \textit{Id.} at 589.
\textsuperscript{605}. \textit{Id.} at 590–91.
\textsuperscript{606}. 925 So. 2d 1078 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{607}. \textit{Id.} at 1079–81.
\textsuperscript{608}. \textit{Id.} at 1079.
\textsuperscript{609}. \textit{Id.} at 1079–80.
\textsuperscript{610}. \textit{Id.} at 1079.
individually. In 2002, the Delray Beach Community Redevelopment Agency (Agency) instituted an eminent domain proceeding with respect to the property and included Mr. and Mrs. Dames among the respondents. On July 17, 2003, Agency deposited $567,163 into the registry of the court pursuant to the court's Agreed Order of Taking. 926 Company, Inc. was awarded compensation of $615,000 for the property taken by Agency. The deposit by Agency allowed it title and possession as of July 17, 2003. In June 2003, the Dames defaulted on their installment obligation to the Millanises, and in December 2003, the Millanises sought to foreclose upon the chattel mortgage. The Millanises' foreclosure action resulted in their re-taking of the leasehold interest.

With respect to the compensable interests issue, 926 Company, Inc. claimed that the Dames were not entitled to any portion of the amount of an award. Although tenants are entitled to a share of condemnation proceeds, 926 Company, Inc. argued, and the trial court agreed, that the Dames "were not entitled to compensation." The Dames appealed and the Fourth District Court of Appeal reversed and remanded. The court held that July 17, 2003, the date on which proceeds were deposited with the clerk, which was the date for valuation and the date that title was transferred under sections 73.071(2) and 74.061 of the Florida Statutes, respectively, was also the date for determining compensable interests in the property. As of July 17, 2003, the Dames were the lessees of the property under a lease that was then in full force and effect. They were entitled to a share of the condemnation

611. Dames, 925 So. 2d at 1080. The landlord argued that the Dames' were not the lessees, but rather Delray Coin Laundry, Inc., the corporation that the Dames' had purchased, was the lessee. Id. The court easily disposed of this issue, finding that Delray Coin Laundry, Inc. had assigned the lease to the Dames, individually, as part of the sale of the corporation and business assets. Id.

612. Id. at 1079.

613. Id.

614. Dames, 925 So. 2d at 1079.

615. Id.

616. Id. at 1081.

617. Id. at 1080.

618. Id.

619. Dames, 925 So. 2d at 1080.

620. Id. at 1082.

621. Id. at 1080–81.

622. Id. at 1081. The fact that the tenants abandoned the property after the date the title transferred, but prior to the date vacation of the premises was required under the Order of Taking, was irrelevant. Id. Also irrelevant was the fact that the tenants later defaulted on their payments to seller under the promissory note and chattel mortgage, and that the seller had instituted foreclosure proceedings in December 2003. Dames, 925 So. 2d at 1081. Fur-
proceeds, as the events occurring after July 17, 2003 were held to be irrelevant.\textsuperscript{623}

The legislature amended Florida’s eminent domain laws in 2006 in response to the United States Supreme Court decision in \textit{Kelo v. City of New London}.\textsuperscript{624} The United States Supreme Court held that the Fifth Amendment to the United States Constitution did not prohibit the city from taking private property by eminent domain for economic development, which the Court held to be a “public purpose,” even though the property might be transferred to private individuals.\textsuperscript{625} Among the revisions to the \textit{Florida Statutes} are provisions that remove the authority to take property to eliminate public nuisance, slum, or blight conditions, or preservation or enhancement of the tax base,\textsuperscript{626} and prohibit transfer of taken property to a private entity, with exceptions for common carriers, private and public utilities, and certain “special use” private entities.\textsuperscript{627}

\section*{IX. EMPLOYMENT LAW}

\subsection*{A. Covenants Not to Compete}

There were numerous appellate cases decided during the survey period that involved covenants not to compete, some of which were entered into in the context of buy-sell agreements,\textsuperscript{628} while in other cases, they arose solely out of an employment relationship where there was no ownership interest.\textsuperscript{629}

In \textit{Whitby v. Infinity Radio, Inc.},\textsuperscript{630} Whitby, who worked for WRMF-FM radio from 1980 to 1995, went to work for WEAT-FM in 1995.\textsuperscript{631} The

\begin{footnotesize}
\textsuperscript{623} \textit{Id.} at 1081.
\textsuperscript{624} 545 U.S. 469 (2005).
\textsuperscript{625} \textit{Id.} at 484.
\textsuperscript{626} FLA. STAT. §§ 73.014(1)-(2), 163.335(7) (2007).
\textsuperscript{627} \textit{Id.} § 73.013(1)-(2).
\textsuperscript{628} See infra note 660 and accompanying text.
\textsuperscript{629} See, e.g., Whitby v. Infinity Radio, Inc., 961 So. 2d 349, 351 (Fla. 4th Dist. Ct. App. 2007); Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C., 939 So. 2d 268, 270, 273 (Fla. 4th Dist. Ct. App. 2006) (holding that the medical clinic had a legitimate interest to protect the existing patient goodwill in the specified geographic area); JonJuan Salon, Inc. v. Acosta, 922 So. 2d 1081, 1083–84 (Fla. 4th Dist. Ct. App. 2006) (affirming an order granting a temporary injunction against a former employee of a hair salon where salon demonstrated that a covenant was supported by legitimate interests of protecting goodwill and the substantial relationship with its customers, and the former employee breached covenant); Colucci v. Kar Kare Auto. Group, Inc., 918 So. 2d 431, 434 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{630} \textit{Whitby}, 961 So. 2d at 349.
\end{footnotesize}
1995 employment agreement between Whitby and the then owner of WEAT-FM contained a non-compete clause. In 2000, four days before her employment contract with WEAT-FM was due to expire, Whitby entered into an employment agreement with the owner of WRMF-FM. On the day the WEAT-FM agreement expired, Whitby started working for WRMF-FM. Infinity Radio, Inc., the owner of WEAT-FM, sought and obtained a temporary injunction against Whitby, alleging violation of the non-compete agreement. The trial court subsequently found that Whitby had violated the temporary injunction and was “in indirect civil contempt,” and she was fined $100,000. The order allowed Whitby to avoid the fine by committing no further violation of the temporary injunction. Subsequently, the trial court found that Whitby had again violated the temporary injunction, directed payment of the fine, and threatened Whitby with jail upon nonpayment. The court found that Whitby had the financial ability to pay the fine.

Running parallel with the contempt proceeding was a breach of contract action against Whitby and her new employer. Whitby argued that once the issues leading to the contempt citation had been resolved by the award in the parallel proceedings, the court lost jurisdiction to impose contempt sanctions. The Fourth District Court of Appeal disagreed. The trial court retained jurisdiction to conclude ancillary matters, which included the contempt proceeding. Although the court must find that the contemnor has the ability to pay a coercive civil fine before enforcing it, the trial court so found in this case on competent evidence. The Fourth District Court of Appeal also observed that threatening incarceration for nonpayment of a coercive civil contempt fine is not improper.

631. Id. at 351.
632. Id. There were several changes in ownership of WEAT-FM during the following few years, and in 1999, Whitby and the station’s new owner, Infinity Radio, Inc., executed an amendment to the 1995 agreement reaffirming the 1995 agreement. See id.
633. Id.
634. Whitby, 961 So. 2d at 351.
635. Id.
636. Id. at 352, 355.
637. Id.
638. Id. at 355.
639. Whitby, 961 So. 2d at 352.
640. Id.
641. Id. at 353.
642. Id.
643. Id. at 353–54.
644. Whitby, 961 So. 2d at 354.
645. Id. at 356.
In another case, \textit{Leighton v. First Universal Lending, LLC},\textsuperscript{646} a former employee of a lending company opened a lending business.\textsuperscript{647} The former employer sought an injunction against the former employee and the employee's new company, although the employee's new company was not a party to the non-compete agreement and was not made a party to the lawsuit.\textsuperscript{648} With respect to the injunction against the employee's new company, the court noted that a third party could be enjoined in connection with enforcing a non-compete agreement, but notice and an opportunity to be heard were required.\textsuperscript{649} The former employee also claimed that the non-compete agreement was unenforceable because the former employer had breached the employment agreement.\textsuperscript{650} With respect to the breach of contract defense, the court held that the former employer's breach of the employment contract was an equitable defense that could be raised by the former employee, but proof of the breach was required.\textsuperscript{651} However, the former employee failed to demonstrate the breach of contract.\textsuperscript{652}

In another covenant not to compete case, \textit{Colucci v. Kar Kare Automotive Group, Inc.},\textsuperscript{653} Colucci sold his business to, and became an employee of, Kar Kare.\textsuperscript{654} He then entered into a non-compete agreement with Kar Kare that, with the exception of a limited area in Florida, purportedly applied anywhere in the United States for five years after termination of his employment.\textsuperscript{655} Kar Kare sought an injunction after Colucci left its employ, alleging that Colucci breached the covenant not to compete by conducting business in Florida that went beyond the scope agreed upon in the contract.\textsuperscript{656} The employer, therefore, stopped making payments on a promissory note that was given in connection with the purchase of the business.\textsuperscript{657} However, the original agreement between the parties provided that the covenant not to compete would not apply if the payments on the purchase agreement were not made.\textsuperscript{658} The trial court granted the injunction and Colucci appealed.\textsuperscript{659} The

\textsuperscript{646} 925 So. 2d 462 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{647} Id. at 463.
\textsuperscript{648} Id. at 463–64.
\textsuperscript{649} Id. at 465.
\textsuperscript{650} Id. at 464.
\textsuperscript{651} \textit{Leighton}, 925 So. 2d at 464.
\textsuperscript{652} Id.
\textsuperscript{653} 918 So. 2d 431 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{654} Id. at 434.
\textsuperscript{655} Id.
\textsuperscript{656} Id. at 433–34.
\textsuperscript{657} Id. at 437.
\textsuperscript{658} \textit{Colucci}, 918 So. 2d at 436–37. In this case, the covenant not to compete was effective upon the employee's termination of employment, even if that occurred before all payments under the promissory note given for the purchase of the business had been made. \textit{See}
Fourth District Court of Appeal noted that a court may consider an employer's breach of an employment agreement when determining if an injunction should be granted.\textsuperscript{660} If the breach is material, then the employee generally will be relieved from the covenant.\textsuperscript{661} Further, the court noted that it must consider the defense if it is raised.\textsuperscript{662} Colucci, however, did not claim that the employer's breach was a complete defense, so the court was required to consider whether the employer had met its burden of establishing that "it [would] suffer irreparable harm . . . ha[d] no adequate remedy at law . . . ha[d] a substantial likelihood of success on the merits; and . . . that . . . [granting the] temporary injunction [furthered] the public interest."\textsuperscript{663} The appellate court stated that irreparable harm could not be said to exist in this case unless Kar Kare could demonstrate that it had a legitimate business interest to protect.\textsuperscript{664} However, Kar Kare could not specify any lost clients or confidential business information, even though Colucci was using a similar name in the new business.\textsuperscript{665} Therefore, Kar Kare did not show that it had suffered any irreparable harm, and thus could not qualify for the injunction.\textsuperscript{666} Section 542.335(1)(b) of the Florida Statutes sets out a "nonexclusive list of 'legitimate business interests.'"\textsuperscript{667} Case law has expanded that list.\textsuperscript{668} The Fourth District Court of Appeal concluded that the record did not show that Kar Kare demonstrated that it had a legitimate business interest under the statute or case law.\textsuperscript{669}

\textsuperscript{659.} Id. at 436. In Alvarez, the covenant not to compete was not effective until the redemption occurred. Alvarez v. Rendon, 953 So. 2d 702, 710 (Fla. 5th Dist. Ct. App. 2007). Also, the payments for Rendon's stock in Alvarez would not have been required to have been made until the redemption. Id. The impact a subsequent default in payment would have had on Rendon's obligations under the covenant not to compete was not an issue. See id. In addition, the court did not specifically address Rendon's defense that the employer breached the agreement, as the court found that Rendon's obligation under the covenant could not have arisen there having been no redemption of stock. Id.

\textsuperscript{660.} Id. at 437.

\textsuperscript{661.} Id. (citing Benemerito & Flores v. Roche, 751 So. 2d 91, 93 (Fla. 4th Dist. Ct. App. 1999)).

\textsuperscript{662.} Id.

\textsuperscript{663.} Id. at 438 (quoting Net First Nat'l Bank v. First Telebanc Corp., 834 So. 2d 944, 949 (Fla. 4th Dist. Ct. App. 2003)).

\textsuperscript{664.} Colucci, 918 So. 2d at 438.

\textsuperscript{665.} Id. at 440. Even though that may have been evidence of Colucci's breach of the sale agreement, it did not result in irreparable harm. Id. at 440–41.

\textsuperscript{666.} Id. at 441.

\textsuperscript{667.} Id. at 438.

\textsuperscript{668.} Colucci, 918 So. 2d at 439.

\textsuperscript{669.} Id. at 440.
B. Discrimination

In *El Toro Exterminator of Florida, Inc. v. Cernada*, 670 El Toro Exterminator of Florida, Inc. (El Toro) provided pest control services for Miami-Dade County’s bus fleet. 671 The contract between El Toro and the County contained restrictions on the products that could be used. 672 Mr. Cernada, El Toro’s former service operations manager, testified that he was told to use and “conceal the use of” a particular pesticide and not to use protective gear so as not to alert the County. 673 The court found that when Mr. Cernada complained to the owners about the physical effects the pesticide was having on him, he was “subjected to racial and ethnic slurs” and given undesirable work schedules. 674 Finally, Mr. Cernada informed Miami-Dade County’s Pest Control Manager of the prohibited use. 675 The court also found that one of the owners of El Toro threatened Mr. Cernada. 676 Mr. Cernada then quit his job. 677 He sued El Toro, alleging, among other claims, “retaliation under the Florida Private Sector Whistleblower’s Act,” section 448.102(3) of the *Florida Statutes*. 678 “At the conclusion of [Mr.] Cernada’s case, . . . El Toro moved for a directed verdict on the . . . [whistleblower] claim” arguing that Mr. Cernada failed to prove his case as pled. 679 El Toro’s position was that Mr. Cernada had not specifically identified the laws El Toro was said to have violated. 680 However, Cernada’s lawyer had orally argued, without objection, the pertinent “ordinances and administrative code sections” El Toro was alleged to have violated. 681 The trial court denied El Toro’s motion and allowed Mr. Cernada to amend his pleadings “to conform to the evidence.” 682 El Toro appealed both rulings. 683 In affirming the trial court, the Third District Court of Appeal found that the trial court did not abuse its discretion by allowing Mr. Cernada to amend his pleadings. 684 "Leave to amend shall be

670. 953 So. 2d 616 (Fla. 3d Dist. Ct. App. 2007).
671. *Id.* at 617.
672. *Id.*
673. *Id.*
674. *Id.*
675. *Cernada*, 953 So. 2d at 617.
676. *Id.*
677. *Id.*
678. *Id.* (citing *FLA. STAT.* § 448.102(3) (2002)). He also sought unpaid wages and alleged negligent supervision. *Id.*
679. *Cernada*, 953 So. 2d at 617.
680. *Id.*
681. *Id.*
682. *Id.*
683. *Id.*
684. *Cernada*, 953 So. 2d at 618.
freely given..." El Toro's conduct complained of in this case remained unchanged after the amendment of Mr. Cernada's pleadings. Furthermore, El Toro was not prejudiced because the trial court allowed the amendment. The allegations in the amendment should have come as no surprise to El Toro.

El Toro next argued that Mr. Cernada's claim under the Whistleblower Act must fail because El Toro was not given "an opportunity to remedy [its alleged] offensive conduct." The court observed that the record of Mr. Cernada's actions was contrary to El Toro's assertions. This was a case for the jury.

X. FIDUCIARY DUTY AND GOVERNANCE

In Orlinsky v. Patraka, Orlinsky and Patraka were at one time both employed by their father-in-law's company. Later, they decided to go into business together without their father-in-law. They initially had a written agreement. The agreement provided that they would have "equal salaries and benefits," and would share equally in business profits and losses from Visual Scene, Inc. Patraka alleged that after several years, they decided to do without a written agreement and "orally agreed [that] they would be equal partners in any [business] they operated." Indeed, for thirty years Orlinsky and Patraka were in business together sharing everything equally. However, due to a financial reverse, and in order to keep their business going after a creditor foreclosed on the assets of Visual Scene, Inc., they decided that in order to buy back Visual Scene from the creditor, it was necessary to sell an interest in their business to investors who happened to be foreigners. A new entity was formed, Visual Scene International (VSI), in which

685. Id. (quoting Fla. E. Coast Ry. Co. v. Shulman, 481 So. 2d 965, 967 (Fla. 3d Dist. Ct. App. 1986)).
686. Id.
687. Id.
688. Id.
689. Cernada, 953 So. 2d at 618.
690. Id.
691. Id.
693. Id. at D1638.
694. Id.
695. Id.
696. Id.
697. Orlinsky, 32 Fla. L. Weekly at D1638.
698. Id.
699. Id.
Orlinsky and Patraka "each received [a] 25.83% interest." The upshot was that as part of a conversion from a "C" corporation to an "S" corporation, Orlinsky purchased the shares owned by the foreign investors in the operating company, VSI. Orlinsky then owned a 69% share of VSI, and Patraka owned a minority interest. Not long after that, the Articles of Incorporation were amended and all of the shareholders waived their preemptive rights. Orlinsky and Patraka had a falling out and VSI’s board of directors fired Patraka. Patraka filed a complaint in court against Orlinsky. He alleged breach of oral contract in count one, breach of fiduciary relationship in count two, sought imposition of a constructive trust in count three, and alleged tortious interference in count four. The trial court granted Orlinsky’s motion for a directed verdict as to counts one, three, and four, but allowed count two, breach of fiduciary duty, to go to the jury. The jury returned a verdict for Patraka consisting of $887,000 for the VSI stock he did not receive as part of the conversion to an S corporation and $3,431,248 for benefits he did not receive because he was fired. On appeal, the court determined that Orlinsky had not breached any fiduciary duty owed to Patraka and reversed the trial court’s denial of a directed verdict on count two. The Third District Court of Appeal discussed the fiduciary duty issue in four ways: 1) was there a general fiduciary duty?; 2) was there an agency relationship?; 3) was there a duty imposed on Orlinsky as majority shareholder?; and 4) was Orlinsky obliged to support the continued employment of Patraka?

The court answered no to each of the questions. The court found no evidence of breach of general fiduciary duty, concluding that this claim was no different from the breach of oral agreement claim that had been properly dismissed by the trial court. As to agency, there was no evidence that Orlinsky agreed to act on Patraka’s behalf in dealings with foreign investors.
Although Orlinsky, a majority shareholder, owed Patraka, a minority shareholder, a fiduciary duty, Orlinsky was a minority shareholder when he purchased the stock from the foreign investor shareholders.\textsuperscript{714} "There was no shareholder agreement in place" that would have given Patraka the right to purchase an equal number of shares—preemptive rights having been waived.\textsuperscript{715} Finally, and as a matter of first impression, the court adopted Delaware’s rule that issues of wrongful employment termination are personal and contractual and are separate from any rights that the employee may have as a shareholder.\textsuperscript{716} A majority shareholder’s fiduciary duties are likewise separate from employment issues.\textsuperscript{717}

XI. INSURANCE

Nob Hill Plaza (Landlord) leased shopping center space to New York Buffet (Tenant).\textsuperscript{718} The lease agreement required Tenant to obtain casualty insurance covering the leased premises with the policy to name Nob Hill Plaza as an additional insured or loss payee.\textsuperscript{719} Tenant bought the insurance from Lloyd’s of London (Lloyd’s), but failed to have the policy include the Landlord.\textsuperscript{720} The premises were damaged by fire, and an insurance claim was filed by Tenant.\textsuperscript{721} Lloyd’s denied Tenant’s claim, and Landlord sued Tenant for damages.\textsuperscript{722} Tenant filed a third-party complaint against Lloyd’s.\textsuperscript{723} The trial court dismissed the third-party complaint.\textsuperscript{724} The Fourth District Court of Appeal noted that it appeared that the trial court concluded that because Landlord did not qualify as a third-party beneficiary of Tenant’s insurance policy, the third-party complaint was improper.\textsuperscript{725} The Fourth District Court disagreed with the trial court.\textsuperscript{726} Since Lloyd’s may have to pay for the damage for which Landlord was suing Tenant, the third-

\textsuperscript{714}. Id.
\textsuperscript{715}. Id.
\textsuperscript{716}. Id. at D1640.
\textsuperscript{717}. Orlinsky, 32 Fla. L. Weekly at D1640.
\textsuperscript{718}. N.Y. Buffet, Inc. v. Certain Underwriters at Lloyd’s London, 950 So. 2d 438, 439 (Fla. 4th Dist. Ct. App. 2007).
\textsuperscript{719}. Id.
\textsuperscript{720}. Id.
\textsuperscript{721}. Id.
\textsuperscript{722}. Id.
\textsuperscript{723}. N.Y. Buffet, Inc., 950 So. 2d at 439.
\textsuperscript{724}. Id.
\textsuperscript{725}. Id.
\textsuperscript{726}. Id.
party complaint was proper. The Court added that "the trial court could sever the third-party action to prevent prejudice to [Lloyd's]."

XII. INTELLECTUAL PROPERTY AND THE INTERNET

In 1991, Ms. Almeida's mother gave written permission to fashion photographer Fabrio Cabral to take and use Ms. Almeida's photograph for exhibit and publication. Ms. Almeida was ten years old at the time. Ms. Almeida's photo was published in a book, Anjos Proibidos (Forbidden Angels). A second edition of Anjos Proibidos was published in 2000. Ms. Almeida's photo was on the cover. Amazon sold the second edition online on its website. Amazon's product detail page displayed the second edition photograph of Ms. Almeida. In addition, a quote was attributed to her. Ms. Almeida's attorney sent a demand letter to Amazon for statutory damages under section 540.08 of the Florida Statutes "for its unauthorized use of Ms. Almeida's image." Amazon responded by promptly removing the book's listing from its websites. Ms. Almeida's lawyer sent a second letter to Amazon demanding damages pursuant to section 772.11 of the Florida Statutes for civil theft. In November 2003, Ms. Almeida filed suit in Miami-Dade County Circuit Court alleging claims under both statutes relied upon by her attorney in his letters. Amazon removed the case to federal district court based on diversity jurisdiction. The federal district court granted Amazon's motion for summary judgment on all of Ms. Almeida's claims, and the Eleventh Circuit Court of Appeals affirmed.

The first issue was whether the Federal Communications Decency Act of 1996 (CDA) preempted Ms. Almeida's right of publicity claim under the

727. Id. at 440.
728. N.Y. Buffet, Inc., 950 So. 2d at 440.
730. Id. at 1318.
731. Id. at 1319.
732. Id.
733. Id.
734. Almeida, 456 F.3d at 1319.
735. Id.
736. Id.
737. Id. (citing FLA. STAT. § 540.08 (2006)).
738. Id.
739. Almeida, 456 F.3d at 1319 (citing FLA. STAT. § 772.11 (2006)).
740. Id.
741. Id.
742. Id.
743. Id. at 1328.
Florida law. The court observed that the CDA was intended to grant immunity to any cause of action that would make internet service providers liable for information that originated with a third-party user of the service—in this case, Ophelia Editions. The court also observed that the CDA was not intended to affect intellectual property rights. Ms. Almeida argued that the federal statute did not preempt the Florida publicity right statute since a publicity right is an intellectual property right. The court stated that "whether the CDA immunize[d] an interactive service provider from a state law right of publicity claim" was a question of first impression for the Eleventh Circuit. The court declined to decide the question because it found that Ms. Almeida’s publicity right claim failed the requirements of the Florida statute. The court concluded that Ms. Almeida’s photograph was not used "for trade, commercial, or advertising purposes as those terms are used in the statute." The court found that Amazon’s use of book cover images only “simulates a customer’s experience browsing book covers in a traditional book store.” The use of book covers is only “incidental to, and customary for,” internet book sellers. The court also rejected the civil theft claim under sections 812.012–812.037 and section 772.11 of the Florida Statutes, finding that Ms. Almeida failed to provide clear and convincing evidence of an injury that could have been caused by civil theft, and likewise failed to show felonious intent on Amazon’s part.

The Eleventh Circuit also affirmed the district court’s award of attorney’s fees to Amazon pursuant to section 772.11 of the Florida Statutes, finding that the civil theft claim was raised without substantial factual or legal support.

Legislation was enacted in 2006 amending Florida’s trademark law to make it more consistent with the Federal Trademark Act of 1946, as amended. Chapter 495 of the Florida Statutes has been given the name
"Registration and Protection of Trademarks Act." The definitional section of the statute has been substantially reworded. A trademark application review, amendment, and administrative hearing process has been created. Notably, the duration of a registered mark has been reduced from ten years to five years. A change of trademark name is to be filed with the Department of State. The statute also now provides that a security interest in a mark may be created and perfected under the Uniform Commercial Code. It also changes the law to allow an owner of a "famous mark" to pursue remedies, including an injunction, to prevent dilution of the mark.

XIII. JURISDICTION AND VENUE

A. Torts

In Hunt v. Cornerstone Golf, Inc., Daly, a golfer and Tennessee resident, and Chamberland, an employee of John Daly Enterprises (JDE), a Florida corporation, granted two companies, Cornerstone, a Georgia corporation, and Hippo, a British corporation, owned partly by Hunt, overlapping "exclusive" rights to the use of Daly’s name and likeness. JDE terminated Cornerstone’s trademark rights contract about six months before its scheduled expiration date, and Cornerstone brought suit in Broward County against Hippo, Hunt, a California subsidiary of Hippo, JDE, and Daly alleging tortious interference with its trademark license. The trial court denied Hunt’s motion to dismiss for lack of personal jurisdiction and Hunt appealed. The issue was whether, under Wendt v. Horowitz, Cornerstone satisfied the two-part jurisdictional test. First, were sufficient jurisdictional facts alleged that Hunt committed a tortious act in Florida and that the cause of ac-

756. Id. § 1, 2006 Fla. Laws at 1954 (codified at Fla. Stat. § 495.001 (2007)).
757. Id. § 2 (amending Fla. Stat. § 495.011 (2006)).
759. Id. § 9, 2006 Fla. Laws at 1960 (amending Fla. Stat. § 495.071 (2006)).
761. Id. (amending Fla. Stat. § 495.081(5)).
762. Id. § 17, 2006 Fla. Laws at 1968–69 (amending Fla. Stat. § 495.151(1)–(2) (2006)).
763. 949 So. 2d 228 (Fla. 4th Dist. Ct. App. 2007).
764. Id. at 229.
765. Id.
766. Id. The decision of the Fourth District Court of Appeal addressed personal jurisdiction with respect to Hunt only. Id. The opinion does not mention if other defendants filed motions to dismiss. See Hunt, 949 So. 2d at 229–31.
767. 822 So. 2d 1252 (Fla. 2002).
768. Hunt, 949 So. 2d at 230.
tion arose from that alleged tortious act? 769 Second, were there minimum contacts between the defendant and Florida that would satisfy due process requirements? 770

It was Cornerstone's burden to prove under the first part of the test that the alleged tortious interference took place in Florida. 771 Under Wendt, where a party asserts jurisdiction over another based on the commission of a tort in Florida that involves a communication originating outside of Florida and there is no physical presence of the other in Florida, the alleged tort must have arisen from that communication. 772 Hunt was never in Florida, but Hunt made telephone calls and sent two e-mails to Chamberland in Florida concerning JDE's contract with Cornerstone. 773 The question, therefore, was whether Cornerstone's claim arose from those contacts. 774 The Fourth District Court of Appeal held that because Hunt initially got in touch with an agent of Daly in Washington, D.C. and with Daly in Tennessee regarding Hunt's interest in the exclusive trademark rights, any claim for tortious interference should have been made where those initial communications occurred, not in Florida. 775 Having determined that Cornerstone failed the first part of the jurisdiction test, it was unnecessary for the Court to opine on the sufficiency of Hunt's contacts with Florida. 776

In Deloitte & Touche v. Gencor Industries, Inc., 777 Gencor Industries, Inc. (Gencor U.S.) acquired a United Kingdom company, which became Gencor ACP (Gencor U.K.). 778 As part of the transaction, Gencor U.K. engaged Deloitte & Touche (Deloitte & Touche U.K.), a United Kingdom partnership, to audit its books. 779 Gencor U.S.'s Florida auditor was Deloitte & Touche U.S. 780 Deloitte & Touche U.K. conducted the audit of Gencor U.K. and sent its audit report to Deloitte & Touche U.S. in Florida. 781 Deloitte & Touche U.S. passed the report on to Gencor U.S. 782 Gencor U.S. claimed that the Deloitte & Touche U.K.'s audit report was defective and brought suit
against Deloitte & Touche U.S. and Deloitte & Touche U.K. in the Orange County Circuit Court alleging professional negligence and negligent misrepresentation.\(^\text{783}\) The first issue was one of in personam jurisdiction, that is, whether or not Deloitte & Touche U.K.'s actions could be found to be the commission of a tortious act in Florida under the long-arm statute, section 48.193(1)(b) of the \textit{Florida Statutes}.\(^\text{784}\) The second issue was venue.\(^\text{785}\)

The Fifth District Court of Appeal stated that, under \textit{Wendt}, the alleged tort must have arisen from the "transmission" of that communication.\(^\text{786}\) Deloitte & Touche U.K. argued that Gencor U.S. claimed only to have relied on a report received from Deloitte & Touche U.S.\(^\text{787}\) Therefore, according to Deloitte & Touche U.K., the alleged tort could not have arisen out of any transmission by it to Gencor U.S. because its transmission of the report was to Deloitte U.S.\(^\text{788}\) The court acknowledged that this case differed from the facts of \textit{OSI Industries, Inc. v. Carter},\(^\text{789}\) and all other Florida cases it knew of, in that the communication from which the alleged misrepresentation was said to arise was not transmitted to the person claiming to have relied on the misrepresentation.\(^\text{790}\) The Fifth District Court of Appeal concluded, based on "the peculiar nature of the particular tort at issue," that it did not matter that Deloitte & Touche U.K.'s audit report was not sent directly to Gencor U.S.\(^\text{791}\) It was sufficient that Gencor U.S.'s unfuted jurisdictional allegations were to the effect that "the reports were sent to Florida" and that Deloitte & Touche U.K. must have known "that [the] reports would be relied on in Florida by Gencor [U.S.] and they were relied upon in Florida by Gencor [U.S.]."\(^\text{792}\)

Perhaps the most important aspect of the decision, however, is what the Fifth District Court of Appeal said with respect to liability of accountants for negligent misrepresentation.\(^\text{793}\) In reaching its decision on the jurisdictional issue, the court noted that although the Supreme Court of Florida had not

\(^{783}\) Id. at 679.

\(^{784}\) Id.

\(^{785}\) Id.

\(^{786}\) Id. at 680. There was no claim that Deloitte & Touche U.K. had any physical presence in Florida or that anyone from Deloitte & Touche U.K. was ever in Florida in connection with any business dealings with Gencor U.S. or any of its subsidiaries, including Gencor U.K. \textit{Deloitte & Touche}, 929 So. 2d at 680.

\(^{787}\) Id. at 680–81.

\(^{788}\) Id. at 681.

\(^{789}\) 834 So. 2d 362 (Fla. 5th Dist. Ct. App. 2003).

\(^{790}\) \textit{Deloitte & Touche}, 929 So. 2d at 680–81.

\(^{791}\) Id. at 681.

\(^{792}\) Id. at 683.

\(^{793}\) Id. at 681.
made it perfectly clear whether Florida has adopted the Restatement (Second) rule with respect to liability of accountants for negligent misrepresentation in connection with an audit, based on Florida Supreme Court cases, "it is difficult reasonably to reach any other conclusion." The other issue, venue, was based on the audit agreement between Gencor U.K. and Deloitte & Touche U.K., which provided that claims by a party would be litigated in the United Kingdom. The trial court found that the provision did not apply to Gencor U.S. because it "was not a party to the contract." The Fifth District Court of Appeal ruled that a non-party could be bound by a choice of forum clause if, as the court found with respect to Gencor U.S., "the interests of a non-party are directly related to or completely derivative of those of a contracting party." Therefore, even though the Orange County Circuit Court acquired jurisdiction over Deloitte & Touche U.K., Gencor U.S.'s claim against Deloitte & Touche U.K. had to be litigated in the United Kingdom.

In another Fifth District Court of Appeal case, the Thorpes sued Gelbwaks in Florida, in connection with the Thorpes' purchase of a franchise operation. The Thorpes alleged, among other things, that Gelbwaks defrauded them in Florida. Gelbwaks, a New Hampshire resident, moved to dismiss the complaint for lack of jurisdiction under Flor-


795. Deloitte & Touche, 929 So. 2d at 681 (citing Nationsbank, N.A. v. KPMG Peat Marwick, LLP, 813 So. 2d 964, 967 (Fla. 4th Dist. Ct. App. 2002)).

796. See, e.g., Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 339 (Fla. 1997); First Fla. Bank, N.A., 558 So. 2d at 15.

797. Deloitte & Touche, 929 So. 2d at 681.

798. Id. at 680.

799. Id. at 683.

800. Id. at 684.

801. Id. at 683.

802. 953 So. 2d 606 (Fla. 5th Dist. Ct. App. 2007).

803. Id. at 608.

804. Id. The claims included "violation of the Sale of Business Opportunities Act," sections 559.80 to 559.815 of the Florida Statutes, and violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.213 of the Florida Statutes. Id. at 608 nn.2–3.
ida’s long-arm statute.\textsuperscript{805} Gelbwaks’ supporting affidavit denied all allegations of wrongdoing.\textsuperscript{806} The Thorpes filed the affidavit of Robert Gregg, a former employee of the same corporation that employed Gelbwaks.\textsuperscript{807} Mr. Gregg’s affidavit was to the effect that Gelbwaks was Vice President of Franchise Operations and would regularly stay in Florida during the work week.\textsuperscript{808} The trial court granted Gelbwaks’ motion to dismiss, finding that Gelbwaks’ affidavit shifted to the Thorpes the burden of proving that Gelbwaks committed a tort in Florida, a burden that they did not carry.\textsuperscript{809} In addition, the trial court concluded that Mr. Gregg’s affidavit did not refute Gelbwaks’ sworn denials of wrongdoing.\textsuperscript{810} The Fifth District Court of Appeal reversed and remanded.\textsuperscript{811} The trial court mistakenly believed that the Thorpes had the burden of proving that the Gelbwaks actually committed a tort in Florida.\textsuperscript{812} However, the Thorpes need only prove that the acts alleged to have constituted the tort occurred in Florida to invoke the long-arm statute.\textsuperscript{813} In addition, Gregg’s affidavit established Gelbwaks’ sufficient minimum contacts with the state.\textsuperscript{814} Thus, the Thorpes passed the two-part jurisdictional test.\textsuperscript{815}

B. \textit{Contracts}

In \textit{Woodard Chevrolet, Inc. v. Taylor Corp.},\textsuperscript{816} Woodard Chevrolet, a California company, and Taylor Corporation, a Florida corporation that does direct mail advertising from Florida, entered into a contract for Taylor to perform advertising services for Woodard Chevrolet.\textsuperscript{817} Taylor had solicited Woodard’s business with respect to mailing advertising to Woodard’s potential California customers.\textsuperscript{818} The contract was signed by Woodard Chevrolet in California, and “[n]o meetings were held in Florida” regarding the contract.\textsuperscript{819} Taylor performed services and Woodard made some of the pay-

\begin{itemize}
\item \textsuperscript{805} \textit{Id.} at 608.
\item \textsuperscript{806} \textit{Thorpe}, 953 So. 2d at 608.
\item \textsuperscript{807} \textit{Id.}
\item \textsuperscript{808} \textit{Id.} at 608–09.
\item \textsuperscript{809} \textit{Id.} at 609.
\item \textsuperscript{810} \textit{Id.}
\item \textsuperscript{811} \textit{Thorpe}, 953 So. 2d at 612.
\item \textsuperscript{812} \textit{Id.} at 611.
\item \textsuperscript{813} \textit{Id.} at 609.
\item \textsuperscript{814} \textit{Id.} at 611.
\item \textsuperscript{815} \textit{Id.}
\item \textsuperscript{816} 949 So. 2d 268 (Fla. 4th Dist. Ct. App. 2007).
\item \textsuperscript{817} \textit{Id.} at 269.
\item \textsuperscript{818} \textit{Id.}
\item \textsuperscript{819} \textit{Id.}
\end{itemize}
ments due to Taylor under the contract.\textsuperscript{820} Taylor sued Woodard in Broward County for breach of contract.\textsuperscript{821} Taylor alleged that there was jurisdiction based on Woodard Chevrolet’s breach of contract by its failure to make payments that were required to be made in Florida.\textsuperscript{822} The trial court ruled that it had jurisdiction over Woodard and Woodard appealed.\textsuperscript{823}

The Fourth District Court of Appeal, once again relying on \textit{Wendt}, observed that Florida has a two-part test for determining if “there is long-arm jurisdiction over a nonresident defendant.”\textsuperscript{824} First, are sufficient jurisdictional facts alleged?\textsuperscript{825} Second, are there enough “minimum contacts between the defendant and Florida to satisfy . . . due process requirements[?]”\textsuperscript{826} The allegations satisfied the first part of the test under section 48.193(1)(g) of the \textit{Florida Statutes}.\textsuperscript{827} However, the court was unable to find sufficient minimum contacts between Woodard and Florida to satisfy due process.\textsuperscript{828} Taylor made contact with Woodard in California.\textsuperscript{829} No one claiming to be a representative of Woodard was ever in Florida.\textsuperscript{830} It could not be said that Woodard ever sought the privileges of doing business in Florida.\textsuperscript{831} The second part of the test was not satisfied and the trial court’s judgment was reversed.\textsuperscript{832}

\section*{C. Subject Matter Jurisdiction}

The case of \textit{Hammond v. DSY Developers, LLC},\textsuperscript{833} discussed earlier in this survey,\textsuperscript{834} dealt with the local action rule and in rem jurisdiction in a real estate matter.\textsuperscript{835} The Third District Court of Appeal said that, “[a]lthough the trial court’s jurisdiction to enter the order in question was not raised below or

\begin{flushright}
\footnotesize
820. \textit{Id.}  \\
821. \textit{Taylor Corp.}, 949 So. 2d at 269–70.  \\
822. \textit{Id.} The court noted that the contract did not contain a choice of venue provision, “[a]lthough not dispositive to this appeal.” \textit{Id.} at 269 n.1.  \\
823. \textit{Id.} at 270.  \\
824. \textit{Id.} (citing \textit{Wendt} v. Horowitz, 822 So. 2d 1252, 1257 (Fla. 2002)).  \\
825. \textit{Taylor Corp.}, 949 So. 2d at 270.  \\
826. \textit{Id.}  \\
827. \textit{Id.}  \\
828. \textit{Id.}  \\
829. \textit{Id.}  \\
830. \textit{Taylor Corp.}, 949 So. 2d at 270.  \\
831. \textit{Id.} at 270–71.  \\
832. \textit{Id.} at 271.  \\
833. 951 So. 2d 985 (Fla. 3d Dist. Ct. App. 2007).  \\
834. \textit{See supra} Part VI.A and accompanying text.  \\
835. \textit{Hammond}, 951 So. 2d at 988–89.  \\
\end{flushright}
on appeal, it is the duty of this [c]ourt to remain vigilant to the issue of sub-
ject-matter jurisdiction.”

The trial court was found to have subject matter jurisdiction with re-
spect to the specific performance aspect of the action, an in personam cause
of action. However, while the trial court’s summary judgment order in
Hammond that directed specific performance was approved, the summary
judgment was disapproved to the extent that it attempted to operate to trans-
fer title. The trial court did not have in rem jurisdiction over the property
located in Indian River County. Citing the “local action rule,” if a court
does not have in rem jurisdiction over the real property involved in the ac-
tion, then the court does not have jurisdiction to convey title. The court
ruled that if court action became necessary to enforce the order and to trans-
fer title, then it would be necessary to transfer the case to the court having in
rem jurisdiction, that court being the Circuit Court for Indian River Coun-
ty.

D. Service of Process

In Mecca Multimedia, Inc. v. Kurzbard, Kurzbard alleged that he was
injured in a slip-and-fall on Mecca’s premises. Kurzbard sued Mecca for
negligence. Kurzbard tried to serve Mecca’s registered agent at the
agent’s address on file with the Florida Secretary of State. The address
turned out to be the address of the agent’s parents, “who refused to accept
service” or provide any information regarding their son, the named agent.
Kurzbard tried two more times “to serve an officer or employee of Mecca at”
Mecca’s business address in Miami, but no one was there. Finally, Kurz-
bard resorted to substituted service on Mecca by serving the complaint on the
Secretary of State as provided in section 48.181 of the Florida Statutes. 
Effective substituted service on a corporation under that statute requires that

836. Id. at 988.
837. Id. at 989.
838. Id.
839. Id.
840. Hammond, 951 So. 2d at 989.
841. Id.
842. 954 So. 2d 1179 (Fla. 3d Dist. Ct. App. 2007).
843. Id. at 1180.
844. Id.
845. Id.
846. Id. at 1180–81.
847. Kurzbard, 954 So. 2d at 1181.
a plaintiff plead and prove that service of the complaint in the normal way under section 48.081 of the Florida Statutes was not possible for one of the reasons enumerated in section 48.181; in this case, a defendant who concealed his or her whereabouts. Kurzbard failed to allege in his complaint facts supporting substituted service. Substituted service was held to be ineffective.

E. Comity

Plaintiff sued defendant in New York for “breach of contract [and] tortious interference with a business relationship.” Defendant instituted an action in Florida with similar claims. Plaintiff moved to stay the Florida proceeding pending the conclusion of the New York action on the ground that the Florida action involved basically the same parties and substantially the same issues as the New York action. Plaintiff also claimed that the New York action would ultimately decide most of the claims involved in the Florida action. The stay was denied because defendant’s claims—brought by defendant as the Florida plaintiff—could not be brought in New York against certain Florida residents who were named as defendants in the Florida action. The Third District Court of Appeal reversed on the basis of comity, stating that “[c]omity principles dictate that an action should be stayed, and a trial court departs from the essential requirements of law by failing to grant such a stay, when the first-filed lawsuit involves substantially similar parties and substantially similar claims.”

The Third District Court of Appeal noted that the policy discouraging forum shopping “would be meaningless if a party could avoid the dictates of comity [by simply] naming nominal defendants in a second-filed action.” While the addition of those parties would preclude an abatement of the Florida proceedings, it does not justify departure from the doctrine of comity.

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849. Kurzbard, 954 So. 2d at 1182.
850. Id.
851. Id. at 1182–83.
853. Id.
854. Id.
855. Id.
856. Id.
857. Pilevsky, 961 So. 2d at 1035 (citing Cuneo v. Conseco Servs., LLC, 899 So. 2d 1139, 1141 (Fla. 3d Dist. Ct. App. 2005)).
858. Id.
859. Id.
The court observed that if the New York case does not resolve all issues concerning the Florida residents, then the Florida action may be pursued after the New York proceedings are concluded.\footnote{Id. at 1036.}

\section*{XIV. LANDLORD AND TENANT RELATIONSHIP}

\subsection*{A. Assignment of Lease}

In \textit{Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.},\footnote{32 Fla. L. Weekly D1032 (2d Dist. Ct. App. April 20, 2007).} Tropic, as lessor (Landlord), entered into a commercial lease with Speedway, as lessee (Tenant).\footnote{Id.} The lease agreement contained a "no assignment" clause that required Tenant to obtain Landlord's prior written consent to Tenant's assignment of the lease.\footnote{Id. at D1032–33.} This clause provided in part that "[a]ny such assignment without consent shall be void, and shall, at the option of the Lessor, terminate this lease."\footnote{Id. at D1032–33.} Landlord refused to consent to the assignment, but Tenant nonetheless assigned the lease to Sunoco, Inc.\footnote{Id. at D1032–33.} The trial court determined that Landlord had the unfettered right to refuse consent and granted summary judgment in favor of Landlord.\footnote{Id.}

The Second District Court of Appeal reversed and remanded, holding that there was an implied obligation of good faith on Landlord's part not to deny consent unreasonably.\footnote{Id. at D1033–34.} If a lease doesn't resolve an issue, or if one party has discretion to act but no standards are set forth regarding the exercise of discretion, then the obligation of good faith will be implied.\footnote{Id. at D1033 (citing Publix Super Mkts., Inc. v. Wilder Corp., 876 So. 2d 652, 654 (Fla. 2d Dist. Ct. App. 2004)).} Since the lease did not resolve the question in that it did not give Tropic the absolute discretion to withhold consent, and it did not contain any standard regarding the exercise of discretion, the obligation of good faith would be implied.\footnote{Id.} The implied covenant "is a gap-filling default rule" under these circumstances.\footnote{Id. (quoting \textit{Wilder Corp.}, 876 So. 2d at 654).} The court, quoting \textit{Cox v. CSX Intermodal, Inc.},\footnote{732 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1999).} held that "[w]here the terms of [a] contract afford a party substantial discretion to

\begin{thebibliography}{99}
\footnotesize
\item 860. \textit{Id.} at 1036.
\item 862. \textit{Id.}
\item 863. \textit{Id.} at D1032–33.
\item 864. \textit{Id.} at D1033.
\item 865. \textit{Id.} at D1032–33.
\item 866. \textit{Speedway SuperAmerica, LLC}, 32 Fla. L. Weekly at D1032.
\item 867. \textit{Id.} at D1033–34.
\item 868. \textit{Id.} at D1033 (citing Publix Super Mkts., Inc. v. Wilder Corp., 876 So. 2d 652, 654 (Fla. 2d Dist. Ct. App. 2004)).
\item 869. \textit{Id.}
\item 870. \textit{Id.} (quoting \textit{Wilder Corp.}, 876 So. 2d at 654).
\item 871. 732 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1999).
\end{thebibliography}
promote that party’s self-interest, the duty to act in good faith nevertheless limits that party’s ability to act capriciously to contravene the reasonable contractual expectations of the other party.”

B. Renewal Options

In *PL Lake Worth Corp. v. 99Cent Stuff-Palm Springs, LLC*, PL Lake Worth Corporation (Landlord) leased shopping center property to 99Cent Stuff-Palm Springs, LLC (Tenant). The lease agreement gave Tenant an option to renew the lease. In order to make an informed decision on the exercise of the option, Tenant needed and requested certain financial information from Landlord well in advance of the option exercise date. The lease agreement did not explicitly require Landlord to provide the information and it refused to do so. With judicial intervention, Tenant finally obtained the necessary information. Almost immediately after receiving the information, Tenant exercised its option to renew the lease. However, by that time the option date had passed. Landlord sought to have the lease declared terminated. The trial court ruled in favor of Tenant, holding that Landlord breached its implied duty to act in good faith by refusing to provide the necessary information to Tenant. The Fourth District Court of Appeal affirmed citing *Bowers v. Medina*, which held that “[a]n established contract principle is that a party’s good-faith cooperation is an implied condition precedent to performance of the contract.” On the authority of *Sharp v. Williams* and *Cox v. CSX Intermodal, Inc.*, the Fourth District Court of Appeal dismissed Landlord’s argument that the contract was silent and,

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873. 949 So. 2d 1199 (Fla. 4th Dist. Ct. App. 2007).
874. *Id.* at 1200.
875. *Id.*
876. *Id.*
877. *Id.*
878. *PL Lake Worth Corp.*, 949 So. 2d at 1200–01.
879. *Id.* at 1201.
880. *Id.* at 1200.
881. *Id.*
882. *Id.* at 1201.
883. 418 So. 2d 1068 (Fla. 3d Dist. Ct. App. 1982).
884. *PL Lake Worth Corp.*, 949 So. 2d at 1201 (citing *Bowers*, 418 So. 2d at 1069).
885. 192 So. 476 (Fla. 1939).
therefore, there was no duty to provide the information requested by Ten-

ant.887

In Peavey v. Reynolds,888 Peavey (Landlord) leased certain commercial
property to Reynolds (Tenant).889 Landlord claimed that provisions in the
lease agreement amounted to "an unreasonable restraint on the alienation of
property" and the lease was therefore void.890 The lease was upheld by the
trial court and Landlord appealed.891 The Fifth District Court of Appeal re-
versed.892 Under the terms of the lease agreement, Tenant had "the right to
renew the lease indefinitely at [amounts] fixed by the . . . lease" agree-
ment.893 The agreement also provided that any successor landlord would be
bound by the terms of the lease.894 The court, citing Seagate Condo Ass 'n v.
Duffy,895 stated that restraints on alienation are a matter of public policy.896
The court observed that the lease terms gave little incentive to any landlord
to make improvements to the property.897 The court also noted that it was
highly questionable that Landlord would ever be able to sell the property
burdened as it was by the lease agreement.898 The test is one of reasonableness
and the Fifth District Court of Appeal, stating that the court knew of no
case directly on point, concluded that the onerous terms of the lease agree-
ment constituted an "unreasonable restraint on alienation" thereby voiding
the lease.899

In Chessmasters, Inc. v. Chamoun,900 the Chamouns (Landlord) leased
certain commercial property to Chessmasters, Inc., (Tenant).901 Landlord
was the successor lessor as the result of its purchase of the property.902

887. PL Lake Worth Corp., 949 So. 2d at 1201.
888. 946 So. 2d 1125 (Fla. 5th Dist. Ct. App. 2006).
889. Id. at 1126.
890. Id.
891. Id.
892. Id. at 1127.
893. Peavey, 946 So. 2d at 1127.
894. Id.
895. 330 So. 2d 484 (Fla. 4th Dist. Ct. App. 1976).
896. Peavey, 946 So. 2d at 1126 (citing Duffy, 330 So. 2d at 485).
897. Id. at 1127.
898. Id.
899. Id. at 1127, & n.1. The result in the case seems to be consistent with the observation
of the Fourth District Court of Appeal in Old Port Cove Condominium Ass 'n One, Inc. v. Old
Port Cove Holdings, Inc., regarding the impact a fixed price for the right of first refusal for an
unlimited time may have had on the outcome of the case. 954 So. 2d 742, 746 (Fla. 4th Dist.
Ct. App. 2007); see also supra note 547 and accompanying text.
900. 948 So. 2d 985 (Fla. 4th Dist. Ct. App. 2007).
901. Id. at 986.
902. Id.
Landlord sought to have the lease agreement declared void on the grounds that certain provisions granted to Tenant in the lease agreement amounted to "an unreasonable restraint on alienation." The trial court agreed with Landlord that the lease could be renewed by Tenant in perpetuity and declared the lease void. Tenant then appealed. The offending lease renewal provision allowed for the automatic renewal of the lease for five additional years unless the Tenant gave the Landlord timely notice of non-renewal. If the lease was renewed rent would increase by "not more than 10% current rental price." The Fourth District Court of Appeal held that before a renewal right could be said to be perpetual and an unreasonable restraint on alienation, the lease agreement had to contain a clear and explicit right to perpetual renewals. The subject lease agreement did not so state. Therefore, the renewal right could not be said to be perpetual. The court had to grapple with the fact that likewise, renewals were not expressly limited by the agreement. How many renewals does the Tenant get? The court, citing Schroeder v. Johnson, said only two. However, unlike the lessee in Schroeder, Tenant gets only one extension because the lease refers to "period" in the singular, whereas the lease in Schroeder referred to "periods," allowing the grant of two extensions.

C. Restrictive Covenants

Winn-Dixie (Tenant) was the "anchor" tenant at Crest Haven Shopping Plaza (Landlord). Tenant's lease with Landlord gave Tenant "the exclusive right to sell groceries" in the shopping center, subject to one exception. The exception allowed other stores to sell groceries in a space no larger than 500 square feet. The lease also provided that Landlord's ex-
exclusive right was deemed to be a covenant running with the land. A short form version of the lease was recorded in the Palm Beach County public records. Dolgencorp then opened a Dollar General Store in the shopping center and began selling groceries from an area larger than 500 square feet. Tenant sued Dolgencorp and Landlord, and the trial court entered summary judgment in favor of Dolgencorp. Tenant appealed, and Dolgencorp argued that Tenant’s exclusive right was not binding on Dolgencorp because Dolgencorp was not a party to the lease agreement between Tenant and Landlord. Ruling in favor of Tenant, the Fourth District Court of Appeal determined that Tenant’s exclusive right was a covenant running with the land and enforceable against Dolgencorp. The court defined an “enforceable covenant running with the land” as a covenant: 1) “that touches and involves the land,” 2) that was created intentionally; and 3) notice of which is given to “the party against whom enforcement is sought.” Based on the record, the court found that Tenant satisfied the first two criteria but had a little more difficulty ruling that the third requirement, the notice requirement, had been satisfied. Stating that notice can be constructive, actual, or implied actual, the Fourth District Court of Appeal determined that Dolgencorp had “at least implied actual notice” of Tenant’s exclusive right. The court based its conclusion on the fact that “Dolgencorp was an experienced commercial tenant” that had many of its sites in shopping centers, and it had a duty to inquire further. In fact, Dolgencorp insisted on “exclusive[] [rights] in its own leases.” The Fourth District Court of Appeal also concluded that Dolgencorp had constructive notice, relying on sections 28.222(3)(a), 695.11, and 695.01(1) of the Florida Statutes. A lease is “one kind of instrument that the clerk...is required to record” and therefore, it is notice under Section 695.11 of the Florida Statutes when it is “officially recorded.” For purposes of section 695.01(1) of the Florida Stat-
utes, "which describes the effect of recording a lease," the court concluded that "a lessee of real property is a 'purchaser' and "a recorded lease 'shall be good and effectual' against subsequent purchasers for value."931

In Autozone Stores, Inc. v. Northeast Plaza Venture, LLC,932 the retail lease agreement between Northeast Plaza Venture, LLC (Landlord) and Autozone Stores, Inc. (Tenant) identified and designated certain unoccupied areas in the shopping center as being reserved "for the exclusive joint use of all tenants."933 Landlord later decided to develop part of the designated property.934 Landlord filed a declaratory judgment action, alleging that Tenant threatened "to enjoin the sale of the [parcels] or to prevent construction" on the site.935 Landlord sought and was granted the determination that Tenant had no right to injunctive relief because Tenant had "an adequate remedy at law in the form of mone[y] damages."936 Tenant appealed, and the Second District Court of Appeal reversed.937 The absence of an adequate remedy at law is not a condition precedent to enjoining the violation of a restrictive covenant.938 This rule applies in commercial real estate contexts as well as residential.939 Every piece of land has a peculiar value.940

931. Id. Another issue presented in the case was whether Tenant's exclusive right violated the Florida Antitrust Act of 1980, section 542.335 of the Florida Statutes. Id. at 267–68. The Fourth District Court of Appeal held that section inapplicable to covenants running with the land. Dolgencorp, 964 So. 2d at 267–68.

932. 934 So. 2d 670 (Fla. 2d Dist. Ct. App. 2006).

933. Id. at 672.

934. Id.

935. Id.

936. Id.

937. Autozone Stores, Inc., 934 So. 2d at 672, 675.

938. Id. at 673.

939. Id. at 674. Two of the three cases upon which the Second District Court of Appeal relied addressed restrictive covenants involving setbacks in residential developments. Id. at 673–674; see also Stephl v. Moore, 114 So. 455 (Fla. 1927); Daniel v. May, 143 So. 2d 536 (Fla. 2d Dist. Ct. App. 1962). The third case involved a commercial tenant. Autozone Stores, Inc., 934 So. 2d at 674; see also Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd., 563 So. 2d 103 (Fla. 3d Dist. Ct. App. 1990).

940. The landlord relied on an earlier Third District Court of Appeal decision, Liza Danielle, Inc. v. Jamko, Inc., 408 So. 2d 735 (Fla. 3d Dist. Ct. App. 1982), where, in a dispute involving a commercial lease, injunctive relief was denied. Autozone Stores, Inc., 934 So. 2d at 674. The Second District Court of Appeal, in Autozone Stores, Inc., distinguished Jamko without acknowledging agreement with the holding there, reasoning that the Jamko case was more in the nature of a non-compete clause rather than a real property restrictive covenant. Id. at 674–75. The Third District, in deciding Jack Eckerd Corp., similarly distinguished the facts in Jack Eckerd Corp. from its earlier decision in Jamko. Id. at 674.
D. Taxes

Wellington Realty Co. (Landlord) entered into a build-to-suit lease with ColorAll Technologies International, Inc. (Tenant) in 2000.\textsuperscript{941} Landlord finished construction of the leased premises near the end of 2001 and Tenant occupied the premises on December 20, 2001.\textsuperscript{942} Tenant was obligated to pay any real estate tax increase "after the base year of occupancy."\textsuperscript{943} The real estate tax was $23,000 in 2001 and $32,300 in 2002.\textsuperscript{944} Tenant paid its rent for 2002 in addition to "a pro-rated amount for [its] eleven days [of occupancy] in 2001."\textsuperscript{945} However, Tenant refused to pay the almost $9300 real estate tax increase, claiming that 2002, not 2001, was the base year of occupancy.\textsuperscript{946} The real estate tax increase was clearly due to the post-improvement value of the property assessed January 1, 2002.\textsuperscript{947} Tenant was in possession under a 2001 certificate of occupancy, and the property "was substantially completed" in 2001.\textsuperscript{948} Under these facts, the Fourth District Court of Appeal, in Wellington Realty Co., had no difficulty determining that the base year of occupancy was 2001.\textsuperscript{949} The court distinguished the facts from those in Handelsman v. Royal Trust Bank of Palm Beach, N.A.,\textsuperscript{950} where the property was not substantially completed during the year of first possession, and the second year of possession was held to be the base year.\textsuperscript{951} The court also stated "that Handelsman did not [create] a bright-line" test.\textsuperscript{952}

XV. PIERCING THE CORPORATE VEIL

In Carnes v. Fender,\textsuperscript{953} Mr. and Mrs. Carnes obtained a $3 million jury verdict against Great Harbour Cay Realty.\textsuperscript{954} Unable to collect the judgment,

\textsuperscript{941} Wellington Realty Co. v. ColorAll Techs. Int'l, Inc., 951 So. 2d 921, 921 (Fla. 4th Dist. Ct. App. 2007).
\textsuperscript{942} Id. at 922–23.
\textsuperscript{943} Id. at 921–22.
\textsuperscript{944} Id. at 923.
\textsuperscript{945} Id. at 922.
\textsuperscript{946} Wellington Realty Co., 951 So. 2d at 922.
\textsuperscript{947} See id. at 923.
\textsuperscript{948} Id.
\textsuperscript{949} Id.
\textsuperscript{950} 426 So. 2d 1220 (Fla. 4th Dist. Ct. App. 1983).
\textsuperscript{951} Wellington Realty Co., 951 So. 2d at 922–923.
\textsuperscript{952} Id. at 923.
\textsuperscript{953} 936 So. 2d 11 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{954} Id. at 13; see also Great Harbour Cay Realty & Inv. Co. v. Carnes, 862 So. 2d 63, 65 (Fla. 4th Dist. Ct. App. 2003).
they sued Mr. Fender, the principal of Great Harbour. They and Mrs. Carnes alleged that at one time Great Harbour was worth $30 million. They also alleged that Mr. Fender was the sole shareholder of Great Harbour, made all corporate decisions, depleted Great Harbour’s assets to defeat their claim, and used Great Harbour “as a sham to defraud investors.” Mr. Fender moved for summary judgment and conflicting evidence bearing on the plaintiffs’ allegations was filed with the court. The trial court granted the motion for summary judgment and the plaintiffs appealed.

The Fourth District Court of Appeal reversed and remanded, noting that summary judgments are rare in fraudulent conveyance cases. The evidence presented on this issue by Mr. Fender conflicted with evidence presented by Mr. and Mrs. Carnes. Only “the scintilla of appreciable evidence [is] required to defeat a motion for summary judgment.” There was also conflicting evidence on the issue of the ability to pierce the corporate veil. Summary judgment was inappropriate as a jury could reasonably have drawn an inference favoring Mr. and Mrs. Carnes from the evidence presented.

In Priskie v. Missry, Priskie and his wife owned forty percent of EXA. From time to time, Priskie made capital contributions to EXA to keep it going. Tiring of this, Priskie asked Missry, another shareholder, for a $20,000 loan to EXA. Missry made the loan, although there was no contemporaneous documentation of the loan. Loan proceeds were used for corporate purposes, and “EXA’s board of directors” ratified the loan and EXA’s obligation to repay Missry. When EXA defaulted, Missry sought to hold both EXA and Priskie liable. The trial court ruled in favor of Mis-

955. Fender, 936 So. 2d at 13.
956. Id.
957. Id.
958. Id.
959. Id. at 12.
960. Fender, 936 So. 2d at 14–15.
961. Id. at 14.
962. Id.
963. Id. at 15.
964. Id.
965. 958 So. 2d 613 (Fla. 4th Dist. Ct. App. 2007).
966. Id. at 614.
967. Id. at 615.
968. Id. at 614.
969. Id.
970. Priskie, 958 So. 2d at 615.
971. Id. at 614.
sry, and both EXA and Priskie appealed. The Fourth District Court of Appeal reversed, holding that the corporate veil could not be pierced to impose liability on Priskie even though Priskie was instrumental in obtaining the loan. In order for Missry to prevail, he would have to prove that: 1) the corporation had no independent existence—the corporation’s shareholders being its alter egos; 2) the corporation was “used fraudulently or for an improper purpose[s]”; and 3) “the [fraud] or improper use of the” corporation caused Missry’s injury. Missry failed to meet his burden of proof.

XVI. PRINCIPAL AND AGENT

In Huffman v. Breezes Full Service Car Wash, the car wash was closed because of rain, and Cash, one of Breezes’ owners, took several of the employees of the car wash out to lunch. Lackowski, another manager, was also there. Alcoholic beverages were consumed during lunch. After lunch, Lackowski was involved in car accident. Melissa Jones, the driver of the other car, was killed. Her son, who was a passenger in her car, was injured. The personal representatives of the estate of Mrs. Jones sued Breezes for wrongful death, alleging that Breezes was vicariously liable for [the] negligent acts committed by” its employees. In support of its motion for summary judgment, Breezes argued “that it could not be vicariously liable for the alleged negligence” of its employees because the facts demonstrated that the employees “ceased acting within the scope of their employment” before the lunch. The trial court agreed and granted the motion.
trial court improperly resolved disputed issues of fact” on the scope of employment question where the record showed disputed issues of fact. 987

In *Palafrugell Holdings, Inc. v. Cassel*, 988 the Third District Court of Appeal considered exceptions to the rule that a third party may rely on the apparent authority of an agent. 989 In this legal malpractice case, the attorney was dealing with a long-standing client, Hernandez—the agent—in connection with the attorney’s representation of a new client, Palafrugell Holdings, Inc.—the principal. 990 Palafrugell Holdings, Inc.—through Hernandez—hired an attorney to represent the corporation in purchasing a “50% interest in a mortgage [from] AAX, Inc.” 991 Hernandez also secured investors and arranged the mortgage purchase by Palafrugell Holdings, Inc., all with the knowledge of the investors that he had secured. 992 Hernandez claimed to be a majority shareholder of Palafrugell Holdings, Inc. 993 There was no question that Hernandez had the authority to hire the attorney as corporate counsel for Palafrugell Holdings, Inc. 994 The investors wired $350,000 of purchase funds to the attorney’s trust account. 995 Hernandez directed the attorney to prepare a mortgage assignment in Hernandez’s name alone, and to disburse the purchase funds to several payees, including $43,375 to Hernandez to repay advances. 996 Hernandez was not an officer or director of the corporation, but the attorney complied with Hernandez’s directions without obtaining the consent of, or confirmation from, an officer of Palafrugell Holdings, Inc. 997 The attorney argued, and the trial court agreed, that Hernandez, as the corporation’s agent, had at least apparent authority to direct the attorney as he did. 998 The Third District Court of Appeal, recognizing that “[t]he acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal,” 999 stated that there are circumstances where failure to make further inquiry into the agent’s authority may preclude reliance on the agent’s representations. 1000 One situation

987. *Id.*
988. 940 So. 2d 492 (Fla. 3d Dist. Ct. App. 2006).
989. *Id.* at 494.
990. *Id.* at 493. There were also causes of action alleging “negligent bailment” and “breach of fiduciary duty arising out of negligent disbursement of trust funds.” *Id.*
991. *Id.*
992. *Palafrugell*, 940 So. 2d at 493.
993. *Id.*
994. *Id.* at 493–94.
995. *Id.* at 493.
996. *Id.* at 493, 494 n.2.
998. See *id.* at 494.
999. *Id.* (quoting Indus. Ins. Co. v. First Nat’l Bank, 57 So. 2d 23, 26 (Fla. 1952)).
1000. *Id.*
where there may be a duty to inquire further, is where an agent directs acts by the third-party that, on their face, are contrary to the interests of the principal. 1001

The Third District Court of Appeal reversed, finding that summary judgment in favor of the attorney was improper. 1002 The trial court failed to consider whether Hernandez's actions should have raised a reasonable doubt as to the extent of Hernandez's authority and prompted the attorney to inquire further. 1003

XVII. TAXES

In Geiger v. Commissioner, 1004 the Internal Revenue Service (IRS) determined a deficiency in Mr. Geiger's 2000 federal income tax of $159,008 and, pursuant to Section 6662(a) of the Internal Revenue Code, also assessed an accuracy related penalty of $31,802. 1005 Mr. Geiger's "S" corporation reported a theft loss of $1,645,986, which was passed through to Mr. Geiger and claimed by him as a deduction on his individual income tax return pursuant to section 165(c) of the Internal Revenue Code. 1006 On audit, the IRS allowed a theft loss of $5586, which resulted in the deficiency and the penalty. 1007 Mr. Geiger was required to establish that a theft, within the meaning of section 165, had occurred and the amount of the loss. 1008 The question of whether the actions alleged to have occurred constituted a theft turned on the definition of the crime under Florida law. 1009 The Tax Court held that Mr. Geiger failed to prove that a theft occurred under section 812.014 of the Florida Statutes. 1010 As the trier of fact, the United States Tax Court upheld the deficiency, finding Mr. Geiger's explanation of the theft loss to be incredible. 1011 The IRS has the burden of proving that the accuracy-related penalty is appropriate. 1012 In this case, because of Mr. Geiger's loss deduc-
tion, Mr. Geiger paid no income tax for 2000. The 20% accuracy related penalty is appropriate if the tax is underpaid by more than the greater of either 10% of the tax due or $5000. Having not paid anything, Mr. Geiger "qualified" for the penalty. The penalty can be avoided if the taxpayer can show reasonable cause for the tax amount, if any, paid. Mr. Geiger claimed that he relied on the information provided to him by his then wife. However, his wife had no bookkeeping experience. Under the circumstances, it was unreasonable for Mr. Geiger to not consult an accountant or other tax professional, and the penalty was upheld.

The Florida annual intangible tax for individuals, businesses, and personal representatives has, with limited exceptions, been repealed, effective January 1, 2007. The exceptions cover leases of government owned property and a one-time intangible tax where notes are secured by mortgages on Florida real property. All obligations for years before 2007 remain in full force and effect subject to prior laws and rules regarding assessment and collection.

XVIII. TORTS

A. Negligence, Products Liability, and Strict Liability

In a case of first impression, Vincent v. C.R. Bard, Inc., the Second District Court of Appeal concluded that a designer of a product may be liable to foreseeable users of a product, even if the designer does not have any subsequent involvement with the product. The court saw no distinction between a designer who is the manufacturer and a designer who is not

1013. Id.
1014. Geiger, 92 T.C.M. (CCH) at 514 (citing I.R.C. § 6662(d)(1)(A) (2000)).
1015. Id.
1016. Id. (citing I.R.C. § 6664(c)(1) (2000)).
1017. Id.
1018. Id.
1019. Geiger, 92 T.C.M. (CCH) at 514.
1022. Id. § 199.133(1).
1023. Id. § 199.303(3).
1024. 944 So. 2d 1083 (Fla. 2d Dist. Ct. App. 2006).
1025. Id. at 1086. The trial court was unable to find that Bard was also a manufacturer. Id. at 1085.
the manufacturer. Where the designer is also the manufacturer, under existing Florida law, the designer has a duty to all foreseeable users, as well as intended users, to exercise reasonable care in the design of the product. However, with respect to the situation where the designer is not the manufacturer, the court could find no Florida case directly on point. Thus, the question, as framed by the Second District Court of Appeal, was whether or not "a designer of a product who did not manufacture, sell, distribute or have any other involvement in getting the product to the user may be liable in negligence for the defective design of the product." The action in Vincent was instituted after the plaintiff's son received an overdose from a patient controlled morphine pump while in the hospital. The overdose left the son "totally and permanently disabled." No record was made of the amount of morphine remaining in the pump, and "the pump permanently disappeared while in the custody of the hospital." The plaintiff sued C.R. Bard, Inc. (Bard) and Baxter Healthcare Corporation (Baxter) alleging negligent design of the pump. It was undisputed that either Bard or Baxter was the manufacturer of the pump used by the plaintiff's son. Plaintiff also sued Bard for negligent design of the pump. With respect to this claim, it was clear that Bard had designed the pump, even though it could not be determined who had manufactured the particular pump. The trial court entered summary judgment in favor of all of the defendants, and the plaintiff appealed.

The Court of Appeal held that summary judgment was properly granted on the negligent design issue in favor of Baxter and Bimeco, the distributor who was also named as a defendant, since the pump could not be

1026. Id. at 1085.
1027. Id. at 1086 (citing Ford Motor Co. v. Hill, 404 So. 2d 1049, 1052 (Fla. 1981)); see also Light v. Weldarc Co., 569 So. 2d 1302, 1303 (Fla. 5th Dist. Ct. App. 1990).
1028. Vincent, 944 So. 2d at 1085.
1029. Id.
1030. Id.
1031. Id.
1032. Id.
1033. Vincent, 944 So. 2d at 1084-85.
1034. Id. at 1085. Baxter had taken over the division of Bard that had designed and manufactured the pumps, so it could not be determined which of the two companies actually manufactured the missing pump. Id.
1035. Id.
1036. Id.
1037. Vincent, 944 So. 2d at 1085. The distributor of the pump, Bimeco, Inc. was also a named defendant, and the summary judgment was also granted to this defendant on the same grounds. Id.
found. However, as to Bard, the designer, the court disagreed. The court noted that a manufacturer, who is also the designer, is under a duty to foreseeable users to exercise reasonable care in the design of the product. The court could find no reason why the designer of a product who is not also the manufacturer should, for that reason, be relieved of liability to foreseeable users if the product was negligently designed. The plaintiff’s son was a foreseeable user. With respect to the negligent design claim, the absence of the particular pump was not an insurmountable obstacle in light of an unopposed affidavit submitted by the plaintiff’s expert, that in his opinion, the overdose was the result of a design error.

In Saullo v. Douglas, Mr. Douglas owned the tractor part of a tractor-trailer rig. Dart Transit Company (Dart), an interstate motor carrier, owned the trailer. Mr. Douglas agreed to permanently lease the tractor to Dart, and to drive the tractor exclusively to carry freight in trailers owned by Dart. The operating agreement between Mr. Douglas and Dart described Mr. Douglas as an independent contractor. While driving the rig for Dart in central Florida, Douglas responded to a call for help from his brother. Mr. Douglas detached the trailer from the tractor and, leaving the trailer parked in the far right-hand lane, left the tractor to assist his brother. In the early morning hours, Mr. Saullo, who was driving to his friend’s apartment, swerved to avoid the trailer, hit a tree, and was killed. The court stated that Mr. Saullo was intoxicated, and that he was not wearing a seatbelt when the accident occurred.

1038. *Id.* Although not specifically stated, presumably the affirmance of the summary judgment on the issue of negligent design applies to Bard as well. *See id.* at 1085–86.
1039. *Id.* at 1085.
1040. *Vincent,* 944 So. 2d at 1085.
1041. *Id.*
1042. *Id.* at 1086.
1043. *Id.* The court noted that there was still, therefore, a genuine issue of material fact—“whether Bard breached its duty to” plaintiff’s son. *Id.* The court did not address what impact the fact that the affidavit was uncontroverted might have on the breach of duty issue. *See Vincent,* 944 So. 2d at 1086. In any event, there presumably is also still the issue of proximate cause. *See id.*
1044. 957 So. 2d 80 (Fla. 5th Dist. Ct. App. 2007).
1045. *Id.* at 82.
1046. *Id.*
1047. *Id.*
1048. *Id.*
1049. *Saullo,* 957 So. 2d at 82.
1050. *Id.*
1051. *Id.*
1052. *Id.*
tive alleged liability on Dart's part by reason of federal regulations governing interstate trucking, and alternatively, that the principle of respondeat superior applied to the dangerous instrumentality doctrine.\textsuperscript{1053} The trial court rejected both theories and granted summary judgment in favor of Dart.\textsuperscript{1054}

On appeal, the Fifth District Court of Appeal observed that two lines of decisions had developed on the effect of pertinent federal regulations "on state tort law in negligence actions."\textsuperscript{1055} One was a strict agency/lease liability paradigm, and the second was an application of "a state law respondeat superior/\"scope of employment\" analysis."\textsuperscript{1056} Finding the choice between the two theories a matter of first impression in Florida, the Fifth District held that the better approach was respondeat superior/\textsuperscript{1057} scope of employment. Clearly, Mr. Douglas acted outside the scope of employment regarding the trailer.\textsuperscript{1058} The negligent use of a dangerous instrumentality by the agent, even if not within the scope of the agent's employment, can result in vicarious liability to the principal.\textsuperscript{1059} The court noted that "[i]t is well-established in Florida...that the trailer [part] of the tractor-trailer rig [has been held] not [to be] a dangerous instrumentality.\textsuperscript{1060} However, the tractor was a dangerous instrumentality."\textsuperscript{1061} The court found that Dart, "owner of the trailer and . . . lessee of the tractor," put "Douglas in operational control of both," thereby subjecting it to vicarious liability.\textsuperscript{1062} The court used the analogy of a dump truck that negligently deposited a load of gravel on the roadway resulting in injury to another driver, as to which the dangerous instrumentality doctrine would apply.\textsuperscript{1063} The court said that "[j]ust because the trailer was dropped off rather than a load of stones should not change that result."\textsuperscript{1064} Finding that the "case present[ed] an issue of causation," the court reversed and remanded the matter to the trial court.\textsuperscript{1065}

In \textit{Atlanta Gas Light Co. v. UGI Utilities, Inc.},\textsuperscript{1066} Atlanta Gas Light Company (Atlanta Gas) and the City of St. Augustine settled a pollution li-

\begin{itemize}
\item \textsuperscript{1053} Id.
\item \textsuperscript{1054} Saullo, 957 So. 2d at 82.
\item \textsuperscript{1055} Id. at 85.
\item \textsuperscript{1056} Id.
\item \textsuperscript{1057} Id. at 86.
\item \textsuperscript{1058} Id.
\item \textsuperscript{1059} Saullo, 957 So. 2d at 86.
\item \textsuperscript{1060} Id. at 87.
\item \textsuperscript{1061} Id. at 88.
\item \textsuperscript{1062} Id. at 87.
\item \textsuperscript{1063} Id. at 88.
\item \textsuperscript{1064} Saullo, 957 So. 2d at 88.
\item \textsuperscript{1065} Id.
\item \textsuperscript{1066} 463 F.3d 1201 (11th Cir. 2006).
\end{itemize}
ability claim with the Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\(^{1067}\) Atlanta Gas instituted suit against UGI Utilities, Inc. (UGI) and Center Point Energy Resources Corporation (Center Point) seeking contribution.\(^{1068}\) The polluted land at issue had accommodated an energy producing plant since 1886.\(^ {1069}\) UGI and Center Point were successors to parent corporations that, at various times, controlled subsidiaries operating the plant.\(^{1070}\) Under CERCLA, liability—and claims for contribution—for environmental pollution can be asserted against “owners” of the damaged property and “operators” of pollution causing facilities.\(^ {1071}\) Atlanta Gas did not assert ownership liability against UGI and Center Point because the predecessor corporations never owned the land involved.\(^{1072}\) Atlanta Gas claimed that the predecessor corporations operated the pollution causing facilities by virtue of their subsidiary operators.\(^{1073}\) The court, relying on the test created by United States v. Bestfoods\(^ {1074}\) to determine if the parent corporation is in fact the operator of its subsidiary’s pollution-causing facility, stated that the parent must have “manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”\(^ {1075}\) Under this test, the parent may be subject to liability if: 1) the parent actually operated the facility alone or jointly with the subsidiary; 2) a person serving as an officer or director of the subsidiary and parent is serving only the parent; or 3) an agent of the parent is placed with the subsidiary to conduct operations.\(^ {1076}\) Atlanta Gas was unable to prove the defendants “passed” the test.\(^ {1077}\)

An interesting issue in the case was the liability of the defendant insurance company, Century Indemnity Company (Century).\(^ {1078}\) Century had issued indemnity policies to the subsidiaries for five years during the period from 1940–1947.\(^ {1079}\) The policies covered damage to the property caused by

\(^{1067}\) Id. at 1202.
\(^{1068}\) Id. at 1203.
\(^{1069}\) Id. at 1202.
\(^{1070}\) Id. at 1202–03, nn.1–2.
\(^{1071}\) Atlanta Gas Light Co., 463 F.3d at 1204.
\(^{1072}\) Id.
\(^{1073}\) Id. at 1204–05.
\(^{1075}\) Atlanta Gas Light Co., 463 F.3d at 1204–05 (quoting Bestfoods, 524 U.S. at 66–67).
\(^{1076}\) Id. at 1205 n.6.
\(^{1077}\) See id.
\(^{1078}\) Id. at 1208.
\(^{1079}\) Id.
accident. The court noted that there was no evidence of contamination during policy coverage periods. There was expert testimony to the effect there must have been routine leakages and contaminants during the coverage period. However, routine leakages are not accidents—they are not unintentional, unexpected events. No liability was imposed on the insurance company.

B. Misrepresentation and Fraud

In Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc., Sunbeam, Inc. (Sunbeam), “pursuant to [a] merger agreement, . . . bought the Coleman [Company, Inc.] stock” owned by Coleman (Parent) Holdings, Inc. Sunbeam paid Parent “approximately half of the purchase price” with Sunbeam stock. The Sunbeam stock Parent received had an “estimated value of over $600 million.” “The transaction closed on March 30, 1998.” Parent was subject to a “lockup” restriction in the agreement. Parent could only sell the Sunbeam stock in increments over time and could not have sold all of it until 270 days after the transaction closed. The average per share price for Sunbeam from the time Sunbeam’s deal with Parent publicly disclosed was $48.26. Parent had acquired 14.1 million shares. Almost immediately after the closing, bad news about Sunbeam began arriving. In April 1998, on poor sales reports, the stock price dropped to $34 per share. In June 1998, fraudulent bookkeeping was alleged, and the stock fell to $18 per share. Arthur Anderson, Sunbeam’s

1080. Atlanta Gas Light Co., 463 F.3d at 1208.
1081. Id.
1082. Id.
1083. Id. at 1209.
1084. Id. at 1210.
1085. Atlanta Gas Light Co., 463 F.3d at 1210.
1086. 955 So. 2d 1124 (Fla. 4th Dist. Ct. App. 2007).
1087. Id. at 1126.
1088. Id.
1089. Id.
1090. Id.
1091. Morgan Stanley & Co., 955 So. 2d at 1126.
1092. Id.
1093. Id. at 1127.
1094. Id.
1095. Id. at 1126.
1096. Morgan Stanley & Co., 955 So. 2d at 1126.
1097. Id.
accountant, revoked its audit certificates for 1996 and 1997.\textsuperscript{1098} Parent was unable to sell its Sunbeam stock even after the lockup because Arthur Andersen’s actions had delayed having the stock registered for sale to the public.\textsuperscript{1099} Registration “could not be completed until late 1999.”\textsuperscript{1100} On February 6, 2001, Sunbeam went bankrupt and its shares became worthless.\textsuperscript{1101} Parent sued Morgan Stanley claiming that Morgan Stanley, Sunbeam’s investment banker, helped Sunbeam carry out a “fraudulent scheme to inflate the price of [Sunbeam] stock until after the merger.”\textsuperscript{1102} The trial court denied Morgan Stanley’s motion for a directed verdict, and the jury returned a verdict against Morgan Stanley for conspiracy and fraud.\textsuperscript{1103} The jury awarded Parent $604,334,000 in compensatory damages and $850 million in punitive damages.\textsuperscript{1104}

The Fourth District Court of Appeal reversed and remanded “with directions to enter judgment for Morgan Stanley.”\textsuperscript{1105} The court observed that “the flexibility theory of damages” is the law in Florida with respect to fraud.\textsuperscript{1106} This theory allows a trial “court to use either the ‘out-of-pocket’ [rule] or the ‘benefit-of-the-bargain’ rule, depending [on] which is more likely to fully compensate the injured party.”\textsuperscript{1107} The trial court, at Parent’s request, used the benefit-of-the-bargain rule.\textsuperscript{1108}

Damages are then “measured by the difference between the value of the property as represented and the actual value of the property on the date of the transaction.”\textsuperscript{1109} Determining actual value is essential to arriving at a damages amount.\textsuperscript{1110} The court found that Parent’s expert on damages failed to opine on “the ‘fraud-free’ price of Sunbeam stock on the . . . closing” date.\textsuperscript{1111} This required “event study” or “event analysis” to consider the economic effect each particular event might have had on the stock price, not just the effect of the alleged fraud.\textsuperscript{1112} This type of analysis was not con-
ducted.\textsuperscript{1113} Parent argued that the fraud-free value of the stock on the closing date did not matter because it could not have sold any of the stock on that day.\textsuperscript{1114} It also argued that it should be allowed to collect damages measured by the decline in stock value from the closing date until it could first have been resold after December 1999.\textsuperscript{1115} The court was not persuaded.\textsuperscript{1116} "The bargain, in this case, included sale restrictions."\textsuperscript{1117} Absent proof of the fraud-free value of Sunbeam on the transaction, the jury's damage award could not be correct.\textsuperscript{1118} Parent was not entitled to a new trial.\textsuperscript{1119} It had a chance to prove correct damages and failed.\textsuperscript{1120} On the issue of punitive damages, the court ruled that the verdict could not stand where "no legally cognizable damage was shown as a result of the alleged fraud."\textsuperscript{1121} Judge Shahood concurred without opinion.\textsuperscript{1122} Judge Farmer dissented with an opinion.\textsuperscript{1123}

C. \textit{Slander and False Light Invasion of Privacy}

The next two cases, false light invasion of privacy cases, are pending in the Supreme Court of Florida.\textsuperscript{1124} According to the renowned torts professor, Dean William Prosser, a category of the invasion of privacy tort is "false light."\textsuperscript{1125} False light is said to be different from defamation in that the objectionable false light in which a person is put by the tortfeasor "may be based on a statement that is not defamatory."\textsuperscript{1126} In this case, Mr. Anderson complained of articles about him that appeared in the \textit{Pensacola News-Journal} between December 13, 1998, and July 12, 2000.\textsuperscript{1127} Mr. Anderson

\begin{enumerate}
\item[1113.] \textit{Id.}
\item[1114.] \textit{Id.} at 1128–29.
\item[1115.] \textit{Id.} at 1129.
\item[1116.] \textit{Morgan Stanley \& Co.,} 955 So. 2d at 1129.
\item[1117.] \textit{Id.}
\item[1118.] \textit{Id.} at 1131.
\item[1119.] \textit{Id.}
\item[1120.] \textit{Id.}
\item[1121.] \textit{Morgan Stanley \& Co.,} 955 So. 2d at 1132.
\item[1122.] \textit{Id.} at 1133 (Shahood, J., concurring).
\item[1123.] \textit{Id.} (Farmer, J., dissenting).
\item[1125.] \textit{Gannett Co.}, 947 So. 2d at 4.
\item[1126.] \textit{Id.}
\item[1127.] \textit{Id.} at 2.
\end{enumerate}
admitted that the articles were factually correct but the December 14, 1998, article was written so as to put him in the "false light" in that it "it falsely implied that he had murdered his wife and gotten away with it." His first complaint, filed on March 21, 2001, brought an action "for libel and tortious interference with a business relationship." Mr. Anderson amended his complaint "to include a... claim for invasion of privacy based on the false light theory." Some of the articles, including the December 14, 1998, article, were subject to the two-year defamation statute of limitations under section 95.11(4)(g) of the Florida Statutes. "The libel and tortious interference claims were voluntarily dismissed... However, relying on Heekin v. CBS Broadcasting, Inc., Mr. Anderson argued that unlike defamation, a false light invasion of privacy action was an unspecified tort that was subject to the four-year statute of limitations found in section 95.11(3)(p) of the Florida Statutes and would thus bring the 1998 article back into the litigation. The trial court agreed, and the case went to the jury on the invasion of privacy count only. The jury awarded Mr. Anderson $18,280,000 in compensatory damages. The issue raised on appeal by Gannett was whether the statute of limitations was two years or four years. The First District Court of Appeal observed that thus far in Florida, only the Second District Court of Appeal in Heekin had recognized a false light invasion of privacy action. The court concluded that the Supreme Court of Florida has not directly held that this tort is cognizable in Florida. The court then conducted an extensive review of the law of other states and pointed out that North Carolina refuses to recognize false light as a tort. The court essentially found that defamation actions and false light claims are virtually indistinguishable and therefore the false light claim should be "subject to the two-year statute" of limitation.

1128. Id. at 3.
1129. Id. 2.
1130. Gannett Co., 947 So. 2d at 2.
1131. Id. at 4, 7; see also Fla. Stat. § 95.11(4)(g) (2007). Section 95.11(4)(g) places a two-year limitation to bring an action for libel or slander. Fla. Stat. § 95.11(4)(g).
1132. Gannett Co., 947 So. 2d at 3.
1135. Gannett Co., 947 So. 2d at 3.
1136. Id. at 1.
1137. Id. at 3–4.
1138. Id. at 7.
1139. Id. at 6.
1140. Gannett Co., 947 So. 2d at 4–5.
1141. Id. at 7.
also concerned with the ease with which a plaintiff could avoid the two year statute of limitation simply by making a false light invasion of privacy claim.\textsuperscript{1142} Conflict with \textit{Heekin} was acknowledged, and the First District Court of Appeal certified the following question to the Supreme Court of Florida: "Is an action for invasion of privacy based on the false light theory governed by the two-year statute of limitations that applies to defamation claims or by the four-year statute that applies to unspecified tort claims?"\textsuperscript{1143} Judge Lewis concurred in the result only.\textsuperscript{1144}

About a month after \textit{Gannett} was decided, the Fourth District Court of Appeal issued its opinion in \textit{Rapp v. Jews for Jesus, Inc.}\textsuperscript{1145} Mrs. Rapp's stepson, Bruce Rapp, was employed by Jews for Jesus.\textsuperscript{1146} In a Jews for Jesus newsletter published on the internet, Bruce claimed that Mrs. Rapp had converted from Judaism to Christianity.\textsuperscript{1147} A relative of Mrs. Rapp saw the newsletter and informed her of what it said.\textsuperscript{1148} Mrs. Rapp sued Jews for Jesus and after several amendments to her complaint, there remained counts for false light invasion of privacy, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent training and supervision.\textsuperscript{1149} The trial court dismissed the complaint on First Amendment grounds.\textsuperscript{1150} On appeal, the Fourth District Court of Appeal upheld the dismissal of all counts except the false light invasion of privacy claim and the negligent training and supervision claim.\textsuperscript{1151} The court said that the lower court mistakenly applied the First Amendment to the United States Constitution.\textsuperscript{1152} The First Amendment bars "courts from resolving internal church disputes [requiring application] of religious doctrine."\textsuperscript{1153} It does not apply to "disputes between churches and third parties."\textsuperscript{1154}

The court made fairly short work of Mrs. Rapp's defamation and emotional distress claims.\textsuperscript{1155} The newsletter was held not to be defamatory because it "was intended for group members who would have" taken the news

\begin{thebibliography}{99}
\bibitem{1142} Id. at 8.
\bibitem{1143} Id. at 11.
\bibitem{1144} Id. (Lewis, J., concurring).
\bibitem{1145} 944 So. 2d 460 (Fla. 4th Dist. Ct. App. 2006).
\bibitem{1146} Id. at 462.
\bibitem{1147} Id.
\bibitem{1148} Id.
\bibitem{1149} Id. at 462–63.
\bibitem{1150} \textit{Rapp}, 944 So. 2d at 462–63.
\bibitem{1151} Id. at 468–69.
\bibitem{1152} Id. at 464.
\bibitem{1153} Id.
\bibitem{1154} Id.
\bibitem{1155} \textit{Rapp}, 944 So. 2d at 464–67.
\end{thebibliography}
about Mrs. Rapp in a positive way, utilizing the "common mind" rule. The court looked at how the information would be viewed by those to whom the ideas were intended to be conveyed. The intentional infliction of emotional distress did not rise to the level of atrociousness necessary to sustain it. False light invasion of privacy was another story, Gannett having been decided a month earlier. The court concluded that misrepresentation of a person's religious beliefs fell squarely within the definition of the tort of false light invasion of privacy. It was not as clear, however, to the court that the tort exists in Florida, even though the Supreme Court of Florida decisions seem to imply that the tort of false light invasion of privacy is recognized in Florida. The court allowed that if it was "writing on a blank slate" it would reject the cause of action. However, given the "toehold" that the cause of action has in Florida, the court certified the question as one of great public importance as follows: "Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of the Restatement (Second) of Torts?"

D. Tortious Interference with Business Relationships

In Walters v. Blankenship, the Walters owned four units in a condominium. They offered to sell all four at an auction which was to be without reserve. Each bidder was required to deposit $50,000 in order to participate, and more than twenty bidders participated. "On the day of the auction, the defendants" who were owners of other units in the condominium put "'for sale by owner' signs in front of their" units in violation of condo-

1156. Id. at 465 (internal quotations omitted).
1157. Id. This was true even though the newsletter was disseminated on the internet and persons other than the intended group saw the newsletter. Id. The court, having found no case where the Supreme Court of Florida adopted comment e to section 559 of the Restatement (Second) of Torts, declined to adopt the rule that a communication is defamatory if the "plaintiff is prejudiced in the eyes of a substantial and respectable minority of the community." Id. at 465–66. The court noted that if comment e applied, "a court might well find that the amended complaint stated a claim for defamation." Rapp, 944 So. 2d at 466.
1158. Id. at 466–67.
1159. Id. at 467–68.
1160. Id. at 468.
1161. Id.
1162. Rapp, 944 So. 2d at 468.
1163. Id.
1164. 931 So. 2d 137 (Fla. 5th Dist. Ct. App. 2006).
1165. Id. at 138–39.
1166. Id. at 139.
1167. Id.
minium rules. Immediately after the Walters' four units were sold at auction for an aggregate amount of more than $2 million, the defendants removed the "for sale" signs. The Walters sued the defendants alleging "tortious interference with a prospective economic advantage, intentional infliction of emotional distress, and civil conspiracy to commit [those torts]." They sought combined total compensatory and punitive damages totaling $6 million. The trial court dismissed the complaint with prejudice and the Walters appealed. The Fifth District Court of Appeal held that the Walters did state a cause of action for tortious interference with prospective economic advantage and civil conspiracy. A cause of action for tortious interference exists if the plaintiff alleges "1) the existence of a business relationship; 2) the defendant's knowledge of the [business] relationship; 3) the defendant's intentional and unjustified interference with the relationship; and 4) damages to the plaintiff as a result of the breach of the relationship."

The court had no difficulty finding that the allegations fit the cause of action. The court then set out the elements of civil conspiracy, which could be based on tortious interference or as an independent tort . . . a conspiracy between two or more parties, to do an unlawful act or to do a lawful act by an unlawful means, the doing of some overt act in pursuance of the conspiracy, and damage to plaintiff as a result of the acts performed pursuant to the conspiracy.

Again, the court found the plaintiff's allegations sufficient to state this cause of action. One of the defendant owners was alleged to have said to another unit owner: "'you wait until the day of the sale and see what we are going to do to Dick Walters.'" The majority opinion did not discuss the plaintiff's claim for intentional infliction of emotional distress. Judge

1168. Id.
1169. Walters, 931 So. 2d at 139.
1170. Id.
1171. Id.
1172. Id. at 138.
1173. Id. at 139–40.
1174. Walters, 931 So. 2d at 139 (citing Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994)).
1175. Id.
1176. Id. at 140.
1177. Id.
1178. Id. at 139.
1179. See generally Walters, 931 So. 2d at 137.
Torpy concurred specially with an opinion. Judge Lawson dissented with an opinion.

E. Negligent Hiring

Mr. Copeland went into an Albertson’s store, “brandish[ed] a knife, robbed a clerk, and fled.” He was pursued by store employees who caught him in a neighboring parking lot. Copeland claimed that the employees attacked and injured him. The employees claimed that Copeland “threatened them with his knife” and that they were only trying “to restrain him and protect themselves.” Copeland “was convicted of armed robbery and aggravated assault.” He then sued the employees for assault and battery and Albertson’s for negligent hiring and training of its employees. The defendants moved for summary judgment which was granted. The Second District Court of Appeal reversed and remanded. Section 776.085 of the Florida Statutes provides a defense to a civil action for damages based on personal injury if the injury happened to “a participant during the commission or attempted commission of a forcible felony.” The defendants raised the statutory defense in the trial court, but they failed to plead it or to include it in their motion for summary judgment. “A defendant cannot present evidence of a statutory defense unless” pleaded. Rule 1.510 of the Florida Rules of Civil Procedure requires “substantial matters of law” be included in the motion and the motion be served at least twenty days before the hearing on it. The statutory defense was a substantial matter of law. The defendants argued that the summary judgment could be upheld anyway, since it was right, albeit for the wrong reason. The statute was a

1180. Id. at 141 (Torpy, J., concurring).
1181. Id. at 143 (Lawson, J., dissenting).
1183. Id.
1184. Id.
1185. Id.
1186. Id.
1187. Copeland, 947 So. 2d at 665.
1188. Id. at 665–66.
1189. Id. at 668.
1191. Copeland, 947 So. 2d at 666.
1192. Id.
1193. FLA. R. CIV. P. 1.510(c).
1194. See Copeland, 947 So. 2d at 666.
1195. Id.
total bar to Copeland’s claim. Copeland argued that the statute would not apply because the forcible felony of which he was convicted occurred in the store, and the actions about which he complained occurred outside of the store after the felony had been committed. Copeland raised a question of fact concerning the applicability of the defense requiring reversal of the summary judgment.

F. Vicarious Liability/Scope of Employment

In Huffman v. Breezes Full Service Car Wash, Breezes was closed one day on account of rain, and one of the owners took several of the employees went out to lunch. Lackowski, a manager, was also there. Alcoholic beverages were consumed at lunch. After lunch, Lackowski left in his car and collided with another automobile. Melissa Jones, the driver of the other car, was killed. Her son, who was a passenger in her car was injured. The personal representatives of the estate of Melissa Jones sued Breezes, among others, for wrongful death, “alleging that Breezes was vicariously liable for negligent acts committed by” its employees. Breezes moved for summary judgment arguing “that it could not be held vicariously liable for the alleged negligence” of its employees because the facts showed that the employees had ceased acting in the scope of their employment before the lunch. The trial court agreed and granted the motion for summary judgment. The appellate court, finding that “the trial court improperly resolved disputed issues of fact,” reversed the summary judgment. The record did not resolve disputed issues of fact on the scope of employment issue.

1196. Id.
1197. Id. at 666–67.
1198. Id. at 667.
1199. 956 So. 2d 1204 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
1200. Id.
1201. Id.
1202. Id.
1203. Id.
1204. Huffman, 956 So. 2d at 1204.
1205. Id.
1206. Id. at 1204–05. The managers, individually, and the restaurant were among the others named as defendants. Id. at 1204.
1207. Id. at 1205.
1208. Huffman, 956 So. 2d at 1205.
1209. Id.
1210. Id.
XIX. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

Substantial changes were made to Florida’s version of the Uniform Commercial Code (UCC) that take effect on January 1, 2008.\textsuperscript{1211} An important change is the clarification that the substantive rules of chapter 671 of the Florida Statutes applies to all transactions governed by any chapter of the UCC.\textsuperscript{1212} The UCC imposes “obligations of good faith, diligence, reasonableness, and care [on the parties].”\textsuperscript{1213} These obligations may not be waived by contract.\textsuperscript{1214} However, the parties may agree on a standard of performance that will be upheld unless it is “manifestly unreasonable.”\textsuperscript{1215} The new statute provides that if the UCC requires that an action be done within a reasonable time, the parties may set the time by agreement, as long as it is not “manifestly unreasonable.”\textsuperscript{1216}

There are extensive amendments to the definitions contained in section 671.201 of the Florida Statutes.\textsuperscript{1217} In addition, the new section 671.209 contains detailed definitions of “notice” and “knowledge.”\textsuperscript{1218} “[A] person has notice of a fact if the person: a) [h]as actual knowledge of it; b) [h]as received a notice or notification of it;” or c) has reason to know of the existence of a fact based on other facts and circumstances “known to the person at the time.”\textsuperscript{1219} Knowledge is the same as actual knowledge.\textsuperscript{1220} There are numerous other aspects of notice that are addressed by this new section, including when notice is considered provided and when notice is received or considered to have been received.\textsuperscript{1221}

Notably, new section 671.211 of the Florida Statutes provides that “a person gives value for rights” if the rights are acquired “[a]s security for, or in . . . satisfaction of, a preexisting claim; [b]y accepting delivery under a preexisting contract; [i]n return for any consideration sufficient to support a simple contract; or [i]n return for a binding commitment to extend credit or

\textsuperscript{1212} Id. § 4, 2007 Fla. Sess. Law Serv. at 1117 (amending FLA. STAT. § 671.101 (2007)).
\textsuperscript{1213} Id. § 5, 2007 Fla. Sess. Law Serv. at 1117 (amending FLA. STAT. § 671.102(2)(b) (2007)).
\textsuperscript{1214} Id.
\textsuperscript{1215} Id.
\textsuperscript{1216} Ch. 2007-134, § 5, 2007 Fla. Sess. Law Serv. 1117.
\textsuperscript{1217} See id. § 8, 2007 Fla. Sess. Law Serv. at 1118–23 (amending FLA. STAT. § 671.201 (2007)).
\textsuperscript{1218} Id. § 15, 2007 Fla. Sess. Law Serv. at 1124 (to be codified at FLA. STAT. § 671.209).
\textsuperscript{1219} Id. (to be codified at FLA. STAT. § 671.209(1)(a)–(c)).
\textsuperscript{1220} Id. (to be codified at FLA. STAT. § 671.209(2)).
\textsuperscript{1221} Ch. 2007-134, § 15, 2007 Fla. Sess. Law Serv. 1124 (to be codified at FLA. STAT. § 671.209(4)–(6)).
for the extension of immediately available credit."\textsuperscript{1222} There are exceptions provided for those situations elsewhere in the UCC where value has a different meaning, more specifically, with respect to negotiable instruments and bank collections.\textsuperscript{1223}

New section 671.212 of the \textit{Florida Statutes}, dealing with electronic signatures, provides that the UCC “modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act,” except with respect to electronic delivery of certain notices.\textsuperscript{1224}

There were substantial statutory revisions in 2007, effective July 1, 2007, with respect to a debtor’s assignment of assets for the benefit of creditors.\textsuperscript{1225} The statute prohibits levy, execution, and attachment by a judgment creditor, other than a consensual lienholder, against assets of the assignor that are in the possession or control of the assignee.\textsuperscript{1226} Consensual lienholders may enforce their rights in the collateral subject to the lien.\textsuperscript{1227} A definition of consensual lienholder was added.\textsuperscript{1228} The definition of “assets” for purposes of chapter 727 of the \textit{Florida Statutes} was amended to include “claims and causes of action,” including tort claims.\textsuperscript{1229} The statute also allows the assignee to make a secondary assignment of claims.\textsuperscript{1230} Under the new statute, the assignee may operate the assignor’s business for no more than fourteen days without court authorization.\textsuperscript{1231} To operate the business for more than fourteen days, but less than forty-five days, court authorization and notice to creditors may become necessary depending upon whether any objections are made.\textsuperscript{1232} After forty-five days, court authorization is required if there is an objection to the assignee’s “motion for authority to operate the assignor’s business.”\textsuperscript{1233} The statute allows an assignee to reject an unexpired lease.\textsuperscript{1234} Unlike the prior statute, a limitation on damages is provided in the event the assignee rejects a lease or terminates employment con-

\textsuperscript{1222}. \textit{Id.} § 17, 2007 Fla. Sess. Law Serv. at 1125 (to be codified at FLA. STAT. § 671.211).
\textsuperscript{1223}. \textit{Id.}
\textsuperscript{1224}. \textit{Id.} § 18, 2007 Fla. Sess. Law Serv. at 1125 (to be codified at FLA. STAT. § 671.212).
\textsuperscript{1226}. FLA. STAT. § 727.105 (2007).
\textsuperscript{1227}. \textit{Id.}
\textsuperscript{1228}. Ch. 2007-185, § 3, 2007 Fla. Sess. Law Serv. 1316 (amending FLA. STAT. § 727.103 (2007)).
\textsuperscript{1229}. \textit{Id.} (amending FLA. STAT. § 727.103(1)).
\textsuperscript{1230}. FLA. STAT. § 727.108(1) (2007).
\textsuperscript{1231}. \textit{Id.} § 727.108(4).
\textsuperscript{1232}. \textit{Id.}
\textsuperscript{1233}. \textit{Id.}
\textsuperscript{1234}. \textit{Id.} § 727.108(5).
tracts. There are also new provisions with respect to objections to claims and priority of claims, those sections having been rewritten.

Section 222.25 of the Florida Statutes increases to $4000—from $1000—the amount of personal property that a person can exempt from the claims of creditors, provided the person does not receive the benefit of the homestead exemption under article X, section 4 of the Florida Constitution. If the person does have a homestead exemption, then the personal property exemption is $1000, as provided in the Florida Constitution.

XX. WILLS, TRUSTS AND ESTATES, AND SPOUSAL RIGHTS

A. Marital Agreements

Florida enacted the Uniform Premarital Agreement Act, effective October 1, 2007, with prospective effect. The statute does not affect agreements made under sections 732.701 and 732.702 of the Florida Probate Code. The new statute sets forth both a nonexclusive list of subjects that may be covered by the agreement, such as property rights, spousal support, life insurance, choice of law, and grounds for invalidation. Premarital agreements must be in writing and signed by the parties, as must amendments and revocations.

B. Dissolution of Marriage

In Haley v. Haley, the Fifth District Court of Appeal was asked to decide if capital loss carry forwards, resulting from non-marital property, belong to the property-owning spouse or constitute marital property. John and Myra divorced. Myra had brought to the marriage, as non-marital property, an interest in Igo Family Partnership (Igo), a partnership formed by

1235. FLA. STAT. § 727.112(6)-(7).
1236. Id. §§ 727.113–114.
1237. Id. § 222.25(4). The personal property exemption does not apply to claims for spousal or child support. Id.
1238. FLA. CONST. art. X, § 4(a)(2).
1241. Id. § 61.079(4), (7)–(8).
1242. Id. § 61.079(3), (6).
1243. 936 So. 2d 1136 (Fla. 5th Dist. Ct. App. 2006).
1244. See id. at 1137–38.
1245. Id. at 1137.
Myra’s parents before Myra’s marriage.\footnote{1246} “It was undisputed [that] John had no interest in Igo. . . .”\footnote{1247} The Igo passed through capital losses to Myra during the marriage, resulting in capital loss carry forwards.\footnote{1248} The issue was whether the capital loss carry forwards that could offset capital gains in later tax years were marital assets subject to equitable distribution between John and Myra.\footnote{1249} The trial court determined that the capital loss carry forwards were owned by John and Myra as tenants in common after the dissolution of marriage.\footnote{1250} The Fifth District Court of Appeal reversed.\footnote{1251} The court decided as an issue of first impression in Florida that capital loss carry forwards resulting from non-marital property belong to the property-owning spouse, that is, the carry forwards are not marital property.\footnote{1252} The court also cited section 1.1212-1 of the Treasury Regulations in support of its decision.\footnote{1253}

In \textit{Wamsley v. Wamsley},\footnote{1254} the Second District Court of Appeal held that it was proper for a husband to have excluded his distributive share of S corporation net income from his financial affidavits.\footnote{1255} The Second District Court of Appeal, relying on the Supreme Court of Florida’s decision in \textit{Zold v. Zold},\footnote{1256} held that the trial court did not err in excluding undistributed pass-through income from the husband’s gross income.\footnote{1257} \textit{Zold} “set the standard for determining” if S corporation distributions are gross income under chapter 61 of the \textit{Florida Statutes}.\footnote{1258} Under \textit{Zold}, the burden is on the shareholder-spouse to show that the S corporation income was properly retained for business purposes, rather than “to avoid alimony, child support or attorney’s fees obligations.”\footnote{1259} Factors to be considered include the amount of control the shareholder has over the income, any statutory restrictions that would preclude distribution by the corporation, and any other reasons why the income is being “retained by the corporation.”\footnote{1260} Husband, the chief executive officer and majority shareholder of an S corporation, explained

\begin{itemize}
\item \footnote{1246} \textit{Id.}
\item \footnote{1247} \textit{Id.}
\item \footnote{1248} \textit{See Haley, 936 So. 2d at 1137–38.}
\item \footnote{1249} \textit{Id. at 1137.}
\item \footnote{1250} \textit{Id. at 1138}
\item \footnote{1251} \textit{Id. at 1140.}
\item \footnote{1252} \textit{Id. at 1139–40.}
\item \footnote{1253} \textit{Haley, 936 So. 2d at 1139 n.3; see also Treas. Reg. § 1.1212-1 (as amended in 1980).}
\item \footnote{1254} \textit{957 So. 2d 89 (Fla. 2d Dist. Ct. App. 2007).}
\item \footnote{1255} \textit{Id. at 91.}
\item \footnote{1256} \textit{911 So. 2d 1222 (Fla. 2005).}
\item \footnote{1257} \textit{Wamsley, 957 So. 2d at 91.}
\item \footnote{1258} \textit{Id.}
\item \footnote{1259} \textit{Id.}
\item \footnote{1260} \textit{Id.}
\end{itemize}
that there were business reasons why the income could not be distributed to him.\textsuperscript{1261} The wife failed to rebut husband's evidence as to the corporation's need to retain the income for its corporate needs, and she failed to present evidence that husband caused the corporation to withhold distributions in order to avoid his obligations in connection with the divorce.\textsuperscript{1262} The court held that \textit{Zold} applied although it was decided after the \textit{Wamsley} hearing in the trial court, since the facts demonstrated that the trial court could reasonably have reached the conclusion that the corporation was statutorily required to retain the income to meet its debts.\textsuperscript{1263}

C. \textit{Wills, Trusts, and Elective Share}

The Second District Court of Appeal in \textit{Trenchard v. Estate of Gray},\textsuperscript{1264} relying on \textit{Dempsey v. Dempsey},\textsuperscript{1265} held that the trial court's order determining that the decedent's interest in jointly held property was part of the elective estate was not a final, appealable order.\textsuperscript{1266} The surviving joint tenant, claimed ownership of the property, and appealed the trial court's order.\textsuperscript{1267} Issues regarding ownership, amount of elective share, and contribution had not been determined.\textsuperscript{1268} Thus, the order was a non-final, non-appealable order.\textsuperscript{1269}

The Second District Court of Appeal noted that the trial court had also entered an order allowing the surviving spouse to file a lis pendens.\textsuperscript{1270} However, the appellant did not appeal that order.\textsuperscript{1271}

D. \textit{Homestead}

Mrs. Cutler died, survived by a son and a daughter.\textsuperscript{1272} She was not survived by a spouse.\textsuperscript{1273} Not long before she died, at a time when she was un-
married, she created the Cutler Irrevocable Land Trust naming herself and her two children as co-trustees. The first parcel was her residence, in which she retained a life estate. The second parcel was a vacant lot adjacent to her residence. The trust agreement provided that all assets remaining in the trust when Mrs. Cutler died were to be distributed to her estate. Under the will, she specifically devised her residence to her daughter and the vacant lot to her son. The provision in the will that dealt with debts, administration expenses, and tax apportionment directed payment of these items from Mrs. Cutler’s residuary estate. To the extent that the residuary was insufficient, then these items were to be charged in equal shares to the daughter’s and son’s devises. Naturally, there was a shortfall, and the son argued that both devises were required by the terms of the will to abate equally. The daughter’s position was that her devise was of homestead property and was constitutionally protected from abatement. The trial court agreed with the daughter, and the son appealed. Referring to Snyder v. Davis, the Third District Court of Appeal reviewed the facts in evidence to determine if the real property was “protected homestead” exempt from forced sale for payment of creditor’s claims after Mrs. Cutler died. It was the daughter’s burden to prove: 1) the property was devised to her; 2) she is an heir within the meaning of the article X, section 4(b) of the Florida Constitution; and 3) when Mrs. Cutler died, the real estate was Mrs. Cutler’s homestead. The court ruled that the daughter had proved each element. The son argued that to be protected homestead, the real property had to have been owned by a natural person and here it was held in an irrevocable trust. The court dismissed this argument by noting that Mrs. Cutler’s life estate was a property interest eligible for homestead status—at least from the

1274. Id.
1275. Id.
1276. Id.
1277. Cutler, 32 Fla. L. Weekly at D583.
1278. Id.
1279. Id.
1280. See id. at D584.
1281. Id.
1282. Cutler, 32 Fla. L. Weekly at D584.
1283. Id.
1284. Id. at D583.
1285. 699 So. 2d 999 (Fla. 1997).
1286. Cutler, 32 Fla. L. Weekly at D584.
1287. Id.
1288. Id. at D586.
1289. Id. at D585.
standpoint of forced sale and the homestead real estate tax exemption—because she had resided on the property for many years, and thus was an "owner" of her residence for purposes of making a devise of protected homestead. The court also noted that other courts had ruled that real estate held in trusts, albeit revocable trusts, could retain its character as homestead. The Third District Court of Appeal saw no reason why this should be otherwise for real estate held in irrevocable trusts. Judge Schwartz dissented.

1290. Id.
1291. Cutler, 32 Fla. L. Weekly at D585.
1292. Id.
1293. Id.
1294. Id. at D586 (Schwartz, J., dissenting). With respect to another context where homestead issues have arisen, there are now contrary decisions between the District Courts of Appeal as to whether or not a cooperative apartment is homestead for purposes of article X, section 4(c) of the Florida Constitution and section 732.4015 of the Florida Probate Code. See Phillips v. Hirshon, 958 So. 2d 425, 426 (Fla. 3d Dist. Ct. App. 2007) (stating that a cooperative apartment is not homestead for purposes of devise and descent). The Third District Court of Appeal certified, conflicting with the Fifth District Court of Appeal's decision in Southern Walls, Inc. v. Stilwell Corp., because of the different results that may be reached in the various contexts in which the determination of homestead is relevant. Compare Southern Walls, Inc. v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th Dist. Ct. App. 2002), with Phillips, 958 So. 2d at 430.
TWIN CASES OF A TAXING SORT

JAMES MCAULEY*

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I. INTRODUCTION

This legal note describes the circumstances leading up to the recent decisions of the Third District Court of Appeal, in Florida Department of Revenue v. Leon’ and Florida Department of Revenue v. Bridger (Bridger I),2 and their implications for Florida taxpayers. This note contains argu-

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1. 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
2. 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006).
ments that limitations found in Florida statutory "non-claim" provisions should not be applied to run from the time of payment of an unconstitutional tax or fee, but rather, from the time the statute is first declared unconstitutional.

II. CONNECTING THE DOTS

"On October 14, 1988, [Mark] Herre was stopped by Monroe County sheriff's deputies after they received an anonymous tip that someone was transporting illegal drugs in a car fitting the description of the car Herre was driving." The deputies thereafter proceeded to search "Herre's vehicle and found 300 pounds of marijuana in the trunk." Unfortunately for Mr. Herre, one year earlier, in 1987, the legislature enacted a sales tax on illegal narcotics. On November 17, 1988, the Department of Revenue, acting under Florida sales and use tax statutes, "sent Herre a notice of tax assessment and jeopardy findings." Approximately eighteen years later, on June 7, 2006, the Third District Court of Appeal entered its decision in Bridger I.

Bridger I arose as a class action regarding the collection of tax under section 212.0505 of the Florida Statutes, concerning the very same statute under which Herre was prosecuted. These two points in time are directly connected because the Bridger I decision represents the latter of the twin class actions, the earlier being Florida Department of Revenue v. Leon. The decisions discussed in this note represent but the latest chapters in a story of protracted litigation concerning maintenance of a class action against the State of Florida for unconstitutionally imposed taxes or fees. The latter of these two Third District class actions, decided in 2006, ended in 2007 with denial of jurisdiction by the Supreme Court of Florida.

5. Id.
7. Herre I, 617 So. 2d at 390.
8. Fla. Dep't of Revenue v. Bridger (Bridger I), 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006).
9. Id. at 537.
10. See id.; see also Fla. Dep't of Revenue v. Leon, 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
11. Fla. Dep't of Revenue v. Bridger (Bridger II), 952 So. 2d 1189 (Fla. 2007).
III. LOOKING BACK TO HERRE AND IMPLICATIONS FOR FLORIDA TAX LAW

The decisions in Bridger II and Leon are directly connected to Mr. Herre by the decision of the Supreme Court of Florida in Florida Department of Revenue v. Herre (Herre I). Both of these class actions arose after the Court’s 1994 decision, affirming Herre I, declaring unconstitutional a 1987 Florida tax statute which imposed Florida sales and use tax on transactions involving illegal substances. The statute imposed taxes on various forms of illegal narcotics trade and fundamentally had the noble, if somewhat misguided goal, of restricting the flow of illegal drugs via heavy taxation and statutory penalties. This statute also imposed significant penalties and mandated disclosures to law enforcement.

Unlike the recent class actions, the Herre I case presented the appeal of a single individual from a Department of Revenue final administrative order which reached the Third District without resolution of the constitutional questions presented. The Third District reversed the final order, concluding that the Fifth and Fourteenth Amendments of the United States Constitution prohibited the sanctions imposed under the tax statute. In so doing, not only did the Third District take a clear and bold step of declaring the statute unconstitutional, but it certified conflict with a prior First District opinion that upheld a Revenue assessment under the same statute by rejecting a challenge on common grounds. As is always the case in tax cases, and usually the case of life in general, the devil, as they say, is in the details. One very important detail, which turned out to be of constitutional dimension for Mr. Herre and the State of Florida, was that chapter 212 of the Florida Statutes not only mandated payment of tax, but also required each “taxpayer” to disclose information concerning the sources of the transaction upon which

13. Fla. Dep’t of Revenue v. Herre (Herre II), 634 So. 2d 618, 621 (Fla. 1994).
14. See id. at 618. “Every person is exercising a taxable privilege who engages in this state in the unlawful sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage of any medicinal drug, as defined in chapter 465, cannabis, as defined in [section] 893.02, or controlled substance enumerated in [section] 893.03.” Id.
15. Id. “For the exercise of such privilege, a tax is levied on each taxable transaction or incident, including each occasional or isolated unlawful sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage . . . .” Id.
16. Under subsection 212.12(2) of the Florida Statutes, the Florida Legislature imposed a penalty for failing to file a return and an additional 100 percent of the tax due penalty for willful intent to evade payment of the tax. Fla. Stat. § 212.12(2) (1993).
17. Herre I, 617 So. 2d at 392.
18. Id.
19. Harris v. Fla. Dep’t of Revenue (Harris I), 563 So. 2d 97, 100 (Fla. 1st Dist. Ct. App. 1990).
the tax was paid by the filing of a return.\textsuperscript{20} While this mechanism represents a mundane necessity for collection of most excise tax transactions, it proved anything but mundane to a person engaging in the "privilege" of illegal narcotics trafficking within the state.\textsuperscript{21} Because of this mechanism and related penalty provisions, the Supreme Court of Florida relied on \textit{Marchetti v. United States}\textsuperscript{22} in accepting Mr. Herre's arguments.\textsuperscript{23} The Court reached the conclusion that Mr. Herre's position under Florida law was indeed indistinguishable from the United States Supreme Court decision in \textit{Marchetti}, with respect to the violation of Mr. Herre's Fifth and Fourteenth Amendment rights.\textsuperscript{24}

\textbf{IV. ENTER \textit{NEWSWEEK}, \textit{VICTOR CHEMICAL}, AND \textit{KUHNLEIN}}

In 1990, the Supreme Court of Florida declared unconstitutional a statutory scheme that imposed a sales tax on magazines, but not on newspapers.\textsuperscript{25} Relying on this ruling, Newsweek magazine sought a tax refund of sales tax paid to Florida claiming that it had been compelled to pay taxes pursuant to the unconstitutional statutory scheme.\textsuperscript{26} The Florida trial and appellate courts rejected the magazine's request by granting summary judgment to the state on procedural grounds,\textsuperscript{27} notwithstanding earlier United States Supreme Court precedent in \textit{McKesson Corp. v. Florida Department of Business Regulation}.\textsuperscript{28} The Florida courts did so by reasoning that, unlike the circumstances in \textit{McKesson}, a remedy existed to dispute the tax prior to payment.\textsuperscript{29} The appellate opinion relied squarely on reasoning which has its parallel in

\textsuperscript{20} FLA. STAT. § 212.12(2)(a) (1993). Subsection 212.12(2) stated in part: "[w]hen any person . . . required . . . to make any return or to pay any tax . . . imposed by this chapter fails to timely file such return or fails to pay the tax . . . due within the time required hereunder, . . . a specific penalty shall be added." \textit{Id.} This provision was identified by the court in \textit{Herre II} as imposing a requirement which created Fifth Amendment implications. Fla. Dep't of Revenue v. Herre (\textit{Herre II}), 634 So. 2d 618, 621 (Fla. 1994).

\textsuperscript{21} \textit{See Herre II}, 634 So. 2d at 620–21.

\textsuperscript{22} 390 U.S. 39 (1968).

\textsuperscript{23} \textit{See id.} at 61.

\textsuperscript{24} \textit{Herre II}, 634 So. 2d at 620–21.

\textsuperscript{25} Dep't of Revenue v. Magazine Publishers of Am., Inc., 565 So. 2d 1304, 1310 (Fla. 1990).

\textsuperscript{26} Newsweek, Inc. v. Dep't of Revenue (\textit{Newsweek I}), 689 So. 2d 361, 362 (Fla. 1st Dist. Ct. App. 1997).

\textsuperscript{27} \textit{Id.} at 364.

\textsuperscript{28} 496 U.S. 18, 22 (1990).

\textsuperscript{29} \textit{Newsweek I}, 689 So. 2d at 363.
the Leon and Bridger I opinions. In Leon and Bridger I, the view was taken that persons who paid the unconstitutional tax, found in section 212.0505 of the Florida Statutes, but failed to timely challenge the statute—meaning within three years of payment—lost those rights. The Florida appellate opinion in Newsweek I stated:

In the present case, the taxpayer could have availed itself of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court.

Ultimately, this position was rejected by the United States Supreme Court in Newsweek, Inc. v. Florida Department of Revenue (Newsweek II), when the case reached it based upon certiorari jurisdiction. As will be discussed in more detail below, the Newsweek II Court observed, inter alia, that the case arrived before the Court in the context of the underlying taxing statute having been declared invalid on constitutional grounds. In this context, it ruled that procedural due process required access to a post-petition refund provision under Florida law. In so doing, the Court observed that under Florida law, there has been “a longstanding practice of permitting taxpayers to seek refunds under [section] 215.26 for taxes paid under an unconstitutional statute.” The practice of providing redress for an unconstitutional taxing was followed in Department of Revenue v. Kuhnlein. In the Kuhnlein decision, Florida residents challenged the constitutionality of an impact fee imposed on cars purchased out-of-state but later brought into Florida. The Supreme Court of Florida declared this statute to be facially unconstitu-

30. See id.; see also Fla. Dep’t of Revenue v. Bridger (Bridger I), 935 So. 2d 536, 539 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep’t of Revenue v. Leon, 824 So. 2d 197, 200–01 (Fla. 3d Dist. Ct. App. 2002).
31. See Bridger I, 935 So. 2d at 539; Leon, 824 So. 2d at 200–01.
32. Newsweek I, 689 So. 2d at 363.
34. Id. at 445.
35. Id. at 442.
36. See id. at 445.
37. Id. at 444 (citing State ex rel. Hardaway Contracting Co., v. Lee, 21 So. 2d 211 (Fla. 1945)).
38. 646 So. 2d 717 (Fla. 1994).
39. Id. at 719; see also Fla. STAT. § 319.231 (1991).
tional as a violation of the Commerce Clause. The Kuhnlein decision rejected the State’s argument that a class action was an inappropriate mechanism to deal with tax refunds, and that class members could not seek a refund of a vehicle impact fee because they failed to comply with the requirements in section 215.26. Despite the failure of the class members to apply for a refund from the Comptroller, as mandated by the statute, the Supreme Court of Florida concluded that the class action for a refund could proceed.

Given the history of the Florida “non-claim” statute, as discussed further below, it is not surprising that the Kuhnlein ruling by the Supreme Court of Florida sparked controversy and uncertainty in the district courts about the limits of its application. Florida’s jurisprudence had previously established that “[a] refund is a matter of grace and if the statute of non-claim is not complied with, the statute becomes an effective bar in law and in equity.”

This often repeated, unequivocal language was derived, not only through the establishment of time-tested jurisprudence, but also by successive re-enactments of section 215.26 by the Florida Legislature over several decades. Notwithstanding the weight of this legislative and jurisprudential background, the Kuhnlein court seemed to eliminate the need to file a refund application with the State of Florida when a law was declared facially unconstitutional. However, this reading of the Kuhnlein decision seemed to create an exception to the jurisprudence previously established by State ex rel. Victor Chemical Works v. Gay and other Florida decisions; in fact, the Supreme Court of Florida acknowledged this shift in its later decision in Department of Revenue v. Nemeth (Nemeth II).
V. THE SUPREME COURT OF FLORIDA REAFFIRMS ITS 1954 DECISION: VICTOR CHEMICAL WORKS IN NEMETH II

In Nemeth II, the Supreme Court of Florida returned to the issues raised in Kuhnlein, after conflict arose in district opinions, when it answered the Fourth District’s certified question concerning the remaining validity of Victor Chemical Works. Following an initial ruling by the circuit court relying on Victor Chemical Works in favor of the State, the Fourth District reversed, relying on Kuhnlein, by ruling that the Nemeths, the named plaintiffs, need not satisfy the requirements of section 215.26 of the Florida Statutes because it determined the statute was facially unconstitutional and read the Kuhnlein case to eliminate the “non-claim” statutory requirements of section 215.26. The Fourth District nonetheless certified the case to the Supreme Court of Florida as being in conflict with a Third District decision. The Supreme Court of Florida subsequently clarified that it intended to honor the statutory “non-claim” limitations on the right to redress—regardless of the existence of facially unconstitutional taxation—by breathing life back into its Victor Chemical Works decision, post Kuhnlein. In so doing, the Court overturned the Fourth District’s 1997 decision in Nemeth I.

The First and Fourth District Courts of Appeal seem to have read Kuhnlein to eliminate the need for taxpayers to comply with the provisions of Florida Statutes section 215.26 in the narrow context of a facially unconstitutional statute. But this ultimately did not prove to be the case as the Supreme Court of Florida relied upon its precedent in Victor Chemical Works and its reading of the McKesson decision from the United States Supreme Court, and restricted the right to a refund to those who paid the tax and filed an action for refund within three years. This limitation was imposed by requiring compliance with section 215.26.

Moreover, Nemeth II did not abandon the earlier decision in Kuhnlein, but rather distinguished it in part and followed the earlier ruling in part by reaffirming Kuhnlein’s elimination of the need to pursue administrative re-
remedies before seeking redress in court. At the same time, this rule was restricted to those circumstances when the sole issue contested was whether the tax statute was facially unconstitutional. Later cases, such as the First District’s decision in *Department of Highway Safety & Motor Vehicles v. Sarnoff*, although not relevant here, further explicated this distinction. For various reasons, including principles of exhaustion of remedies—outside the context of constitutional issues—and judicial economy, this limitation made sense. This exception has been referred to as the “direct-file” rule because of the elimination of administrative compliance with *Florida Statutes* section 215.26(2). In *Nemeth II*, the Supreme Court of Florida also harmonized its many prior decisions regarding the exhaustion of remedies with the futility of such a procedure by saying: “We recognize that the Comptroller cannot declare a tax unconstitutional, and thus, when the claim is solely that the refund is required because the tax is unconstitutional, to file the claim with the Comptroller would be a futile act.”

VI. *Leon and Bridger I and Their Claims to McKesson Following Nemeth II*

Elimination of administrative remedies is all well and good under such circumstances as found in both *Kuhnlein* and *Nemeth II*, but the elimination of administrative procedures did little to alleviate the sting of the State’s extraction of tax monies based upon a facially unconstitutional statute as found in the *Bridger, Leon*, and *Nemeth* cases. *Kuhnlein* addressed this problem by requiring backward-looking relief. *Nemeth II* did not deny such relief,  

55. Id.
56. Id.
57. 776 So. 2d 976 (Fla. 1st Dist. Ct. App. 2000).
58. Id. at 978–79.
59. Id. at 978. In deciding *Nemeth II*, the Supreme Court of Florida returned to early precedent in *Reynolds Fasteners, Inc. v. Wright*. *Nemeth II*, 733 So. 2d at 974 n.8 (citing *Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d 295, 298 (Fla. 1967)). The *Reynolds Fasteners, Inc.*, case is interesting because it was decided based upon a general statute of limitations (chapter 95) rather than a specific statute of non-claim—such as *Florida Statutes* section 215.26. *Reynolds Fasteners, Inc.*, 197 So. 2d at 296.
60. *Nemeth II*, 733 So. 2d at 974. It is well established that a challenge to the facial constitutionality of a statute cannot be resolved by an administrative agency. *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).
61. *See* Fla. Dep’t of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536, 537 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep’t of Revenue v. Leon, 824 So. 2d 197, 199 (Fla. 3d Dist. Ct. App. 2002); *Nemeth II*, 733 So. 2d at 972.
62. Dep’t of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994).
but narrowed the availability of it by subjecting the class members to compliance with the refund statute.\textsuperscript{63} Nemeth II eliminated administrative compliance with the refund process administered by the Department of Revenue, but it did nothing to eliminate the need to take legal action, once payment occurred, under the penalty of a ticking legal clock.\textsuperscript{64} Unfortunately, elimination of compliance with administrative remedies proved to be a distinction—without a difference—because it did not help by redressing constitutional injury through backward-looking relief.\textsuperscript{65}

This decision separated Nemeth from Kuhnlein but resolved the conflict because certain Florida district courts read Kuhnlein to stand without exception—albeit limited to a facially unconstitutional statute—for the legal maxim: "[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions."\textsuperscript{66} Ultimately, this maxim was the basis upon which Kuhnlein was grounded.\textsuperscript{67} However, in Nemeth II, as discussed earlier, the Court reaffirmed that the legislature, through enactment of Florida Statutes section 215.26, limited a taxpayer's right to obtain a refund, including redress from an unconstitutional statute.\textsuperscript{68} At the end of the day, the reaffirmation of the validity of Victor Chemical Works means that the Florida Legislature has the right to establish limitations on redress from unconstitutional taxation—whether the "non-claim" period is decided to be one year or three years.\textsuperscript{69} This interpretation eliminated the Nemeths from class representative status in the case of the automobile fee,\textsuperscript{70} and ultimately, directed the outcome of the Leon and Bridger decisions by limiting class participation in their circumstances as well.\textsuperscript{71}

VII. LEON AND BRIDGER SEEK REDRESS RELYING UPON MCKESSON?

In Public Medical Assistance Trust Fund v. Hameroff,\textsuperscript{72} the First District read the Kuhnlein decision, what appeared to be at face value, as rejecting a belated invitation of the Department of Revenue to tie refunds in com-

\begin{itemize}
  \item \textsuperscript{63} Nemeth II, 733 So. 2d at 974.
  \item \textsuperscript{64} \textit{Id}.
  \item \textsuperscript{65} Kuhnlein, 646 So. 2d at 726.
  \item \textsuperscript{66} \textit{Id}. at 721.
  \item \textsuperscript{67} \textit{Id}. at 725–26.
  \item \textsuperscript{68} Nemeth II, 733 So. 2d at 974.
  \item \textsuperscript{69} \textit{Id}. at 973–74.
  \item \textsuperscript{70} \textit{See id}.
  \item \textsuperscript{71} \textit{See Fla. Dep't of Revenue v. Bridger (Bridger I), 935 So. 2d 536, 539 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 202 (Fla. 3d Dist. Ct. App. 2002).}
  \item \textsuperscript{72} 689 So. 2d 358 (Fla. 1st Dist. Ct. App. 1997).
\end{itemize}
pliance with *Florida Statutes* section 215.26, regardless of the basis for the claim.\(^3\) The First District made the observation that

\[\text{s}\]overeign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supercede a provision of the federal or state constitutions.\(^4\)

This observation was set forth because of the contrast between this viewpoint and the results in *Nemeth I, Leon*, and *Bridger I*. As reported in the Third District opinion in *Leon*, on February 8, 1990, while the criminal charges were pending against Ana Leon,

the Department served Leon with its form “Notice of Assessment and Jeopardy Findings,” alleging that she owed $45,798.75 in taxes and penalties, pursuant to section 212.0505. On March 21, 1991, the Department issued a revised Notice, lowering the amount due to $10,502.28. With her criminal case still pending, Leon paid the assessment.\(^5\)

Likewise, another member of the *Leon* class, Richard Munson,

received the same form “Notice” in May 1989, seeking $24,750 in taxes and penalties. Munson, unlike Leon, filed a timely administrative challenge to the assessment, but his appeal was denied. Due to his cooperation with state law enforcement authorities, however, the Department agreed to reduce the assessment to $7,500, which Munson paid.\(^6\)

These facts are recited, not as a mere recitation of the mundane facts of this case, but instead, because payments of these tax assessments became important, post *Nemeth*, due to the circumstances which surrounded the payments—how the amount of payment was established and finally paid. In the scenarios in this case, unlike in *Nemeth* or *Victor Chemical*, the payments were made following a “Notice of Assessment and Jeopardy Findings.”\(^7\)

The Notice of Assessment and Jeopardy Findings was important because in

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\(^3\) See *id.* at 359.

\(^4\) *Id.*

\(^5\) *Leon*, 824 So. 2d at 200.

\(^6\) *Id.*

\(^7\) *Id.*
Leon, the court made the following important observations about these jeopardy findings.

The appellees in this case are the plaintiff class members in the circuit court, constituting the 815 taxpayers who, between 1986 and 1994, were identified by the Department as accused drug traffickers and served with jeopardy tax assessments under section 212.0505. The class members were notified that *their assets would be frozen or seized if the tax and penalties were not immediately paid*.

Thus, the court in Leon acknowledged the existence of a classic case of state imposed duress in the extraction of the tax payments. The existence of this duress, in the extraction of an unconstitutional tax via jeopardy findings, represents distinguishing circumstances from the circumstances of Nemeth and Victor Chemical. As discussed above, under Florida law found in Victor Chemical and reaffirmed in Nemeth II, the right to seek a refund of taxes and fees alike, even when paid pursuant to an unconstitutional statute, accrued upon payment and was limited to three years from the date of payment by legislative fiat. In Leon and Bridger, the class plaintiffs argued due process, as found in McKesson, required that section 215.26 of the Florida Statutes should be read to allow access to a statutory remedy via the refund provisions of Florida law. In Leon, the Third District reversed the trial court, granting final summary judgment to the named taxpayers, Leon and Munson, because they had paid taxes under their Notice of Assessment and Jeopardy Findings, more than three years before the Supreme Court of Florida’s ruling in Herre. The direct result of the Third District’s application of the Nemeth II precedent to the facts before the court in Leon, and subsequently in Bridger I, eliminated the right to a refund with respect to the original class representatives. As reported in Leon, the class representatives argued that the right to a refund should not have accrued until the Supreme Court of Florida acted to declare the statute unconstitutional in Herre.

78. Id. at 199 (emphasis added).
79. See generally id. at 198–202.
81. Fla. Dep’t of Revenue v. Bridger (Bridger I), 935 So. 2d 536, 537 (Fla. 3d Dist. Ct. App. 2006); Leon, 824 So. 2d at 201; see also McKesson Corp. v. Fla. Dep’t of Bus. Reg., 496 U.S. 18, 24 (1990).
82. Leon, 824 So. 2d at 200, 202; see also Fla. Dep’t of Revenue v. Herre (Herre II), 634 So. 2d 618 (Fla. 1994).
83. Bridger I, 935 So. 2d at 539; Leon, 824 So. 2d at 202.
The focus of this argument, discussed separately below, depends on an examination of the *McKesson* decision, but because of *Nemeth II*, the court did not have the authority to approve such a result even if it so desired. 85

In *Bridger I*, the court observed that the decisions of the court in *Leon*, its sister case, fell within “the law of the case” doctrine. 86 The *Bridger I* opinion both rejected and seemed to chastise attempts to reargue the issues decided in *Leon*, following from the law of the case doctrine. 87 The *Bridger I* decision, concerning the law of the case, held in favor of a class action that consisted of taxpayers who fell within a specified range. 88 That range, incorrectly decided by the trial court, represented all taxpayers who paid tax under the unconstitutional statute “within the preceding three-year period of when this action was originally filed (after January 16, 1993).” 89

VIII. INQUIRING WHETHER LEON AND BRIDGER’S CLAIM TO *MCKESSON* HAS MERIT

The opinion in *Leon* reflects the fact that the Third District reluctantly, but given the precedent, correctly disagreed with the *Leon* class’ arguments, based upon the controlling precedent of *Nemeth I*. 90 Given this history, the key to the *Leon* opinion, beyond the obvious observation by the court of the existing *Nemeth I* precedent, was the rejection of the argument that under *McKesson* the state had not provided adequate post-petition relief. 91 Clearly, this argument was not one which the Third District had the luxury of indulging, given the *Nemeth I* precedent. Moreover, in *Bridger I*, the Supreme Court of Florida did not accept jurisdiction to speak again on its *Nemeth I* decision. 92 Nevertheless, questions remain outside of the context of strict legal precedent within Florida jurisprudence.

Discussion of what *McKesson* means to the facts involved in these cases, as well as equitable consideration should, at the very least, be aired. *McKesson* may be fairly characterized as holding that “the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.” 93

84. *Leon*, 824 So. 2d at 199.
85. See Dep’t of Revenue v. Nemeth (*Nemeth II*), 733 So. 2d 970, 975 (Fla. 1999).
86. *Bridger I*, 935 So. 2d at 537.
87. *Id.* at 538.
88. *Id.*
89. *Id.* at 539.
91. *Id.*
92. *Bridger I*, 935 So. 2d at 539.
But the Court also acknowledged, in dicta, the right of the state to maintain sound fiscal planning by interposing procedural requirements to refund requests. Notwithstanding the importance of sound fiscal planning, when considering what was equitable in these twin cases, the Leon and Bridger I class’ argument has great appeal based upon logic, fairness, and principles of adequate notice.

First, as to the logic, the simple and clear logic, if applied with no other criteria, would dictate a refund because it is the decision by a court which precipitates the right to refund, not the actual date of payment of the tax. Beyond arguments based simply on logic, there exists an issue of fairness to taxpayers. The fairness issue simply flows from the logic just described, but the need for fairness is heightened by the existence of duress in the acquisition of the tax monies. It is of no great mental stretch to understand that the date of payment of the tax represents a unique, and in many instances, compelled act by the taxpayer, following state action with the threat of the imposition of significant financial, if not criminal, penalties. For example, in these twin cases, the class was subject individually to a penalty of fifty percent of the estimated tax due. Therefore, it is clear that duress accompanied payment. However, the decision to declare a state tax statute unconstitutional, in particular, is not only a rare event—it is the rare event which triggers the right to a refund. Finally, awareness of the decision, even if the “non-claim” statute were to be applied from the date of a trial court decision, would at least establish a clear demarcation point for all previous taxpayers.

A rhetorical question can be raised, based upon the facts surrounding the original class representatives found in Leon and Bridger I: Should a taxpayer who has paid tax, and, as reported in the Leon decision, filed a challenge as a named class member, be left without redress when the tax statute is subsequently declared facially unconstitutional? Clearly, the reason persons so situated received no recompense for this particular unconstitutional taking is the payment of tax under duress. Under such circumstances, it is both unjust and ironic that the duress used by the state, in extraction of the tax, works against the taxpayer twice. First, the duress works to compel payment wrongly, and then, once payment is received, the compelled payment works against the right to recovery instead of providing grounds for a refund. This is because the payment operates under Florida’s non-claim sta-

94. Id. at 44–45.
95. See, e.g., Bridger I, 935 So. 2d at 539; Leon, 824 So. 2d at 202.
96. Fla. Dep’t of Revenue v. Herre (Herre II), 634 So. 2d 618, 618 (Fla. 1990); see also Bridger I, 935 So. 2d at 537; Leon, 824 So. 2d at 198–200.
97. Bridger I, 935 So. 2d at 537.
tute so as to trigger a dwindling hour-glass of time under the statute. In essence, time begins to run out under the refund statute once the money is paid regardless of the unconstitutional nature of the statute and the duress used in its acquisition. How fair or just is such a result and does it really comply with federal due process?

Originally, Kuhnlein seemed to say no, but Nemeth II said yes. Moreover, under the maxim, "neither the common law nor a state statute can supersede a provision of the federal or state constitutions," there should be, at least in theory, no legislative impasse to access a refund once such a wrong has been committed. This result, however, was not the outcome for all but for approximately fifty-one class members in Leon and Bridger, nor was it given the same hour-glass reading of the refund statute in the earlier decision in Nemeth II. Despite the equity of such arguments, as presented in Leon and Bridger, the result did not follow in these cases. Different conclusions can be drawn, but one logical one suggests that under current Florida law, as found in Nemeth, due process would dictate no recompense is necessary. Returning to the McKesson case, by examining the later decisions from the United States Supreme Court, regarding unconstitutional taxation and refunds of state taxes and decisions of other states on the same subject, can perhaps add further light, if not heat, to the issues.

IX. RETURNING TO MCKESSON VIA NEWSWEEK, A TAX PROCEDURE CASE, AND ITS SIGNIFICANCE

In Newsweek II, the United States Supreme Court rejected the state district court’s interpretation of the McKesson decision, as rationalized by Florida, during the state appeals process, but prior to arriving in the United States Supreme Court. As touched upon earlier, during this process, a rationalization was accepted that McKesson was distinguishable, balanced on the basis of the existence of a pre-deprivation statutory remedy. The state court accepted the argument that the absence of a pre-deprivation remedy,

99. See id.
100. Dep’t of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994).
101. Dep’t of Revenue v. Nemeth (Nemeth II), 733 So. 2d 970, 975 (Fla. 1999).
102. Kuhnlein, 646 So. 2d at 721.
103. Fla. Dep’t of Revenue v. Bridger (Bridger I), 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep’t of Revenue v. Leon, 824 So. 2d 197, 201 n.1 (Fla. 3d Dist. Ct. App. 2002);
104. See Nemeth II, 733 So. 2d at 970.
105. See id. at 974–75.
107. Id. at 442.
which had been enacted into Florida law after the *McKesson* decision, eliminated the need for access to refund statutes. The *Newsweek II* Court observed that the effect of the district court’s opinion was to cut off a postpetition remedy to section 215.26, thus denying a retroactive remedy to taxpayers affected by an unconstitutional statute, when it stated: "While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax."  

Moreover, in *Newsweek II*, the Court explicitly indicated the reasoning found in *Reich v. Collins (Reich II)* was applicable. In the *Reich* decision, the Court observed a set of facts parallel to those which later arose in *Leon* and *Bridger*. The Court disapproved the ruling by the Supreme Court of Georgia, which, if let stand, would have allowed the state of Georgia to refuse a refund when "the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." The very nature of the circumstances outlined in *Reich*—a state tax statute declared unconstitutional when duress existed in the extraction of the tax, mandated retroactive relief—establish the grounds for redress. These are the same circumstances present in the twin class actions, *Leon* and *Bridger*. The issue of payment of a tax under duress, as alluded to earlier, is a circumstance which the United States Supreme Court called for remedial solution. In *McKesson*, the Court stated:

The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax’s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningfull
backward-looking relief to rectify any unconstitutional deprivation.\textsuperscript{117}

Perhaps, the Court did not literally mean that meaningful "backward-looking relief to rectify an unconstitutional deprivation" does not always mean a refund, but the strength of the language and the choice of these words, in the context of the discussion of the Georgia tax involved in the case, clearly gives this impression.\textsuperscript{118} Under these circumstances, the mere potential access to a tax procedure, at some point in time prior to the declaration of the unconstitutional nature of the tax, would appear to be inadequate to meet the standard set forth in \textit{Reich}. It should also be stated, however, that the establishment of time limits for refund actions, whether in the form of a statute of limitations or a statute of non-claim, is a generally accepted method of insuring a state's fiscal stability.\textsuperscript{119}

State tax courts in other jurisdictions have addressed this issue in light of \textit{McKesson}.\textsuperscript{120} The New York Tax Court opinion in \textit{Brault v. New York State Tax Appeals Tribunal},\textsuperscript{121} represents one example of the common rationale that is found in these opinions. That rationale is simply one grounded in the state's need for fiscal planning.\textsuperscript{122} The \textit{McKesson} Court addressed this by saying: "The State's interests in avoiding serious economic and administrative dislocation and additional administrative costs may play a role in choosing the form of and fine-tuning the relief to be provided McKesson, though Florida's interest in financial stability does not justify a refusal to provide relief."\textsuperscript{123}

Thus, the \textit{McKesson} Court seemed to acknowledge the need for such overarching concerns such as "financial stability," but did not suggest these concerns eroded the need for relief.\textsuperscript{124} The circumstances of \textit{Leon} and \textit{Bridger} can be viewed as particularly inequitable to the taxpayers, even beyond the use of duress in obtaining payment of the unconstitutional tax. Indeed, an argument within the bounds of reason could go so far as to characterize the denial of relief after the application of duress as a type of legal "gotcha." This is not simply attributable to the existence of duress in extracting payments, but also because the unconstitutional nature of the underlying tax

\begin{itemize}
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} See id. at 44.
\item \textsuperscript{120} See \textit{Reich v. Collins (Reich II)}, 513 U.S. 106, 109 (1994); see also \textit{Newsweek, Inc. v. Fla. Dept'p of Revenue (Newsweek II)}, 522 U.S. 442, 443 (1998).
\item \textsuperscript{121} 696 N.Y.S.2d 579 (App. Div. 1999).
\item \textsuperscript{122} \textit{McKesson}, 496 U.S. at 44.
\item \textsuperscript{123} Id. at 21.
\item \textsuperscript{124} Id. at 37.
\end{itemize}
statute, as a Fifth Amendment violation, was raised on appeal in the First District in an appellate decision preceding the class actions and let stand by the Supreme Court of Florida in *Harris v. Florida. Dep't of Revenue (Harris I).* This decision and jurisdictional appeal occurred before conflict jurisdiction ultimately brought the constitutionality of the unlawful statute before the court in *Herre.* Also, as in *Newsweek I,* taxpayers reasonably relied upon the apparent availability of a post-payment remedy when paying the tax. Unfortunately, the post-payment remedy represented an hour-glass of rights, which was tipped over upon payment; therefore, it ran out before the statute was declared unconstitutional. Such a remedy sounds in theory, more than fact, if it begins to disappear once a tax is paid, especially if paid under duress.

In *Kuhnlein,* the Supreme Court of Florida appeared to follow the *McKesson* decision because it recognized that the statute at issue was both void ab initio and, equally important under *McKesson,* there was no way the State of Florida could correct the wrong which had resulted from the imposition of the fee. In the *Newsweek II* and *McKesson* decisions, an adequate remedy was not balanced upon elimination of an administrative application for refund. Instead, the legal lens was focused on remedies of constitutional dimensions. Both cases addressed tax procedures to provide backward looking relief from facially unconstitutional taxation. Under the circumstances present in *Leon* and *Bridger,* elimination of an administrative exhaustion step, via the State of Florida, provided no adequate backward looking relief to the original class of plaintiffs and therefore, *it may be argued,* an incomplete constitutional remedy. Application of precedent, such as *Victor Chemical,* based upon a concept of sovereign immunity, through the enactment of a non-claim statute, seems incongruent with the maxim that statutory limitations cannot override constitutional rights. As stated eloquently by the Supreme Court of Florida in *Kuhnlein:* “Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will.”

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125. 563 So. 2d 97 (Fla. 1st Dist. Ct. App. 1990), review denied, 574 So. 2d 141 (Fla. 1990).
126. *Herre v. Fla. Dep't of Revenue (Herre I)*, 617 So. 2d 390, 390 (Fla. 3d Dist. Ct. App. 1993); see also *Fla. Dep't of Revenue v. Herre (Herre II),* 634 So. 2d 618, 618 (Fla. 1994).
128. *Dep't of Revenue v. Kuhnlein,* 646 So. 2d 717, 726 (Fla. 1994).
129. See *Newsweek, Inc. v. Fla. Dep't of Revenue (Newsweek II),* 522 U.S. 442, 442–44 (1998); see also *McKesson,* 496 U.S. at 31.
130. *Kuhnlein,* 646 So. 2d at 721.
hour-glass statute of "non-claim" from the payment of a tax, paid under duress and pursuant to a statute later declared to be facially unconstitutional, appears, at the very least, inequitable, offers no relief for wrongfully injured parties, and steps outside the spirit, if not the letter of the law, found in the context of McKesson, Reich, and Newsweek, as well as the Supreme Court of Florida's earlier decision in Kuhnlein.

X. CONCLUSION

Perhaps statutory limitations and/or interpretation of the same, as outlined in this note, will be subsequently altered by the courts in the proper case. Or perhaps alternatively, the issues will be addressed and remedied by the Florida Legislature through amendment to Florida Statute section 215.26, thus eliminating the bar to recovery when taxes or fees are determined by Florida's courts to be facially unconstitutional. This would be accomplished by removing such circumstances in cases from the view that an hour-glass effect begins at the time of payment, especially if payment occurs under duress. Rather, under such circumstances, "non-claim" limitations should not begin to run before the statute, under which the tax was paid, has been declared unconstitutional.
2006–2007 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

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Recent trends on the employment front, both nationwide and in Florida, inspire hope on some fronts, but cause for alarm on others as the following laundry list of employment-related data illustrates:

- Aging and younger workers are calling for "more work-life flexibility."
- Rising cost of living makes securing and retaining employ-

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1. Niala Boodhoo, South Florida’s Economic Outlook: South Florida Employers Need to Focus on Retention in 2007, Experts Say, MIAMI HERALD, Jan. 15, 2007, at 23G [hereinafter Boodhoo, Focus on Retention]. Forty percent of the current United States labor force will be eligible for retirement by 2010. Id.
While average age of retirement is sixty-two, many older workers seek instead to opt for part-time work. Federal Reserve predicted that Florida would be hit hard thanks to its high concentration of housing-related employment. "In Miami-Dade and Broward Counties, consumer prices [increased] 4.4 percent" in 2007 over prices in 2006, thanks to higher rents, home payments, and property insurance seeing its largest yearly hike in twenty-five years: 8.2%.

With a shortage of workers, wages rose in 2005 and 2006. There is a "critical shortage of health care workers" nationwide. New nurses are receiving recruiting bonuses; incumbent nurses get retention bonuses.

A 2007 study found that 52% "of adults lack the literacy skills they need to compete in the 21st century." "A [striking] restructuring of the labor market [fueled] by technology and globalization has [created rising] demand for higher-educated workers and will" produce more pronounced income inequality.

"[T]he workforce will grow at a slower rate over the next 20 years [and] none of the growth will come from native-born Americans between the ages of 25 and 54."

In 2004, "[t]he expected lifetime earnings of males with a bachelor’s degree" was 96% higher than their counterparts.

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2. Id. "At times, [Miami-Fort Lauderdale area prices] ran 30 percent higher than the U.S. average for urban areas." Niala Boodhoo, After Years of Record Growth, 2007 May Be a Year of Moderation for Economy, MIAMI HERALD, Jan. 15, 2007, at 22G [hereinafter Boodhoo, Years of Record Growth]. Main cause: Housing prices and insurance premiums. Boodhoo, Focus on Retention, supra note 1.

3. See Boodhoo, Focus on Retention, supra note 1.

4. Boodhoo, Years of Record Growth, supra note 2.


7. Boodhoo, Focus on Retention, supra note 1.

8. Id.


10. Id.

11. Id.
with only a high school diploma.\textsuperscript{12}

\begin{itemize}
  \item "2.9 million manufacturing jobs have been lost" since 2001.\textsuperscript{13}
  \item In 2007, "there was a notable increase in the rate [of] unmarried mothers with children under age 1" in the labor force, "up 4.3 percentage points to 59 percent."\textsuperscript{14}
  \item In 2007, for the second consecutive year, Florida has achieved "the [number two] spot as the fastest growing high-tech hub."\textsuperscript{15}
  \item In 2005, Florida ranked "as the fourth largest high-tech state in the nation."\textsuperscript{16} Florida's "high-tech industry added 10,900 jobs for an industry total of 276,400 tech workers in 2005."\textsuperscript{17}
\end{itemize}

This survey article covers the several phases of public (and at times private) employment in Florida during 2006–07, beginning with the law (common, statutory, constitutional, and regulatory) governing the hiring of public employees and public officials. Part III outlines recent legal developments touching on the terms and conditions of public employment. Among other topics, Part III explores recent legal issues in the Fair Labor Standards Act (FLSA)—a variety of topics concerning wages and hours of employment. The "Benefits" section covers developments involving health care, Family and Medical Leave Act (FMLA) issues, disability and death benefits, workers' compensation, unemployment compensation, safety issues, and public pensions. Part IV surveys recent cases and statutes governing discipline, retaliation, the First Amendment and the Hatch Act. Part V, "Employment Discrimination," outlines recent developments in the law relating to race, national origin, affirmative action, gender, age, disability, religion, and concludes with a brief roundup of remedies recoverable in employment discrimination lawsuits.

\textsuperscript{12} Id.
\textsuperscript{13} Carolyn B. Maloney, \textit{Protect All Workers—Here and There}, \textit{Miami Herald}, Jan. 16, 2007, at 15A.
\textsuperscript{15} Madhusmita Bora, \textit{High-Tech Strides Earn High Marks}, \textit{St. Pete Times}, Apr. 24, 2007, at 1D.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
II. THE LAW GOVERNING PUBLIC EMPLOYMENT

A. Hiring Issues

1. Hiring Freezes

In 2007, Governor Charlie Crist ordered “all state agencies to cut 4 percent from their budgets and prepare for 10 percent cuts,” thanks to lower tax collections. In response, public universities and community colleges have imposed a hiring freeze on new faculty. For example, Florida International University (FIU) eliminated eighty positions through attrition. Moreover, FIU is considering freezing employee raises. Overall, eleven Florida public universities must cut $100 million in spending in 2007 and were told to be prepared to cut another $150 million. In 2007, Dania Beach’s city manager imposed a ninety-day hiring freeze until the Florida Legislature decides “how much money local governments can collect” in property taxes after reforms take effect. Despite budget cuts, Fort Lauderdale will increase its police force to 478 in 2006, and to 498 in 2008, plus twelve frozen positions, which will be hard to fill, in light of the trend of city police officers leaving urban areas for suburbs that offer higher pay and less work.

2. Hiring Incentives

In 2007, the United States Senate Judiciary Committee approved a bill that would set up, “within the U.S. Department of Justice, a student loan repayment program for lawyers who [promise] to [stay] employed for . . . three years [or more] as state or local criminal prosecutors, or as state, local or federal public defenders in criminal cases.” While Broward County pays

18. Noah Bierman, FIU Spares Its Faculty as Others Put Freeze on Hiring, MIAMI HERALD, July 12, 2007, at 3B [hereinafter Bierman, FIU Spares Its Faculty]. Facing lower tax revenues, the Florida Legislature held a special session in September 2007 to balance the state’s $71.5 billion budget. Gary Fineout & Marc Caputo, Deeper Budget Cuts on the Way, MIAMI HERALD, July 25, 2007, at 1A.
20. Id.
21. Id.
22. Id.
24. Diana Moskovitz, Budget Crunch Impacts Cop Hires, MIAMI HERALD, Aug. 5, 2007, at 1BR.
$2500 of county employees’ school tuition annually per worker, Miami-Dade County pays up to “50 percent of county employees’ school tuition with no annual limits.”

A Miami Herald editorial criticized Miami-Dade County’s reimbursement policy as too lenient and too generous, given that the employee need only earn “a ‘C’ grade and work for the county one year after receiving the degree.”

A severe shortage of bus mechanics forced Broward County Transit, in 2007, to increase starting pay for new mechanics by 39%, which may necessitate the first bus fare hike in the county “in more than 10 years.” Starting pay will rise “from $16.64 to $23.19 an hour.”

B. Outsourcing and Privatization

“[O]utsourcing by foreign companies has created more than 6.5 million jobs for American workers.”

One of the main causes of the “scandal over treatment of outpatients at Walter Reed Army Medical Center” was the privatization of the hospital’s support workforce. “[T]he largest federal workers union, blamed pressure on the [United States] Army from the White House’s Office of Management and Budget for the decision to privatize its civilian work force.” In 2007, the Federal Office of the Director of National Intelligence revealed that “private contracts now account for 70 percent of the intelligence budget.” One expert urged Congress to exercise better oversight procedures to reduce the “conflicts of interest that [emerge] when agencies and industry[ies get too] close.”

In Dania Beach, Florida, contentious efforts to outsource lifeguards at the beach in order to save money came to the fore in 2007 as it had in 2006. Critics claim privatizing beach lifeguards will put lives at risk because the independent contractors “are less skilled, less experienced, and lower-paid than” city employees.

28. Id.
30. Id.
32. Steve Vogel & Renae Merle, Staff Privatization at Walter Reed Under Scrutiny, MIAMI HERALD, Mar. 11, 2007, at 9A.
33. Id.
35. Id.
36. Jasmine Kripalani, Lifeguards at Risk Now, MIAMI HERALD, July 16, 2007, at 1B.
37. Id.
Learning from the wrenching fight to unionize janitors at the University of Miami, FIU decided in 2006 "to end 10 years of outsourcing custodial work." 38

Confounding the conventional wisdom that privatization saves money, Florida’s agency for aiding disabled residents insists it can cut its budget by hiring more state employees and terminating the private contractors who “now do the work.” 39

C. Background Checks and Surveillance of Employees

A 2007 government report estimates there are “9.4 million illicit drug users and 10.1 million heavy drinkers [holding down] full-time jobs.” 40 But “the rate of drug-abusing” and heavy-drinking employees is lower in the South. 41 As a result, more “employers are testing for drug and alcohol abuse.” 42 “The lowest rate of [illegal] drug use,” 3.4%, was found among firefighters and police officers. 43 In 2006, the federal government mulled over whether to include hair analysis in its existing employee drug testing guidelines. 44

In 2007, the University of Georgia subjected new hires to criminal record checks, prompting a faculty protest. 45 At a minimum, this screening entailed “running fingerprints through the Federal Bureau of Investigation” (FBI). 46

Under the Jessica Lunsford Act, contractors who work at public schools while children are present must undergo “fingerprinting and criminal background checks.” 47 In 2007, thirty-seven workers were put on unpaid leave after local school boards refused to give them clearance owing to minor criminal infractions, committed sometimes decades earlier. 48 If they are not

38. Ana Menendez, FIU Opt to Do the Right Thing About Janitors, MIAMI HERALD, Oct. 1, 2006, at 1B.
39. Gary Fineout, Agency Urges Firing Firms to Save Cash, MIAMI HERALD, Aug. 9, 2007, at 6B.
40. Jeff Nesout, Millions of Full-Time U.S. Workers Use Drugs, MIAMI HERALD, July 17, 2007, at 3C.
41. Id.
42. Id.
43. Id.
44. Curtis L. Taylor, Drug Tests Using Hair Debated, MIAMI HERALD, Nov. 24, 2006, at 33A.
45. Jonathan D. Glater, Critics Question Breadth of Background Checks for Hiring at Education Department, N.Y. TIMES, Feb. 11, 2007, at 18.
46. Id.
47. Niala Boodhoo, Workers’ Pasts May End Jobs, MIAMI HERALD, Feb. 22, 2007, at 1C.
48. Id.
cleared for work, many workers fear they will be fired and "lose pensions and healthcare benefits." A 2007 measure "would revise and standardize background screening checks for school contractors."  

In March 2007, the Miami-Dade County School Board modified its background screening standards to allow 500 excluded workers to file appeals for their jobs. The Florida Statutes provide that if a person's criminal record has been expunged, the individual "may lawfully deny or fail to concede arrests . . . except when" applying for certain state jobs and school positions. Moreover, it is "illegal for [an] expunged record to be disclosed" to a prospective employer outside the specified categories. "In 41 states, people accused or convicted of crimes . . . can have their criminal records expunged."  

In 2006, the United States Department of Justice urged Congress to extend access to an FBI database consisting of criminal history information to any employer who qualified for access.  

A Florida school for the deaf and blind was accused in 2007 of allowing felons on its campus to work on construction projects in violation of state law. In its defense, the school insisted the felons were monitored "by a full-time off-duty police officer and [it] only hired" them after the school was unable to "find a felon-free construction crew."  

In 2007, a bill proposed in the Florida Legislature would strengthen state regulation of the towing and wrecking industry by imposing "criminal background checks of tow truck operators." While Miami-Dade County

49. Id. For example, one contractor was not cleared because he publicly urinated on the side of a Florida highway twenty years earlier. Id.  
50. Id.  
53. Inquiry, supra note 52.  
54. Adam Liptak, Criminal Records Erased by Courts Live to Tell Tales, N.Y. TIMES, Oct. 17, 2006, at A1. Like Florida, "Illinois . . . prohibits prospective employers from asking about or making decisions based on expunged or sealed criminal histories." Id.  
56. Felons Worked on Campus, Paper Says Head of School for Deaf, Blind Defends Action, SUN-SENTINEL, Mar. 27, 2007, at 8B.  
57. Id.  
already conducts background checks on tow company owners, Broward County does not.\(^{59}\)

A 1999 Florida law “requires adults who come in routine contact with children,” including teachers, principals, and coaches, “to report suspected sexual abuse to authorities.”\(^{60}\) One Miami school violated this law, in 2006, when school administrators failed to report a sexual encounter between the school’s star football player and an underage girl.\(^{61}\)

In an effort “[t]o protect high-end secure data,” some employers have gone beyond background checks, key cards, and clearance codes, and have embedded microchips in employees for tracking purposes, however, this has raised privacy concerns.\(^{62}\) Wal-Mart was accused by a whistleblower, in 2007, of “spy[ing] on company [employees], critics, vendors, and consultants.”\(^{63}\) A growing concern, pitting privacy against security, stems from the employee practice of “forwarding their office e-mail to free Web-accessible personal accounts,” often simply to enable them to continue to work from home.\(^{64}\) But increasingly, employers are banning the practice and monitoring outbound e-mail and Web traffic to ensure compliance.\(^{65}\)

According to a 2007 study by the Centers for Disease Control and Prevention, workplaces are about “40,000 lives a year safer than they were in the 1930s.”\(^{66}\) In 2005, workplace deaths came to 5702, about 200 short “of the all-time low in 2003.”\(^{67}\)

Employers have every incentive for hiring workers who will not expose the employer to vicarious liability over negligent acts by employees, committed within the scope of employment. Florida precedent makes clear that an employer may be liable for injuries caused by an intoxicated employee on his way home from an employer-hosted party.\(^{68}\) In 2007, a case went to trial over whether an employee was acting within the scope of employment when

59. Hatcher, Legislature Considers, supra note 58.
60. David Ovalle, Athlete’s Sex Case Unreported for Weeks, Police Say, MIAMI HERALD, Jan. 17, 2007, at 1A.
61. Id.
62. Todd Lewan, High-Tech Helpers or the Tools of Big Brother?, MIAMI HERALD, July 22, 2007, at 1L.
65. Id.
67. Id.
68. E.g., Carroll Air Sys., Inc. v. Greenbaum, 629 So. 2d 914, 917 (Fla. 4th Dist. Ct. App. 1993).
he attended a luncheon hosted by his employer. 69 A third party injured by the intoxicated employee sought to hold the employer liable under the doctrine of respondeat superior. 70

In Copeland v. Albertson’s, Inc., 71 a robber sued an employer for injuries inflicted by the employees in capturing him. 72 While the trial court disposed of plaintiff’s case through summary judgment alleging negligent hiring and training, 73 the appeals court sent the case back for a determination of whether a Florida statute, which bars a claim for damages based on personal injury sustained by a plaintiff during the commission of a forcible felony, applies. 74 If the assault occurred after the felony was committed, then the employer is not immune from liability. 75

In Garcia v. City of Hollywood, 76 a pedestrian sued the City of Hollywood for injuries sustained when she was struck by an off-duty police officer driving his marked police car. 77 The Florida appeals court allowed the negligence case to proceed to trial, emphasizing that the officer was on his way to work to study for a work-related exam. 78 Although the court initially held that driving a police car to and from work was within the scope of an officer’s employment, 79 the court later withdrew its opinion and held that such activity was not within the scope of the officer’s employment. 80

D. Nepotism

Florida’s anti-nepotism law basically prohibits public employers from hiring members of their families or other relatives. 81 In 2006, the Miami-Dade County Police Department was accused of violating the state’s anti-nepotism law when the Department hired the police director’s son. 82 An investigation found several other instances in which the county hired rela-
tives of county employees.83 Specifically, Florida’s anti-nepotism law prohibits “public official[s] [with] authority over a particular job [from] employ[ing] or promot[ing] a relative into that job, or [from lobbying] for a relative to get [the public] job.”84 To fill public positions, Florida public employers must follow a competitive selection process that awards jobs based on merit—not on family connections.85

E. Immigration

A 2007 study “found that 34 percent of documented and undocumented immigrants arrive without a high school diploma and that 80 percent of immigrants without a diploma cannot speak English well or at all.”86

In 2006–07, more than one hundred cities in twenty-seven states have proposed measures that would punish employers who hire undocumented immigrants.87 Most of these efforts have failed either thanks to legal challenges or the cities themselves have changed their minds.88 A powerful legal argument maintains that these local laws are preempted by federal immigration law.89 By contrast, New Haven, Connecticut, who offers identification cards to undocumented immigrants, is in sharp departure from migrant restrictions imposed by other cities and states.90 Moreover, New Haven “already offers federal tax help to immigrants and [bars] police from asking about immigration status.”91 New Haven’s beneficent treatment of undocumented workers has stoked “interest in immigrant-rich South Florida.”92

In 2007, a bill was introduced in the Florida Legislature that would fine employers who hire undocumented workers and revoke any tax breaks or benefits they receive from the state.93 At the local level, Palm Bay, Florida,

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83. Id.
84. Id.
85. See id.
86. Smith, supra note 9.
87. Michael Rubinkam, Crackdown Against Illegal Immigration Faces Legal Setbacks, MIAMI HERALD, Jan. 21, 2007, at 14A. According to a study, “35 towns have approved undocumented immigrant laws, 35 have defeated them, and 35 others have ordinances pending.” Id.
88. Id.
89. Id.
90. Cara Rubinsky, Connecticut City Approves IDs for Illegal Immigrants, MIAMI HERALD, June 6, 2007, at 6A.
91. Id.
92. Alfonso Chardy et al., Local Officials Differ on City’s ID Card Idea, MIAMI HERALD, July 25, 2007, at 1A.
reversed a 2006 ruling that fined businesses that hired undocumented immigrants. 94 Likewise, in 2006, the Avon Park Florida City Council narrowly defeated an ordinance that would have sanctioned employers who hire undocumented workers. 95 Another proposal at the state level would force contractors, who do business with the State of Florida, to take part in the Department of Homeland Security’s free internet-based screening. 96

In 2007, Dunkin’ Donuts sought to strip three Key West, Florida donut shops of their franchises after the shops were accused of hiring undocumented workers. 97 Critics allege “Dunkin’ Donuts may be using [immigration] laws as a pretext for terminating franchise agreements.” 98 Key West employers have had a hard time finding workers due to “the lack of affordable housing.” 99

While current federal immigration law leaves it up to employers to verify that they are hiring legal employees, legislation proposed, but defeated in the United States Senate in 2007, would have required that documentation of legal status, such as Social Security numbers, “be run through the [E]lectronic [Employer Verification] System.” 100 Under the defeated measure, employers who violate the law could face fines and jail. 101 In August 2007, the Department of Homeland Security issued new regulations forcing employers to dismiss workers “whose Social Security numbers and names [do not] match government records.” 102 This new crackdown on illegal immigration will likely hurt key Florida industries such as “construction, agriculture, and hospitality.” 103

In 2007, the Department of Labor issued a final ruling prohibiting employers from substituting aliens’ names on permanent labor certification in a move to reduce immigration fraud. 104

94. Id.
95. Casey Woods, Immigration Opens Big Split in Small Town, MIAMI HERALD, Aug. 9, 2006, at 1A.
96. Boodhoo & Reinhard, supra note 93.
97. Patrick Danner & Niala Boodhoo, Dunkin’ Donuts Sues Franchise Owner, MIAMI HERALD, June 6, 2007, at 1C.
98. Id.
99. Id.
100. Suzanne Gamboa, Employers Protest Verification Rule, MIAMI HERALD, May 31, 2007, at 6C.
101. Id.
103. Id.
On remand from the United States Supreme Court, the Eleventh Circuit allowed Mohawk Industries employees—alleging that the carpet-maker conspired with labor recruiters to hire illegal immigrants with the aim of depressing wages for legal workers in Georgia—to press their claim under the Racketeer Influenced Corrupt Organizations Act (RICO). 105

F. Ethics and Conflicts of Interest

Many public governments have framed so-called codes of governmental ethics that set standards of conduct for public officials among others. 106 Florida requires that violations of its Code of Ethics be established by clear and convincing evidence of wrongdoing. 107

In 2007, a bill was proposed in the Florida Legislature that would require legislative staff members and lawmakers, but not members of the general public, to speak under oath while addressing the Legislature. 108 Critics of the measure insist the measure will “have a ‘chilling effect’ on debate.” 109

Whether public officials should refuse, on ethical grounds, to buy Super Bowl “tickets at face value” when the general public must pay far higher prices emerged as an issue in South Florida early in 2007. 110 The Miami-Dade ethics director ruled that the face value tickets do not amount to a gift, and the public officials did not solicit the tickets. 111 One public official refused the offer in an effort to “avoid any appearance of receiving unauthorized compensation or benefits.” 112

At the federal level, Democrats taking over Congress in 2007 proposed “new restrictions on gifts, meals or trips paid for by lobbyists.” 113 Moreover, lawmakers would have to reveal their support of pet projects “known as ear-

105. Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1281, 1295 (11th Cir. 2006). The Second and Ninth Circuits also allow such RICO suits. See Baker v. IBP, Inc., 357 F.3d 685, 687 (7th Cir. 2004) (citing Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002); Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001)). However, the Seventh Circuit, in Baker v. IBP, Inc., held that an employer that hired illegal employees did not share a common purpose with recruiters. Id. at 689.


108. Breanne Gilpatrick, Legislature Trying Truth or Consequences, MIAMI HERALD, Apr. 27, 2007, at 6B.

109. Id.

110. Jack Dolan et al., Public Servants Offered Super Bowl Tickets at Face Value, MIAMI HERALD, Jan. 11, 2007, at 1A.

111. Id.

112. Id.

113. Kirkpatrick, supra note 106.
marks that they [smuggle] into major bills."\textsuperscript{114} "An ethics bill passed the House" by a 411 to 8 vote in late July 2007 "aimed at curbing corruption in Congress."\textsuperscript{115} Among other reforms, the measure bars spouses "from the payrolls of campaigns."\textsuperscript{116} Three days after the ethics reform bill passed the House, the Senate approved an ethics and lobbying law entailing "a battery of new restrictions . . . on gifts, meals and travel paid for by lobbyists."\textsuperscript{117}

Florida’s "zero tolerance" law that prohibits lawmakers from accepting "gifts or meals from lobbyists" was challenged by lobbyists in 2006.\textsuperscript{118} According to the lawsuit, by "forcing lobbyists to [disclose] how much they get paid," the law violates Florida’s constitutional privacy right guarantee.\textsuperscript{119}

In 2006, the Miami-Dade Ethics, Integrity, and Accountability Task Force proposed to frame "a new code of ethics for" the county that would buttress the powers and duties of the County’s Commission on Ethics and Public Trust.\textsuperscript{120} To deal with the complaint that the ethics commission acts in secrecy, one aim will seek to make the body more transparent.\textsuperscript{121} Finally, a whistleblower provision would allow the commission to prove claims of retaliation against public employees.\textsuperscript{122} On September 19, 2006, the federal judiciary enacted new rules requiring disclosure of "junkets for judges"\textsuperscript{123} which raised perceptions that judges may have conflicts of interest when they take part in cases involving corporate sponsors of the conferences.\textsuperscript{124}

In 2007, the Florida commission that polices judges filed ethics charges with the Supreme Court of Florida against a Broward County Circuit Judge over "a pattern of arrogant, discourteous, and impatient conduct."\textsuperscript{125} Since 2005, complaints have been filed against three other judges for a range of

\begin{footnotesize}
\begin{itemize}
\item[114.] \textit{Id.}
\item[115.] Margaret Talev, \textit{Ethics Push Gains Ground}, \textit{MIAMI HERALD}, Aug. 1, 2007, at 3A.
\item[118.] Gary Fineout, \textit{Suit Targets Ban on Freebies}, \textit{MIAMI HERALD}, Sept. 29, 2006, at 8B.
\item[119.] \textit{Id.}
\item[120.] Charles Rabin, \textit{Ethics Board Seeks to Broaden Its Reach}, \textit{MIAMI HERALD}, Mar. 22, 2007, at 8B.
\item[121.] \textit{Id.}
\item[122.] \textit{Id.}
\item[125.] Nikki Waller, \textit{Judge Faces Ethics Charges}, \textit{MIAMI HERALD}, Feb. 7, 2007, at 1B.
\end{itemize}
\end{footnotesize}
misconduct. While the Supreme Court of Florida "rarely removes judges from the bench," it has imposed "[o]ther forms of discipline, such as fines, reprimands, and suspensions." State ethics charges have also been threatened against Florida public university professors over trips paid for by textbook publishers. Weeks after such a trip, a professor's "three-member committee selected the publisher's book as required reading for all anatomy students at [Miami-Dade College's] Kendall campus." Nationwide, colleges struggle "with how to [frame] conflict-of-interest policies without" trampling on professors' authority to select textbooks.

In the past, Florida law required "persons seeking any federal public office' . . . to resign from one office to run for another." But "a giant loophole [was created in 2007] in the resign-to-run law." Now, anyone in public office in Florida can "run for Congress without having to resign from their current [position]."

G. Affordable Housing for Employees

Sixty percent of Miami-Dade County business owners "said the rising cost of housing in" South Florida has eroded "their ability to recruit employees." In response, most employers raised salaries or added relocation assistance. Other innovative programs aimed at recruiting employees include: 1) funding up to $300,000 of a new employee's mortgage; 2) offering signing bonuses; and 3) offering forgivable loans for employees "who are buying a first home." In 2005, "the average wage in Miami-Dade County" was $40,610; virtually pricing out many teachers and police officers from home ownership.

126. Id.
127. Id.
129. Id.
130. Id.
132. Id.
133. Id.
134. Niala Boodhoo, Firms Unwilling to Tackle Housing Issues, Survey Says, MIAMI HERALD, Nov. 15, 2006, at 1C.
135. Id.
136. Id.
137. Id.
One private hospital is contemplating purchasing distressed developments or building new homes on tracts of land it already owns. The hospital "already has a program helping . . . employees who are first-time homebuyers with . . . forgivable loans to help with down payments." A 2007 study found that health care workers are unable to afford home ownership, especially in South Florida. The study found that an average "of $93,500 [is] needed to qualify for a mortgage . . . median-priced home," far above incomes earned by health care workers.

In 2007, a real estate developer funded a $5 million grant to address the long commute that many South Florida teachers and nurses endure thanks to the lack of affordable "housing near their jobs." The Urban Land Institute aims to add "3500 units of workforce housing in . . . three [targeted] markets within five years." Hallandale Beach is addressing the housing shortage for lower-wage earners by launching a program lending the 20% down payment for eligible workers who need not repay the loan until the property is sold.

In 2007, the Miramar Florida City Commission voted unanimously to approve a proposal by a developer to discount twenty-one townhouses by $30,000 for public service workers, including teachers and police officers. Moreover, Miramar is assessing the feasibility of "modular housing, shotgun homes and denser development lots as [ways of solving] its affordable housing crisis." The Broward County School Board hopes to solicit bids from developers in October 2007 to build 300 affordable rental housing units for new teachers on "four sites in Fort Lauderdale and Pompano Beach."

139. Id.
140. Jane Bussey, Home Ownership Hindered, MIAMI HERALD, Jan. 11, 2007, at 3C.
141. Id.
142. Lesley Clark, Grant Targets Housing Woes, MIAMI HERALD, Feb. 2, 2007, at 5B.
143. Id.
144. Jasmine Kripalani, Town Payments, MIAMI HERALD, July 29, 2007, at 1BR.
145. City OK’s Revised Offer from Builder, MIAMI HERALD, Apr. 5, 2007, at 3B.
146. Natalie P. McNeal, Miramar Targets Its Housing Crisis, MIAMI HERALD, Apr. 18, 2007, at 1B.
147. Hannah Sampson, Board’s Aim: Rental Units for Teachers, MIAMI HERALD, Sept. 9, 2007, at 1BR.
III. RECENT LEGAL DEVELOPMENTS IN PUBLIC EMPLOYMENT

A. Hours and Wages

1. Fair Labor Standards Act Issues

The FLSA governs minimum wage, overtime pay, and child labor in both the public and private employment sectors.\(^{148}\) The federal minimum wage was frozen at $5.15 an hour from September 1997 until July 24, 2007, when the minimum wage rose “70 cents to $5.85 an hour,” ending “the longest period without an increase since . . . 1938.”\(^{149}\) “Legislation signed in May [2007] increases the [rate] 70 cents each summer until 2009, when it will reach $7.25 an hour.”\(^{150}\) Critics of minimum wage increases insist they do not reduce poverty, but instead, “reduce the number of jobs for low-skilled workers.”\(^{151}\) Columnist George Will opposes increases in the minimum wage, in part on the bald assertion that “most of the 0.6 percent (479,000 in 2005) of America’s wage workers earning the minimum wage are not poor.”\(^{152}\) Moreover, he cites studies that indicate that increases in the minimum wage encourage more teens to drop out of school.\(^{153}\) Some economists insist that “a higher minimum wage” prompts employers to move jobs offshore.\(^{154}\) By contrast, one survey of small business owners found that they can handle the boost in the minimum wage.\(^{155}\)

“Frustrated by Congress’ inaction” until 2007, twenty-eight states—including Florida—enacted “minimum wages above the federal floor, [covering] 70 percent of the work force.”\(^{156}\) For example, the minimum wage in Florida is currently $6.67 an hour.\(^{157}\) By constitutional amendment, Florida’s minimum wage will be “adjusted each fall for inflation.”\(^{158}\) Florida “[b]usinesses that pay minimum wage”, covering about 400,000 of the state’s 8.7 million workers, “must post signs in English and Spanish stating


\(^{150}\) Id.


\(^{153}\) Id.

\(^{154}\) Experts Seek Wage Reform, MIAMI HERALD, Oct. 12, 2006, at 1C.

\(^{155}\) Study: Small Businesses Can Handle Wage Boost, MIAMI HERALD, Dec. 27, 2006, at 3C.

\(^{156}\) Greenhouse, Tax Cut, supra note 151.

\(^{157}\) Niala Boodhoo, Florida's Minimum Wage Rises 27 Cents Today, MIAMI HERALD, Jan. 1, 2007, at 5G.

\(^{158}\) Id.
the minimum [wage] and the rights of employees."\textsuperscript{159} About 3\% of all workers in Florida earn minimum wage.\textsuperscript{160} Since Florida raised its minimum wage, the unemployment rate dropped to 3.3\% from 4.4\%, belying critics who predicted increased unemployment in the wake of higher minimum wage laws.\textsuperscript{161}

The FLSA also governs overtime pay. In 2007, the United States Supreme Court, in \textit{Long Island Care at Home, Ltd. v. Coke},\textsuperscript{162} resolved conflicting provisions of the FLSA's home companion exemption from overtime rules as it applies to third-party employers.\textsuperscript{163} According to one study, "3 million people work in direct-care jobs . . . as nursing assistants, home health aides, and personal care aides."\textsuperscript{164} Their wages average "less than $10 per hour" and 25\% of such workers lack health insurance.\textsuperscript{165} The Court's unanimous decision denying these health care workers overtime pay was criticized as "'another blow to struggling, low-wage women.'"\textsuperscript{166} The Eleventh Circuit Court of Appeals ruled in 2007 that companionship services are exempt from the overtime provisions of the FLSA.\textsuperscript{167}

In 2005, the United States Supreme Court ruled that under the FLSA, time spent walking between the area where workers put on and take off protective gear, an activity that is "integral and indispensable"\textsuperscript{168} to the principal activity, plus time spent waiting to doff, is compensable.\textsuperscript{169} By contrast, time devoted to waiting to put on the first article of gear is excluded from the scope of the FLSA under section 4(a)(2) of the Portal-to-Portal Act.\textsuperscript{170} Similarly, in 2006, the Eleventh Circuit Court of Appeals ruled that under the

\begin{flushright}
159. \textit{Id.}
161. \textit{Id.}
165. \textit{Id.}
166. Pete Yost, \textit{Home-Care Employees Not Entitled to Overtime}, \textit{MIAMI HERALD}, June 12, 2007, at 3C.
170. \textit{Id.} at 42.
\end{flushright}
Portal-to-Portal Act, an employee's time spent commuting to the job site in
an employer-owned vehicle was compensable under the FLSA, even though
the employer insisted that the vehicle be parked overnight at a secure parking
lot. In 2007, a Florida appeals court ruled that construction workers at
Miami International Airport cannot be paid "for time spent on parking-lot
shuttles and clearing security checkpoints to get to their job site." In 2007,
airline workers at Fort Lauderdale-Hollywood International Airport sued
their employer after "they were forced to work through lunch breaks without
getting paid." Federal law requires greater airport security when the na-
tional terror threat is raised to "orange, or high, threat level." As a conse-
quence, "the Broward Sheriff's Office has spent [over] half a million extra
dollars [every] month to pay [officers] working overtime at Fort Lauderdale-
Hollywood International Airport."

The FLSA also regulates child labor. The recent trend at the Depart-
ment of Labor is to relax the rules governing teenage workers. For exam-
ple, in 2004, an FLSA amendment authorized, under certain conditions, em-
ploying fourteen to eighteen-year-olds in workplaces "that use machinery to
process wood products." The Department of Labor proposed rules in 2007
that would, for example, allow fifteen-year-olds to work as lifeguards at
swimming pools and water amusement parks, but not at beaches.

At the same time that the Department of Labor is relaxing restrictions
on teen employment, a 2007 study found significant numbers of teens "per-
forming [hazardous] tasks or working too late on school nights." According
to federal statistics, "[h]undreds of thousands of U.S. teenagers are in-
jured at work" annually and about seventy die each year from work-related
injuries.

171. Burton v. Hillsborough County, Fla., No. 05-10247, 2006 WL 1374493, at *8-9
(11th Cir. May 18, 2006).
173. Ina Paiva Cordle, Workers Sue AirTran over Unpaid Breaks, MIAMI HERALD, Feb. 7,
2007, at 1C.
174. Breanne Gilpatrick & Diana Moskovitz, Terror Level Raises Security Costs at Air-
port, MIAMI HERALD, Aug. 8, 2007, at 6B.
175. Id.
177. Id.
178. Id. at 19345–46.
10A.
180. Id.
2. Teachers' Pay

A 2006 survey found that "the average teacher salary [in the United States] increased by only $1,000 from 1994 to 2004, [far] less than the average [raise] for other professionals." In 2004, "the average annual salary for teachers was $46,597." For 2005 to 2006, "the national average classroom teacher salary" was $49,109. In Broward County, the 2005 to 2006 average salary was $44,000.

In 2006, the Florida Legislature approved a measure setting aside $147.5 million "to reward outstanding teachers." "Under the Special Teachers Are Rewarded, or STAR program," merit pay is tied to "how much a teacher's students improve their scores on the Florida Comprehensive Assessment Test, or FCAT." The STAR program has been challenged by a statewide teachers' union claiming that any merit system "is premature until base salaries . . . [equal] the national average."

Less than a year after the passage of the STAR program, however, the Florida Legislature scrapped the plan after teachers protested that it did not reward enough teachers and that it was unduly based on FCAT scores. In its place, in 2007, the legislature adopted a plan that still calls for school districts to evaluate teachers based on "FCAT scores, but also takes into account "how principals rate teachers." Bonuses "can range between five and [ten] percent of a teacher's annual salary."

A perennial pay equity issue at the college level stems from the gaping disparity between the salaries earned by professors and those earned by football and basketball coaches. While the University of Florida professors' "salaries rank 55th among 60 peer schools," the head coaches earn a combined salary of $4 million. While academic departments face budget cut-

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182. Id.
183. Hannah Sampson, Deal Lifts Teachers' Pay 5.6%, MIAMI HERALD, Aug. 23, 2007, at 1B.
184. Id.
185. State Ok's Teacher Merit-Pay Plan, MIAMI HERALD, Oct. 18, 2006, at 8B. The first performance-pay plan in the state was approved for Hillsborough County (Tampa). Id.
186. Id.
187. Id.
188. Gary Fineout, Teacher Bonus Plan in Peril, MIAMI HERALD, Mar. 8, 2007, at 1B.
189. Gary Fineout, Teacher Pay Plan Revised, MIAMI HERALD, June 30, 2007, at 7B.
190. Id.
191. See Fred Grimm, Taxpayers are Propping up the Jockocracy, MIAMI HERALD, Oct. 31, 2006, at 1B.
192. Id.
backs, "[a]thletic department budgets [grow] wildly."\textsuperscript{193} A United States Congressman for California, Bill Thomas, has challenged this state of affairs, stating: "Why should the federal government subsidize the athletic activities of educational institutions [through tax-exempt status] when that subsidy is being used to help pay for escalating coaches' salaries, costly chartered travel and state-of-the-art athletic facilities?"\textsuperscript{194}

Controversy erupted in 2006, at Florida State University (FSU), over a $29.5 million gift to the university by one of its chemistry professors who made millions for himself and the university from development of the anticancer drug Taxol.\textsuperscript{195} The professor stipulated that the money be used, not only to build a chemistry building, but also to endow four professorships.\textsuperscript{196} But when building costs soared, the university decided to drop the endowed positions, leading to a lawsuit and an order that FSU "return $11 million plus interest . . . to the professor's foundation."\textsuperscript{197}

In 2006, Broward Community College approved a new faculty contract calling for "faculty salary [raises] of [around] 4 percent."\textsuperscript{198} Trouble brewed at Florida Agricultural and Mechanical University, "the state's only public [and] historically black college," when in 2007, 150 of the college's 400 "adjunct professors and graduate assistants" went for months without receiving a pay check.\textsuperscript{199} Even "some full-time professors who teach outside their" fields went unpaid.\textsuperscript{200} The college has been rocked by scandal and financial wrongdoing over the years.\textsuperscript{201}

3. Longevity Bonuses and "Living Wages" for Public Employees

In the wake of severe budget cuts in 2007, Miami-Dade County entered negotiations with county employees to reduce bonuses guaranteed by contract.\textsuperscript{202} "Cost-of-living raises alone will cost the county $56 million" in

\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Breanne Gilpatrick, \textit{BCC Trustees Ok Faculty Contract}, MIAMI HERALD, Nov. 23, 2006, at 3B.
\textsuperscript{199} Brent Kallestad, \textit{FAMU Failed to Pay Part-Time Instructors}, MIAMI HERALD, Feb. 17, 2007, at 8B.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
2008, while merit raises come to $46.5 million. One solution proposed was to eliminate 1200 jobs, among other cuts. Another proposal would suspend merit raises for executive employees.

One controversial benefit reaped by Miami-Dade County government workers, known as longevity bonuses, has come under scrutiny as the county is forced by budget cuts to tighten its belt. While all but unheard of in the private sector, these bonuses, ranging from $350 to over $2000, that are in addition to cost-of-living raises, cost the county $15.9 million in 2006. An editorial in the Miami Herald urged an end to this entitlement at the taxpayers’ expense, where “county employees with 15 years or more on the job get a bonus paycheck just for sticking around.”

Shrinking sales tax revenue in 2007 is forcing the Broward County School District to employ fewer crossing guards, and instead of hiring 400 new teachers, it will only take on 200. Broward County’s “living wage law,” adopted in 2003, requires county employees to be paid $10.63 an hour, although the law does not govern contracts entered into before 2003.

4. The Wage Gap Between Men and Women

Women make about 80% of the salaries their male counterparts do one year after college. After ten years working, the gap widens further. Apart from sex discrimination, the gap stems in part from people’s choices. For example, some employers assume that young women will leave their jobs when they have children. For women without a college degree, the pay gap with men has narrowed slightly since the mid-1990s.

In May 2007, the United States Supreme Court ruled against a woman who failed to sue “within the 180-day statute of limitations from when her
The first paycheck showed evidence of sex-based pay discrimination.\textsuperscript{215} The trouble with this ruling, however, is that given the secrecy shrouding pay figures, women may not know what their male peers earned until it is too late.\textsuperscript{216} Critics regard the decision as a "severe weakening of civil rights."\textsuperscript{217} In August 2007, the House of Representatives "voted to reverse the Supreme Court’s [ruling] limiting the time workers have to sue their employers for pay discrimination."\textsuperscript{218}

Men, on average, earn more money than women.\textsuperscript{219} "[A] woman earns only 77 percent as much as her male counterpart with the same job description and experience."\textsuperscript{220} Among many possible reasons for this gap is that traditionally, how much each employee earns has been shrouded in secrecy.\textsuperscript{221} One proposed remedy that would enable women to know about wage disparities between men and women would be legislation forcing all employers to post salaries.\textsuperscript{222} Even absent legislation, several internet websites, such as Salary.com, PayScale.com, and Payscroll.com, try to level the playing field by providing salary information to the forty-seven million people looking for jobs each month, and to the untold "others who think they are underpaid at the ones they have."\textsuperscript{223} Surprisingly, a 2007 analysis of recent census data found that young women in several of the country's largest cities, working full-time, earned 117\% of men's wages for the twenty-one to thirty age group.\textsuperscript{224}

5. Wage Growth in South Florida

In 2007, Miami-Dade County’s wage growth was the fastest among the largest counties in the United States.\textsuperscript{225} While Miami-Dade County was up 8\%, wage growth rose only 5.6\% in Broward County between 2005 and


\textsuperscript{216} See id.

\textsuperscript{217} Id.

\textsuperscript{218} \textit{Supreme Court: House Against Pay Ruling}, MIAMI HERALD, Aug. 1, 2007, at 1C.


\textsuperscript{220} \textit{Seeing Red}, MIAMI HERALD, Apr. 26, 2006, at 1C.


\textsuperscript{222} Id.


\textsuperscript{225} Boodhoo, \textit{Wage Growth Up}, supra note 6.
While such statistics may be good news for the average worker, people at the lower end of the pay scale face unexpected hardship. For example, “wages have not kept pace” with the higher fines imposed for most traffic violations. As a result, many Floridians “fail to pay their tickets and [end] up with a suspended license.” It is estimated that 1.8 million Floridians have had their driver’s licenses either revoked or suspended. Since 900,000 of these Floridians drive anyway, a bill was introduced in 2007 that would authorize police to “impound or boot vehicles operated by anyone with a suspended or invalid license.” Two-time offenders could receive a year in prison.

While $165,200 annual salaries, in the abstract, sounds like a lot of money, such “low” pay is compelling some of the nation’s best judges to leave the federal court bench, eroding the quality of the federal judiciary according to the testimony of Supreme Court Justice Anthony Kennedy before Congress in 2007. With “first-year lawyers at leading [law] firms in large cities . . . earning almost as much as district judges,” nineteen federal judges have left the bench since 2004, many “to take higher-paying jobs.” In 2007, the United States Senate passed a bill that would raise federal judges’ salaries to keep pace with inflation.

6. The Mommy Track and Part-Time Worker Issues

A 2007 study found a “notable increase in the rate among unmarried mothers with children under age 1” in the labor force, “up 4.3 percentage points to 59 percent.” Another 2007 study found that “[t]he marriages of women who work outside the home are more likely to stay together than the marriages of those who don’t.” This finding runs counter to the view of many economists who insist “that the specialization of a traditional mar-

226. Id.
227. Larry Lebowitz, Bill Puts Brakes on Drivers Who Have Suspended Licenses, MIAMI HERALD, Mar. 5, 2007, at 1B.
228. Id.
229. Id.
230. Id.
231. Id.
233. Id.
234. Id.
riage—a bread winner and a homemaker—[is] more efficient and productive.” The Bureau of Labor Statistics found an increase of roughly “8 percent in the number of married women at home with infants from 1997 to 2004,” with the biggest growth “among mothers with college degrees.” All too often, stay-at-home mothers find that even a short break from their careers takes a “huge economic toll . . . over a lifetime.”

An emerging alternative between stay-at-home and full-time working moms is the rise in the appeal of part-time work. One study found that 60% of working mothers favor part-time over full-time work, an increase of 12% since 1997. “[A] new generation of working mothers” cherish flexibility, “but only 24 percent of them” achieve it. “A decade ago, 49 percent [of unmarried mothers] preferred full-time hours;” today only 26% do. By contrast, 72% of fathers “say the ideal situation is a full-time job.”

Bucking the national trend, 60% of women and 67% of men “working part time in Miami-Dade County want to work full time.” This departure from the national norm may be explained, in part, by the fact that only 20% of part-time workers have employer health insurance.

B. Health Benefits

1. Generally

Roughly “43.6 million people in the United States, or 14.8 percent of the population,” lacked health insurance in 2006. In Florida, over three million people do not have health insurance. “More than 1.5 million full-time [employees in Florida] are without health insurance.” Nearly “9.3

237. Id. In the new “‘egalitarian marriages,’ . . . husbands and wives share decision-making power more equally and housekeeping and child-care duties more equitably.” Id.
239. Id.
241. Id.
242. Id.
243. Id.
244. Id.
246. Id.
248. Menendez, supra note 38.
249. County Pay Boosts Families, MIAMI HERALD, Aug. 19, 2007, at 3L.
percent of children under 18 lacked [health] insurance," down from 13.9% in 1997.250 A bill in Congress proposes to extend health insurance to more uninsured children, but President Bush opposes the measure as one step toward socialized medicine.251

"About 47 percent of parents in families earning" under $40,000 annually lack "health insurance through their employers"—9% less than in 1997.252 After Texas, Florida has the highest percentage of uninsured children at 16.9%.253

"The percentage of large and medium-size employers paying 100 percent of [employees'] individual [health insurance] premiums [dropped] to 17 percent in 2004 from 29 percent in 2000."254 Only "6 percent of employers in 2004" paid the full premium for family coverage, down from 11% in 2000.255 Moreover, employees "are paying more in co-payments for doctor visits and for drug benefits."256

In 2005, health care spending rose 6.9%—the lowest increase in six years.257 The slower pace is owed in part to a bigger reliance on generic drugs.258 At the same time, 2005 spending on hospital care rose 7.9%, about the same as in previous years.259 About 2% of the U.S. population accounts for a third of health care expenditures.260 "Health insurance premiums . . . rose 7.7 percent [in 2006], twice the rate of inflation."261

252. See Employee Benefits Eroding, MIAMI HERALD, Mar. 14, 2007, at 1C.
253. Id.
254. Milt Freudenheim, Fewer Employers Totally Cover Health Premiums, N.Y. TIMES, Mar. 23, 2007, at 1C.
255. Id.
256. Id.
258. See id.
259. Id.
260. Id.
2. National Developments

a. Federal Legislation

In his January 23, 2007 State of the Union address, President Bush proposed changes to the Internal Revenue Code. Under the plan, employer-provided health insurance would be treated as taxable income. A standard deduction would be provided: $15,000 for families, $7500 for individuals.

On April 25, 2007, the House passed legislation that will make it illegal for employers or health insurers to discriminate against individuals based on their genetic information or test results.

In 2007, "[a] bipartisan coalition in Congress [proposed] a mental health-parity bill, which would [force] group health plans to [provide similar] coverage for mental and physical illnesses." The bill prohibits insurers from having "different co-payments, deductibles and out-of-pocket limits for mental-health benefits and medical/surgical benefits."

In 2007, the House of Representatives passed a measure forcing the federal "government to negotiate lower drug prices for the Medicare prescription drug program." President Bush said he would veto the bill because it would be "tantamount to price controls."

b. Innovative State Health Programs

In 2006, a Massachusetts law required all residents to have health insurance coverage, but the governor vetoed a provision that forced employers with eleven or more employees to provide employee health coverage, or pay...
an annual per worker assessment.\textsuperscript{270} On October 1, 2006, a Massachusetts agency issued final regulations forcing all employers of eleven or more workers to start making minimum contributions to employee health insurance.\textsuperscript{271} Of the four states with plans aimed at universal health care coverage, "only Massachusetts has mandated individual coverage."\textsuperscript{272}

In 2007, California Governor Arnold Schwarzenegger proposed a plan that forced employers "with 10 workers or more to buy insurance for their workers or pay a fee of 4 percent of their payroll into a program" to cover the uninsured.\textsuperscript{273} The plan would also cover individuals otherwise denied health insurance thanks to pre-existing medical conditions.\textsuperscript{274} Already, "71 percent of California employers offer [employees] health insurance."\textsuperscript{275}

Maryland’s innovative Fair Share Health Care Fund Act, which is aimed at forcing Wal-Mart Stores to spend more on employee health care, was successfully challenged in court.\textsuperscript{276} In \textit{Retail Industry Leaders Ass'n v. Fielder,}\textsuperscript{277} the Fourth Circuit ruled that the Act was preempted by the federal Employee Retirement Income Security Act.\textsuperscript{278} Meanwhile, Wal-Mart Stores announced in 2007 that "the number of [employees] enrolled in [its] health plan rose 8 percent" in late 2006, thanks to "its introduction of cheaper insurance policies."\textsuperscript{279}

In Utah, an entrepreneur proposed that small businesses "should stop [offering] group health insurance and instead" offer individual policies.\textsuperscript{280} Critics counter that people who are uninsurable, due to pre-existing illnesses, will suffer.\textsuperscript{281}

\begin{itemize}
\item \textsuperscript{271} 114.5 MASS. CODE REGS. 16.01 (2006).
\item \textsuperscript{272} Kevin Sack, \textit{California's Ambitious Health Plan Stalls}, \textsc{N.Y. Times}, Sept. 9, 2007, at A30.
\item \textsuperscript{273} Jordan Rau, \textit{Healthcare Overhaul Sought}, \textsc{Miami Herald}, Jan. 9, 2007, at 2A.
\item \textsuperscript{274} \textit{Id.}
\item \textsuperscript{275} \textit{Id.}
\item \textsuperscript{276} See Michael Barbaro, \textit{Appeals Court Rules for Wal-Mart in Maryland Health Care Case}, \textsc{N.Y. Times}, Jan. 18, 2007, at C4.
\item \textsuperscript{277} 475 F.3d 180 (4th Cir. 2007).
\item \textsuperscript{278} \textit{Id.} at 183.
\item \textsuperscript{279} Michael Barbaro & Reed Abelson, \textit{Wal-Mart Says Health Plan Is Covering More Workers}, \textsc{N.Y. Times}, Jan. 11, 2007, at C13.
\item \textsuperscript{280} Chad Terhune, \textit{Second Opinion: Employers Turn to Alternative for Insuring Staff Despite Legal Concerns, Workers Are Encouraged to Use Individual Policies}, \textsc{Wall St. J.}, July 30, 2007, at A1.
\item \textsuperscript{281} \textit{Id.}
\end{itemize}
3. Florida Developments

Health care experts met in Miami in 2007 to discuss ways of “covering America’s 46 million uninsured.” One plan, called Insurance-for-All, calls for “$25 billion in federal tax funding,” with the balance paid by “subscribers who would pay $94 a month for coverage with a $1,000 deductible and 20 percent co-pays.” Florida’s new secretary of the Agency for Health Care Administration favors covering all children “for preventive and catastrophic care.”

In 2007, Miami-Dade County weighed becoming self-insured to cover family members of county employees against spending thousands of dollars annually on insurance premiums. Already, county workers have “free HMO coverage for themselves, but family coverage” is expensive. But instead of passing on savings to employees by going self-insured, the county may have to use the fund to pay cost-of-living increases in light of the mayor’s plan to cut $222 million from the county’s budget.

The North Broward Hospital District announced plans in 2007 “to set up walk-up clinics in up to six Wal-Mart superstores.” The clinics will charge $50 to treat simple medical problems and write common prescriptions, but will refer more complex cases to one of its hospitals. Wal-Mart already has six clinics in Florida.

4. Wellness Programs

Thanks to mounting health care costs, many employers have set up wellness programs aimed at encouraging workers to switch to healthier habits that might reduce the incidence of diseases tied to “eating poorly and being overweight or inactive.” So-called “twinkie taxes” increase the price

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283. Id.
284. Id.
285. Matthew I. Pinzur, Dade May Offer Own Health Plan, MIAMI HERALD, Mar. 3, 2007, at 1C.
286. Id.
289. Id.
290. Id.
of fatty foods in company cafeterias and lower the price for salads and fruits.292

According to one expert, "if healthcare costs keep rising, they could consume 100 percent of the gross domestic product by 2026."293 But wellness programs face an uphill battle given that the food industry spends $25 billion annually to promote mostly unhealthy food choices while the federal government spends only $1 million promoting fruits and vegetables per day.294

Of the 63% of major U.S. companies who said they would become more involved in the health of their employees, about half in 2007 offered incentives for workers to take part “in exercise or other wellness programs.”295 Some employers build gyms in the workplace,296 offer personal “coaches and computerized health tracking.”297 One study found that health care costs could be cut “in half if the employee is a nonsmoker, nonobese and engages in physical activity three times a week.”298 While some employers charge smokers more for health insurance, few have been willing to charge overweight workers more.299 Other employers use the carrot, not the stick, such as lower deductibles for employees with “weight, cholesterol and blood pressure under control.”300

“The head of Florida’s prison system” warned correctional employees to get physically fit by 2009 or run the risk of losing their jobs.301 Under the plan, male workers over the age of fifty must “walk or run 1.5 miles in 17 minutes, do 19 push-ups in two minutes and a minimum of 27 sit-ups.”302 While Florida’s governor endorses the plan, some say the proposal is hurting employee morale.303

The health of truck drivers has come under scrutiny given studies showing that many truckers do not “wear seat belts because their stomachs get in

292. Id.
293. John Dorschner, Wellness Programs Can Save Big Money, MIAMI HERALD, June 6, 2007, at 3C.
294. Id.
295. John Dorschner, Shaping up the Workforce, MIAMI HERALD, Apr. 29, 2007, at 1E [hereinafter Dorschner, Shaping up].
296. E.g., John Dorschner, UM Invests $14M in Employee Gym, MIAMI HERALD, Apr. 29, 2007, at 2E.
297. Dorschner, Shaping up, supra note 295.
298. Id.
299. Id.
300. Id.
302. Id.
303. Id.
the way,” 28% of them suffer from sleep apnea, and 50% of them smoke.\textsuperscript{304} Already, commercial drivers cannot be licensed if their blood pressure is too high or if they suffer from severe heart conditions.\textsuperscript{305} One employer of truckers offers free “blood pressure and cholesterol checks,” while another employer offers a twelve-week weight-loss program.\textsuperscript{306} Another provides drivers, who suffer from apnea, with “air masks to help them sleep.”\textsuperscript{307}

The insurance company, Phoenix, is the first insurer to offer 20% discounts “on life-insurance policies to customers whose” body-fat ratio is low.\textsuperscript{308}

In light of the fact “that 9.4 million illicit drug users and 10.1 million heavy drinkers have full-time jobs,” many employers, in addition to instituting drug testing, are providing “benefits such as education and treatment.”\textsuperscript{309}

5. Retiree Health Benefits

“[After] years of [massive] layoffs, employee buyouts and sending jobs offshore, corporate America has helped create a pool of about 800,000 early retirees who now find themselves in a health care bind.”\textsuperscript{310} Too young for Medicare and unable to afford their own health insurance, former employees aged fifty-five to sixty-four welcome some big employer plans offering health insurance.\textsuperscript{311} Significantly, under these innovative plans, “no one could be [denied] coverage [over pre-existing] medical condition[s].”\textsuperscript{312} While the policies come with high annual deductibles and monthly premiums ranging from $400 to $1200, this is far less than these early retirees would pay on their own.\textsuperscript{313} Over four million people ages fifty-five to sixty-four are jobless and increasingly unable to afford health insurance.\textsuperscript{314} Only 18% of large employers defray part of the cost of health insurance for retirees under age sixty-five.\textsuperscript{315}

\begin{thebibliography}{99}
\bibitem{304} Emily Fredrix, \textit{Road Hazards}, MIAMI HERALD, July 11, 2007, at 1C.
\bibitem{305} Id.
\bibitem{306} Id.
\bibitem{307} Id.
\bibitem{309} Nesmith, \textit{supra} note 40.
\bibitem{311} Id.
\bibitem{312} Id.
\bibitem{313} Id.
\bibitem{314} Id.
\bibitem{315} Freudenheim, \textit{supra} note 310.
\end{thebibliography}
Under new rules effective in 2007, state and local public employers must “disclose the value of the health care they have” pledged for their retirees.\(^{316}\) The rule was enacted in 2004 by the Federal Governmental Accounting Standards Board to counter the common practice among public employers who promise retiree health care without disclosing the cost.\(^{317}\) Many states with open-ended care obligations oppose the standard because these states will likely find their credit ratings being lowered.\(^{318}\)

New Jersey public employees were promised free health care when they retired, provided they had worked twenty-five years.\(^{319}\) But in 1994, the state stopped contributing to the health care fund and, today, New Jersey has almost “no money in reserve to cover” the $58 billion needed to cover health care for current and future retirees.\(^{320}\) One solution requires “retirees [to] pay for part of their health premiums” and shifts “retirees into a network of doctors at negotiated fees.”\(^{321}\)

6. Domestic Partnership Benefits

Some states, and many cities and counties, extend dependent health benefits to spousal equivalents of its public employees.\(^{322}\) In 2005, the Supreme Court of Alaska ruled that the state’s grant of health insurance to married employees’ spouses, but not to same-sex domestic partners of employees who could not legally marry, violated the Alaska Constitution’s Equal Protection Clause.\(^{323}\) In 2006, Alaska Governor Sarah Palin pledged that the state would obey the ruling affording health “benefits to same-sex partners of state employees.”\(^{324}\)


\(^{317}\) Id.

\(^{318}\) Id.


\(^{320}\) Id.

\(^{321}\) Id.

\(^{322}\) See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 791–92 (Alaska 2005). As of 2007, while Massachusetts is the only state that recognizes gay marriage, the District of Columbia and five states offer civil unions or domestic partnerships to gay couples. *The Sky Isn’t Falling*, WASH. POST, July 5, 2007, at 16A. In August 2007, Kathleen Sebelius, Governor of Kansas, “signed an executive order” extending protection to most state employees from sexual orientation discrimination. *Kansas: Governor Signs Ban on Bias Based on Sexuality*, N.Y. TIMES, Sept. 1, 2007, at A12. The order also extends protection to “people who have had surgery for sex changes.” *Id.*

\(^{323}\) *Alaska Civil Liberties Union*, 122 P.3d at 793–94.

\(^{324}\) *Same-Sex Partners to Get State Benefits*, MIAMI HERALD, Dec. 21, 2006, at 3A.
In 2007, California became "the first state to" force businesses holding "state contracts to offer domestic partners" of its employees the same benefits that spouses enjoy.\(^{325}\)

The Broward County, Florida, law granting "marriage-like benefits to unmarried domestic partners of employees, homosexual or heterosexual," was allowed to stand by the Supreme Court of Florida.\(^{326}\)

7. Disability and Death Benefits

According to a 2007 survey, "22 million Americans live and work in chronic pain," up from 15 million in 1996.\(^{327}\) Part of the blame is owed to ever-growing workloads.\(^{328}\) Another 2007 study found that when formerly "uninsured people became eligible for Medicare, they had 13 percent more doctor visits, 20 percent more hospitalizations, and reported 51 percent greater medical expenditures than those with the same diseases who had insurance all along."\(^{329}\) According to the Social Security Administration, one-third of twenty-year-old workers in 2007 will become disabled by age sixty-seven and the key cause of disability will be chronic disease, not work-related illnesses, injuries, or non-workplace accidents.\(^{330}\) "About 42 percent of full-time workers have no short or long-term disability" insurance.\(^{331}\)

In 2007, "Veterans Affairs Secretary Jim Nicholson" launched a plan to guarantee that disabled veterans "receive state benefits they might" have no knowledge of, owing to federal privacy law.\(^{332}\) Among other state benefits, veterans are entitled to job training.\(^{333}\) In Florida, "[t]en severely disabled veterans" received valuable state benefits "during a four-month tryout of the plan."\(^{334}\)


\(^{326}\) Caroline J. Keough, Broward Same-Sex Benefits Survive High Court Won't Hear Attack on Law, MIAMI HERALD, Apr. 7, 2001, at 1A.

\(^{327}\) Study: Many Americans Work/Live in Pain, MIAMI HERALD, Apr. 10, 2007, at 3C.

\(^{328}\) Id.

\(^{329}\) Gina Kolata, Some Chronically Ill Adults Wait for Medicare to Arrive, N.Y. TIMES, July 12, 2007, at A14.


\(^{331}\) Id.

\(^{332}\) Suzanne Gamboa, Veterans' Chances to Collect Benefits Improved, MIAMI HERALD, Feb. 13, 2007, at 3A.

\(^{333}\) Id.

\(^{334}\) Id.
In 2007, injured Iraq War veterans sued the federal government over delays in securing disability pay and health care. Among other allegations, the lawsuit accuses the Veterans Benefits Administration of knowingly cheating some vets by reclassifying post-traumatic stress disorder claims as pre-existing personality disorders to avoid paying benefits.

Under the Federal Hometown Heroes Act, "if an emergency responder dies of a heart attack or stroke within 24 hours of duty, there is a 'presumption' that the person died in the line of duty," entitling survivors to death benefits. In 2006, of the 106 firefighters who died in the line of duty, thirteen were entitled to death benefits under the Hometown Heroes Act. However, nationwide, over 200 survivors of such heroes have not received the $295,194 in death benefits, outraging advocates for fallen firefighters and police officers.

Under the federal Public Safety Officers' Benefits Act (PSOBA), Congress extended death benefits to families of firefighters or police officers "who enforce the criminal law rather than only civil law." The Federal Circuit ruled that a deputy sheriff, who did not actually enforce criminal laws and was accidentally killed in a wild horse roundup, was not entitled to PSOBA death benefits.

8. Family Medical Leave Act Issues

Under the FMLA, all state and local government eligible employees are entitled to twelve weeks of unpaid leave in a twelve-month period: (1) for birth or adoption of a child or placement of a foster child; (2) to care for a spouse, child or parent with a serious health condition; or (3) for the employee's own serious health condition. In the twelve years since the

335. Hope Yen, Vets Sue over Healthcare, MIAMI HERALD, July 24, 2007, at 5A.
336. Id.
338. Id.
339. Id.
341. See id. at 995–97.
342. Mark Zelek, Department of Labor Seeks Employer Input by Feb. 2, MIAMI HERALD, Jan. 15, 2007, at 7G. "Only 7 percent of U.S. [employers] have specific policies on caring for elderly family members,” but about 16% of all employees care “for an elderly, ill or disabled family member.” Christina Rexrode, Next Care Challenge: The Elderly, ST. PETE TIMES, Aug. 12, 2007, at 1F.
FMLA was enacted, over fifty million workers have taken unpaid leave and employers want clarification on what constitutes a "serious health condition" and the use of unscheduled intermittent leave or sporadic absences." Moreover, employers seek the right to call doctors to confirm employee illnesses.

While employers aim at weakening the FMLA, employee advocates are working to strengthen and extend its protections. For example, studies showing that the marriages of women who work outside the home are more stable than the marriages of those who do not are cited to support "public-policy arguments for more paid maternal and paternal leave." In Miami-Dade County, a local version of the FMLA grants unpaid time off to workers caring for grandparents.

While the FMLA provides for unpaid leave, paid leave has become a new battlefront. Already, "[a]t Ernst & Young, new fathers can take up to six weeks paid paternity leave." In 2007, a new law took effect in San Francisco "requiring paid sick leave for all . . . employees," the "first of its kind in the United States." In 2007, Ohio weighed the decision of whether to join eighteen states that grant maternity leave going beyond the requirements of the FMLA. The proposed Ohio law offers employees at a workplace with four or more workers twelve weeks of unpaid leave for infant care, no matter how long they have been on the job.

"Legislation has been proposed nationally and in Florida to [force] employers [to grant] paid sick days;" eight other states are weighing legislation too. Under the proposed federal Healthy Families Act, employers with fifteen or more employees must grant workers up to seven paid sick days a year.

345. Id.
347. Zelek, supra note 342.
348. Cindy Krischer Goodman, Year of the Man, MIAMI HERALD, Jan. 17, 2007, at 1C.
351. Id.
352. Cindy Krischer Goodman, Cold Remedy, MIAMI HERALD, Mar. 21, 2007, at 1C.
Almost 50% of all full-time, private sector employees receive no paid sick days. About 80% of employees in the bottom quarter of wage earners get no paid sick days at all. About 145 countries grant paid sick leave, leaving the United States as "the only industrialized [nation] lacking such a [benefit]."

A 2006 survey found "that personal illness accounts for only 35 percent of unscheduled absences, [with the balance owing] to family issues (24 percent), personal needs (18 percent), stress (12 percent), and entitlement mentality (11 percent)."

A Florida court ruled that an employer violated the FMLA by failing to explain FMLA benefits and leave rights to an employee when she asked for leave. This failure amounts to actionable interference with the worker's capacity to exercise her right to FMLA leave if she can establish resulting prejudice.

A hog slaughtering plant in North Carolina protested a company's decision not to give them Martin Luther King Jr. Day as a paid day off by refusing to work part of the day.

On July 1, 2007, a new Florida law, "[a]n act relating to domestic violence," took effect. The law entitles certain employees up to three working days leave who are either victims of domestic violence themselves, or have a family member who is a victim. The law applies to workplaces with fifty or more employees. Individuals requesting leave must have worked for at least three months.

C. Guns and Violence in the Workplace

In March 2007, the Florida Senate Criminal Justice Committee adopted a measure that would bar employers from prohibiting guns, pornog-

356. Id.
357. Id.
358. Absenteeism Hits New High, MIAMI HERALD, Oct. 28, 2006, at 1C.
360. Id. at 986–87.
363. Id. § 1, 2007 Fla. Sess. Law Serv. at 1035 (codified at FLA. STAT. § 741.313(2)(a) (2007)).
364. Id. (codified at FLA. STAT. § 741.313(3) (2007)).
365. Id.
raphy, and other legal material from their parking lots.\textsuperscript{366} Although the bill shields employers if any of the legal materials were enlisted to commit a crime, opponents insist the law infringes on employers’ property rights and Florida’s “at will” labor laws.\textsuperscript{367} Advocates of the bill assert that if an employee “is licensed to carry a gun,” that right also includes keeping it in his car, no matter where it is parked.\textsuperscript{368}

In April 2007, however, the Florida House Committee killed the NRA-backed measure a day after the gun slaughter of thirty-two people at Virginia Tech.\textsuperscript{369} Employers cheered the bill’s defeat, claiming the law would have exposed them to marked liability and posed a risk to employees.\textsuperscript{370} In a poll of 600 voters, 62% said they had no knowledge of the “gun at work” law.\textsuperscript{371}

In March 2007, a Florida “judge [flashed] a handgun in his courtroom after a man . . . punched a handcuffed defendant accused of molesting his son.”\textsuperscript{372} “Duvall County[‘s] Public Defender . . . questioned the safety of [permitting] judges to carry guns,” even though the practice is currently legal.\textsuperscript{373}

Violence in the workplace is more likely during downsizing and layoffs, and is often preceded by danger signals ranging from staring, to nasty looks, to verbal threats, to stalking.\textsuperscript{374} Violence can stem from former employees who are “bitter about their separation,” and domestic violence “can . . . spill over into the workplace.”\textsuperscript{375} Prudent workplace security policies should declare “zero tolerance for threatening or violent behavior.”\textsuperscript{376} In the private workplace, federal law makes clear that “in [any] workplace [in which] the risk[es] of violence and serious personal injury are [substantial] enough to be ‘recognized hazards,’” the employer must take reasonable steps to counter those risks.\textsuperscript{377}

\textsuperscript{366} Jim Wyss, \textit{Loaded Debate}, \textit{MIAMI HERALD}, Mar. 28, 2007, at 1C.
\textsuperscript{367} \textit{Id.}
\textsuperscript{368} \textit{Id.}
\textsuperscript{369} Monica Hatcher, ‘Guns at Work’ Bill Rejected, \textit{MIAMI HERALD}, Apr. 19, 2007, at 1C.
\textsuperscript{370} \textit{Id.}
\textsuperscript{371} 62% Percent of Voters Unaware of Gun Bill, \textit{MIAMI HERALD}, Apr. 17, 2007, at 3C.
\textsuperscript{372} Judge Pulls out Gun in Court, \textit{MIAMI HERALD}, Mar. 28, 2007, at 7B.
\textsuperscript{373} \textit{Id.}
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} \textit{Id.}
According to a survey of workplace violence conducted by the Bureau of Labor Statistics, over 70% of U.S. workplaces lack a policy addressing workplace violence, and about 80% offer no training for preventing it.\textsuperscript{378} The survey also found that 5.3% of all employers faced an incident of workplace violence in the previous year.\textsuperscript{379}

D. Workers' Compensation

In 2003, Florida’s workers’ compensation law was substantially overhauled, resulting in fewer injured workers’ claims, largely owing it to “less fraud and abuse.”\textsuperscript{380} In late 2006, state regulators approved a reduction in workers’ compensation insurance rates, averaging 16% statewide.\textsuperscript{381} Florida’s Chief Financial Officer ordered a 50% reduction in the 2008 Workers’ Compensation Administration Trust Fund assessment rate, which is projected to save Florida employers $19 million.\textsuperscript{382}

Thanks to sagging sales tax collections, the Broward County School District cut “$61 million from its budget” in 2007, including $2 million on workers’ compensation claims.\textsuperscript{383} Many employers saw annual workers’ compensation claims drop 80% after introducing wellness programs aimed at preventing illnesses.\textsuperscript{384}

In 2006–07, Florida case law addressed a wide range of workers’ compensation issues, including: 1) employee versus independent contractor status;\textsuperscript{385} 2) the exclusivity of workers’ compensation as claimants’ sole recourse;\textsuperscript{386} 3) heart and lung acts creating rebuttable presumptions that some


\textsuperscript{379.} Id.

\textsuperscript{380.} Drop in Workers’ Comp Rates Approved, MIAMI HERALD, Nov. 1, 2006, at 3C.

\textsuperscript{381.} See id.

\textsuperscript{382.} Assessment Rate Cut 50 Percent, MIAMI HERALD, July 9, 2007, at 5G.

\textsuperscript{383.} Shah, School Cuts, supra note 209.

\textsuperscript{384.} Emily Fredrix, Road Hazards, supra note 304 (explaining that as a result of the introduction of wellness programs aimed at preventing illness, one company in Michigan saw an 80% drop in workers’ compensation claims).

\textsuperscript{385.} Compare Orange County Sch. Bd. v. Powers, 959 So. 2d 370, 371 (Fla. 1st Dist. Ct. App. 2007) (explaining that student teachers are not employees covered by workers’ compensation), with Fla. Dept’ of Fin. Servs. v. MJ Versaggi Trust, 952 So. 2d 583, 586 (Fla. 2d Dist. Ct. App. 2007) (explaining that construction workers who do not meet the definition of an independent contractor are considered employees and covered by workers’ compensation); see also Blue Stone Real Estate v. Ward, 962 So. 2d 945, 947 (Fla. 1st Dist. Ct. App. 2007).

\textsuperscript{386.} FLA. STAT. § 440.11(1)(b) (2007) (providing for tort claims against “an employer [who] commits an intentional tort that causes” an employee’s injury or death); see generally Bakerman v. Bombay Co., 961 So. 2d 259, 265 (Fla. 2007) (finding an exception to workers’
illnesses are job-related for police and firefighters; 387 4) medical benefits; 388 5) pre-existing conditions; 389 6) the dual purpose exception to the going and coming rule; 390 7) offsets; 391 and 8) remedies. 392

E. Unemployment Compensation

According to a 2007 "study, unemployment benefits [in the United States] replace, on average, [only] 14 percent of workers' lost earnings." 393 At the federal level, in 2006, the Department of Labor issued a final rule requiring state agencies doling out unemployment compensation to protect confidential information as a condition for securing federal grants to operate their departments. 394 On January 16, 2007, the Department of Labor published a final rule that codifies a federal requirement that states may only

compensation immunity where an employer's acts were substantially certain to result in injury or death).

387. See Orange County Fire Rescue v. Jones, 959 So. 2d 785, 789 (Fla. 1st Dist. Ct. App. 2007) (finding “hepatitis C is no longer recognized as an occupational disease for firefighters”); City of Tarpon Springs v. Vaporis, 953 So. 2d 597, 599 (Fla. 1st Dist. Ct. App. 2007) (noting that the “presumption merely [shifts] the burden of proof” to an employer to prove that a heart attack was not suffered in the line of duty).


390. Wilcox v. AG Mart Produce, 942 So. 2d 959, 962–63 (Fla. 1st Dist. Ct. App. 2006) (stating that although an employee was injured while driving his company car home from work, he is not entitled to workers’ compensation under the dual purpose exception to the going and coming rule because the employer received no benefit from keeping its car at the employee’s house at night).


award unemployment compensation to claimants "who are able [to work] and available . . . for work."395

At the end of 2006, "Florida’s overall non-farm [unemployment] rate, seasonally adjusted, was 3.3 percent," with "Broward County’s jobless rate . . . the lowest in South Florida at 2.7 percent," while Miami-Dade County's unemployment rate was 3.5%.396 While Florida added 145,200 jobs in January 2007, which is a 1.8% growth, "the state’s rate of employment growth has slowed" markedly compared to the past few years.397 By June 2007, Florida’s jobless rate was 3.4%, still far lower than the national average and "the lowest of the 10 most populous states."398 While experts insist Florida is not “headed for a recession,” earlier forecasts of how much the state’s economy would contract were too sanguine.399 By July 2007, however, Florida’s jobless rate rose to its “highest [level] in two years.”400 The state’s unemployment rate in July registered 3.9%, quite a hike “over the June [to] July 2006 rate of 3.3 percent,” but Florida still ranks “below the national rate of 4.6 percent.”401

Claimants are not eligible for jobless benefits if they were “discharged for misconduct connected with work.”402 A Florida court ruled in 2007 that a claimant’s refusal to allow his employer to inspect the contents of his briefcase amounted to misconduct, especially since the former employee admitted that he possessed company property in his briefcase.403

396. Niala Boodhoo, Florida’s Jobless Rate Maintains Status Quo, MIAMI HERALD, Jan. 20, 2007, at 1C.
397. Niala Boodhoo, Job Growth Slow but Steady, MIAMI HERALD, Mar. 9, 2007, at 3C.
399. Id.
400. Niala Boodhoo, Jobless Rate Rises as Construction Slows, MIAMI HERALD, Aug. 18, 2007, at 1A.
401. Id.
403. Id. at 477.
F. Public Pensions

1. National Developments

Generally, nationwide public employee pensions are more secure than private sector employee pensions. Increasingly, however, more and more public employers are chipping away at those pension promises. Thanks to unexpectedly spiraling obligations to retirees, public employers have raised the eligibility requirements for retirement; some have declared bankruptcy to shed some of the nation’s $1.4 trillion public pension debt.

In the 1990s, many local governments started tapping their public pension funds to help pay for retiree health care of former public employees. But with “double-digit increases in health care costs,” some are regretting it.

At the federal level, “[t]he Governmental Accounting Standards Board [(GASB)] . . . sets the rules for state and local governments.” In 2006, the GASB proposed rules that would require public pension funds to report their financial position, much like private corporations.

Until recently, public pensions of federal lawmakers could be forfeited only if the office holder “commit[ed] crimes such as treason or espionage.” In 2007, however, a House bill weighed extending forfeiture for other “felonies related to the performance of official duties.”

2. Florida Developments

In 2007, “Florida became the first state” to enact a law banning state pension fund investing “in any companies doing business with Iran’s energy...
sector and Sudan." Together, Florida's pension fund and the investment fund for state employees amount to $130 billion.

In Florida, public employees "can forfeit [their] taxpayer-funded pension benefits" if they "are found guilty or plead no contest" to "conduct that represents a violation of public trust." Three Hollywood police officers arrested in an FBI sting in 2007 faced losing their public pensions if they accepted a plea deal or plead no contest to the charges.

As belt tightening grips Florida's cities and counties thanks to shrinking tax revenues and property tax reform, lavish public pension benefits have come under scrutiny. For example, some criticize Davie, Florida's generous system, whereby firefighters are entitled to a 95% pension of their final salary after thirty years. By contrast, Fort Lauderdale police officers receive only 60% after twenty years of service.

The Broward County School District's 10,300 substitute and part-time teachers' pensions, unlike their full-time counterparts, receive no matching funds from the school district. Criticized as the "privatization" of Social Security, the practice is being challenged in federal court by disgruntled substitutes and part-timers whose pensions are invested in low-interest accounts instead of a state matching program.

In 2007, a Florida court denied a beneficiary retroactive retirement benefits, since nine years earlier she had "failed to timely respond to three" notices of her right "to monthly retirement benefit[s] following her husband's death." Under Florida's Deferred Retirement Option Program (DROP), longtime school administrators are entitled to retirement benefits at the same time they earn their regular salary for five years before they retire. One popular Broward County school principal, however, faced

413. Sudan Off-Limits for Florida Pension Fund, MIAMI HERALD, June 9, 2007, at 3C.
414. Breanne Gilpatrick, State Investments Bill Would Drop Firms Active in Iran, Sudan, MIAMI HERALD, May 3, 2007, at 8B.
415. Wanda J. DeMarzo et al., Pensions at Stake in Police Scandal, MIAMI HERALD, Mar. 23, 2007, at 1B.
416. Id.
418. Id.
420. Id. Under a 1991 federal tax law, some public employers may "contribute to government retirement programs—instead of to Social Security—on behalf of their employees." Id.
422. Nirvi Shah, School's 'Kahuna' on Retirement Wave, MIAMI HERALD, Aug. 29, 2007, at 1B.
forced retirement at age fifty-seven or losing eleven months of retirement pay for unwisely enrolling in the DROP program.423

G. Working Conditions

Recent surveys reveal that both employers and employees are overworked.424 One study of small business owners found that 20% said they carried “their phones or documents on . . . bathroom breaks.”425 About 50% “checked voice mail or e-mail or used a cell phone during family time, while driving or while on vacation.”426 40% said they worked eighty-hour weeks.427 40% “had no plans to take a vacation in the next six months.”428 When work spills over into personal lives, “private lives . . . are not as private anymore.”429 Increasingly, workers face “24/7 client demands, [short] deadlines, and [volatile] work flows;” therefore, it is no wonder that “45 percent of high-earning [employees] are too tired [at the end of an overlong workday] to say anything to their spouses or partners.”430 Abusive employers are also contributing to employee “exhaustion, job tension, nervousness, depress[ion], and mistrust.”431 Poor morale lowers productivity too.432

In response, more and more workplaces are experimenting with ways of achieving a reasonable work-life balance.433 For example, some workers facing child-care emergencies bring a child to work or work from home.434 Some opt to work for a temporary agency, working full-time some weeks but “turning down jobs when family demands” emerge.435 It is no surprise that

423. Id.
424. See generally Jane Bussey, Work Life Overtakes Leisure, MIAMI HERALD, Jan. 9, 2007, at 1C [hereinafter Bussey, Work Life]. But a 2007 study found that “[t]he average worker wastes 1.7 hours a day [surfing the Web], socializing with co-workers, and conducting personal business.” Average Time Slacking: 1.7 Hours in a Workday, MIAMI HERALD, Aug. 27, 2007, at 9G.
426. Id.
427. Id.
428. Id.
432. Id.
temp agencies are projected to “grow faster than any other industry” in the next ten years, producing 1.6 million jobs.436 Today, temp jobs are held by 2.9 million people.437 Telecommuting—working at home—offers flexibility, eliminates commuting time, lowers absenteeism, and improves recruitment and retention.438

Innovative solutions to child-care responsibilities are emerging. For example, some hospitals offer “sick-child day-care center[s].”439 Bringing children to work, however, is sometimes not an option—either owing to employer inflexibility or hazardous workplaces.440 Flexible schedules are yet another popular option for achieving a reasonable balance between the demands of work and family. While flexible schedules are options for two-thirds of working parents earning over $71,000 a year, it is offered to less than one-third earning under $28,000 a year.441 A voluntary overtime system would be welcomed by many working parents as well.

Workers enlist a host of strategies for reducing job-related stress: some use the commute to decompress; others relax after work with a drink or two; some turn to physical activity; and some “negotiate a time out” at home where family members leave the tired worker alone and undisturbed until dinner.442

H. Health and Safety

“[I]n 2005, 406 people lost their lives on the job” in Florida while “246,300 were injured or became ill [thanks to] unsafe [working] conditions.”443 Florida has less than fifty Occupational Safety and Health Administration (OSHA) inspectors covering the whole state.444 Nationwide, 5734 workers died at work, “and 4.2 million were injured” in 2005.445 According to the Centers for Diseases Control and Prevention, workplaces today are about “40,000 lives a year safer than they were in the

436. Id.
437. See id.
438. See Mark Cheskin & Kristen Foslid, So You’re Thinking About Offering Telecommuting? Think Carefully, MIAMI HERALD, Mar. 12, 2007, at 9G.
440. Id.
441. Id.
442. Goodman, Struggling to Escape, supra note 430.
444. Id.
445. Id.
Among several factors credited for safer workplaces is the marked "increase in the number of . . . women, whose accident rate is [only one] tenth that of men." The four leading causes of job-related deaths include: 1) highway deaths; 2) falls; 3) a category known as "struck by object;" and 4) homicide. Roughly 75% of workplace killings stem from robberies. Workplace homicides decreased to 564 in 2005 compared to 1080 in 1994. Since 2001, OSHA enforcement of workplace safety weakened as OSHA's Secretary moved "aggressively away from regulations in favor of corporations' pledges to police themselves." In addition, Congress repealed an ergonomics regulation for employees. The Bush Administration successfully rolled back what it deemed onerous OSHA rules that put unnecessary "costs on businesses and consumers." Since 2001, OSHA issued fewer significant standards in its history.

I. Public Unions

In agency shops, public employees must pay union dues whether or not they join the union. Thirty years ago, the United States Supreme Court ruled that states must constitutionally recognize the agency shop for public employment so long as union dues go toward collective bargaining, contract administration, and grievance adjustment. At the same time, the ruling recognized that public employees' freedom of association is unduly burdened when the union forces them to contribute to the support of an ideological cause they oppose. What remained unresolved until 2007 was whether the employee must take the initiative and specifically object to having a portion of the fees used for political causes she opposes, or whether the union must obtain the objecting employee's consent before diverting fees for that purpose.
In *Davenport v. Washington Education Association*, the United States Supreme Court addressed the State of Washington’s “opt-in” law shifting the burden to the union to obtain objecting employees’ consent, in contrast to the traditional “opt-out” alternative already approved of in *Abood v. Detroit Board of Education* where the employee bears the burden of taking the initiative. In vacating the Supreme Court of Washington’s ruling, striking down the “opt-in” provision as an unconstitutional burden on a union’s rights of free speech and association, the United States Supreme Court said states are free to adopt either the “opt-in” or “opt-out” approach without violating the First Amendment.

Other federal level developments affecting public unions nationwide include a ruling by the District of Columbia Circuit Court interpreting a provision in federal law ensuring that Homeland Security “employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.” In *National Treasury Employees Union v. Chertoff*, the District of Columbia Circuit ruled that the Department of Homeland Security illegally restricted collective bargaining rights of its employees.

In 2007, President Bush and his Senate allies threatened to oppose an anti-terror bill if Congress approved it containing a provision entitling federal airport screeners to unionize. Nevertheless, on March 13, 2007, the United States Senate enacted a measure extending collective bargaining rights to Transportation Security Administration airport screeners.

A Florida court in 2007 upheld the constitutionality of a law that prohibits public employee unions, “their members, agents, or representatives, or . . . persons acting on their behalf . . . from soliciting public employees during working hours.”

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459. Id. at 2379.
464. 452 F.3d 839 (D.C. Cir. 2006).
465. Id. at 867.
IV. DISCIPLINE, RETALIATION, FIRST AMENDMENT, AND HATCH ACT REMEDIES

A. Discipline

At the federal level, the Congressional Research Service urged that at-will employees, who are quarantined after exposure to dangerous viruses be protected under the doctrine of wrongful discharge on the grounds that the employer violates public policy by undermining acts that are "beneficial to the public welfare."470

In 2007, the Florida House passed a bill prohibiting "the bullying of students and employees at school, on school buses, at school events, and online."471 "The Senate version of the [anti-harassment] bill is stalled in that chamber."472

Discipline cases involving public school teachers fall more or less into two categories: misconduct committed at school and off-duty misconduct. A 2007 analysis of thousands of Florida teacher investigations revealed that over 50% of the "750 teachers punished since 1997 for sexual misconduct or physical and verbal assaults on students . . . [continued] to keep their license[s] to teach."473 "While principals and superintendents can" dismiss errant teachers if they have notice of prior misconduct allegations, the state licensing board decides if the teacher should still be certified to teach in other Florida schools.474

Beginning in 2008, state education officials will unveil the website, MyFloridaTeacher.com, enabling parents to learn whether complaints have been lodged against teachers, the county where the misconduct occurred, and the ultimate resolution of any disciplinary action.475

Disciplinary action recently taken pursuant to complaints against teachers over misconduct committed at school include: a) "indefinite suspension [of a middle school arts teacher] after he showed students a documentary

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471. House Passes Bill to Ban Harassment at Schools, MIAMI HERALD, Apr. 25, 2007, at 9B.
472. Id.
474. Id.
[portraying] images of aborted fetuses;" 476 b) resignation of a second-grade teacher who admitted hitting students with a belt or ruler or shaking or grabbing them to control their behavior; 477 c) suspension of a high school teacher, in part, for using his "school-issued laptop to [view] sexually explicit websites;" 478 and d) potential dismissal of a teacher for lifting a student by his head. 479

Disciplinary action recently taken against teachers for off-duty misconduct include: a) potential dismissal of a teacher after he was arrested for fondling an eleven-year-old boy while on vacation in Hawaii; 480 b) potential discipline of a high school culinary arts teacher after he was charged with possession of marijuana and drug paraphernalia; 481 c) a history teacher quit after students saw pictures of her posing for the U.S. National Bikini Team on a website; 482 and d) a part-time high school music teacher was threatened with dismissal if he refused to pull out of a community theater production of _The Full Monty_, where he bared his bottom. 483

Turning to the judiciary, a judge ordered a court stenographer—and all her equipment—sent to jail until she completes an overdue transcript of a child rape case. 484 Judges themselves faced disciplinary action on several grounds including being arrested for smoking marijuana in a public park and for making insensitive comments in court about minority groups. 485 A Miami City Commissioner was removed from office after engaging “in a drunken fight with police at [an airport].” 486 In 2007, three police officers “re-

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477. _Teacher Who Hit Students Resigns_, MIAMI HERALD, Feb. 6, 2007, at 2B (stating that while corporal punishment is permitted by Florida law, Broward County had banned it).
478. _Two Teachers Accused of Misconduct Suspended_, MIAMI HERALD, July 25, 2007, at 3B.
479. Nirvi Shah, _Board to Rule on Firing Two Teachers_, MIAMI HERALD, Aug. 2, 2007, at 3B.
480. Id.
481. _Cops: Teacher Received Marijuana in the Mail_, MIAMI HERALD, July 26, 2007, at 3B.
482. Christina DeNardo, _Former Teacher Poses for Playboy_, MIAMI HERALD, Feb. 13, 2007, at 6B.
483. _Teacher Sticks by ‘Full Monty’_, MIAMI HERALD, Mar. 14, 2007, at 8B.
484. Scott Andron, _Tardy Transcriber Is Jailed_, MIAMI HERALD, Mar. 11, 2007, at 3B.
485. Nikki Waller & Kathleen McGrory, _Longtime Judge Charged with Smoking Marijuana_, MIAMI HERALD, Mar. 20, 2007, at 1A.
486. Editorial, _No-Contest Plea Isn’t an Acquittal_, MIAMI HERALD, June 6, 2007, at 16A.
signed after an investigation [found] they had sex with prostitutes and some [traded] drugs for [sex]." 487

B. Retaliation

I. Federal Whistleblower Statutes

The Whistleblower Protection Enhancement Act, passed by the House of Representatives in 2007, would extend protection against official retaliation to the FBI, to intelligence agencies, “[a]nd non-government workers employed by federal contractors.” 488 In addition, the measure extends anti-retaliation rights to employees who complain “about the politicization of science by patronage appointees and to airport security workers.” 489

Under the Federal False Claims Act (FCA), public employees who report government fraud are protected against retaliation, and may also recover “a percentage of the funds recovered.” 490 An amendment to the FCA, effective January 2007, requires public employers to instruct their workers on how to detect health care fraud and how to be whistleblowers once they expose it. 491 It is estimated that there is one billion dollars a year of Medicaid fraud in South Florida alone. 492 A former accountant at a Miami public hospital claimed she was discharged after blowing “the whistle on a financial scandal.” 493

Under the FCA, a person bringing a cause of action must be an original source of the information. 494 In 2007, the United States Supreme Court ruled, in Rockwell International Corp. v. United States, 495 that “[a]n ‘original

487. Three Officers Resign over Illicit Sex Charges, MIAMI HERALD, July 27, 2007, at 10B.
489. Id.
490. John Dorschner, Hospital Workers Learning How to Be Whistle-Blowers, MIAMI HERALD, Dec. 29, 2006, at 1C [hereinafter Dorschner, Hospital].
492. Dorschner, Hospital, supra note 490.
493. Tere Figueros Negrete, Fired Whistle-Blower Wants Job Back, MIAMI HERALD, July 14, 2007, at 5B.
495. 127 S. Ct 1397 (2007). The laid-off engineer’s FCA claim failed because he lacked the “direct” and “independent knowledge” of the alleged violations to qualify as an “original source” eligible to bring the qui tam suit. Id. at 1409.
source' is [defined as] 'an individual who has direct and independent knowledge of the information on which allegations are based.'

2. Florida Whistleblower Statute

Three retaliation cases were decided in 2007 under the Florida Private Sector Whistleblower Act (FPSWA). One retaliation claim was granted because the plaintiff offered evidence that the defendant was given an opportunity to remedy the misconduct. In addition, the plaintiff offered evidence that he complained to his employer on numerous occasions about the misconduct and, thus, his employer was aware of the misconduct before filing suit. Another circuit court ruled that it lacked jurisdiction to hear whistleblower claims against an archdiocese given the First Amendment's bar against secular court review of religious policy and administration. A third Florida circuit court dismissed a whistleblower’s claim because the FPSWA excludes employees of independent contractors from its definition of “employee.”

C. First Amendment and Hatch Act Issues

1. Public Employee Speech

In 2006, in Garcetti v. Ceballos, the United States Supreme Court ruled that public employees, who made statements as part of their official duties, “are not speaking as citizens for First Amendment purposes,” and so may face employer discipline stemming from work-related communications. In the wake of Garcetti, the Seventh Circuit Court of Appeals has ruled that a public school district in Indiana did not violate the First Amendment by dismissing an at-will school teacher for expressing her view on military operations in Iraq because current events were part of the teacher’s as-

496. Id. at 1403 (citing 31 U.S.C. § 3730(e)(4)(B)).
498. Cernada, 953 So. 2d at 618.
499. Id.
500. Miñagorri, 954 So. 2d at 642-43.
501. See Morin, 963 So. 2d at 261.
503. See id. at 1960.
signed duties. Another Seventh Circuit case explained the impact *Garcetti* has on the First Amendment test for weighing public employee speech. Before *Garcetti*, courts first looked at the "'content, form, and context' of the employee's speech to determine whether the employee spoke as a citizen on a matter of public concern." "After *Garcetti*, however, the threshold inquiry is whether the employee was speaking as a citizen; only then [should courts] inquire into the content of the speech."

Two Eleventh Circuit Court of Appeals cases addressed public speech in 2006. In *Battle v. Board of Regents of Georgia*, the court ruled that a financial aid counselor at a state university, whose contract was not renewed after she reported her supervisor's student loan fraud to superiors, was speaking as an employee fulfilling official duties. Thus, her First Amendment retaliation claim must fail under the ruling in *Garcetti*.

In *City of San Diego v. Roe*, the United States Supreme Court ruled that the First Amendment did not bar the discharge of a police officer who sold videotapes of "himself stripping off a police uniform and masturbat-

2. Freedom of Association

Many police departments have written policies prohibiting all department employees from associating with anyone convicted of a felony. In fact, a twenty-one-year veteran Miami police officer was warned, "[l]eave your husband or lose your job," in light of her husband's felony conviction. Such policies have been challenged on freedom of association

504. Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).
505. Spiegla v. Hull, 481 F.3d 961, 965 (7th Cir. 2007).
506. Id.
507. Id.
508. 468 F.3d 755 (11th Cir. 2006).
509. Id. at 761.
511. Id. at 78, 84.
512. Id. at 84.
513. Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1356–57 (11th Cir. 2006).
515. Id.
grounds, as well as on equal protection grounds, given that such policies disproportionately affect black female officers owing to the huge number of inmates who are black males.\textsuperscript{516} The \textit{Miami Herald} condemned this policy as "morally wrong, socially discriminatory and very likely unconstitutional."\textsuperscript{517}

A Florida court ruled in 2007 that a county corrections officer was illegally dismissed on the ground that she lived with her boyfriend who was a convicted felon on parole.\textsuperscript{518} Absent a written policy, the court concluded, the public employee was denied adequate notice that simply living with a convicted felon was cause for discharge.\textsuperscript{519}

3. Hatch Act

The Federal Hatch Act regulates the partisan political activities of federal employees.\textsuperscript{520} In 2007, the Justice Department and Congress opened investigations into whether senior justice department officials improperly filled career jobs based on applicants' political affiliation.\textsuperscript{521} "Politicization of civil service positions could violate [the Hatch Act]..."\textsuperscript{522} The inquiry centers on whether the replacement of nine U.S. attorneys in 2006 stemmed from Republican efforts to file more vote-fraud cases against Democrats in close elections.\textsuperscript{523} The Bush Administration countered "that six [of the] U.S. attorneys were [terminated] on performance-related" grounds.\textsuperscript{524} "Legal experts [agree] that the Hatch Act [allows] White House officials to talk about upcoming [pending] elections and political strategy generally, but [the Act] would prohibit any official from taking [action to sway] an election."\textsuperscript{525}

\textsuperscript{516} Id.
\textsuperscript{517} Editorial, \textit{A 'Scarlet Letter' Approach to Policing}, MIAMI HERALD, May 18, 2007, at 18A.
\textsuperscript{519} Id.
\textsuperscript{521} Margaret Talev & Greg Gordon, \textit{Probe Will Cover More than Firings}, MIAMI HERALD, May 31, 2007, at 3A.
\textsuperscript{522} Id.
\textsuperscript{523} Id.
\textsuperscript{524} Dan Eggen, \textit{Deputy Attorney General Defends Prosecutor Firings}, WASH. POST, Feb. 7, 2007, at 3A.
In a nutshell, the Hatch Act "bar[s] consideration of political affiliation in hiring of [federal employees] for non-political, career jobs."\textsuperscript{526}

D. Remedies

Under the Arbitration Fairness Act of 2007 introduced in Congress, mandatory arbitration clauses that force individuals to seek relief through arbitration instead of litigation would be rendered unenforceable.\textsuperscript{527} While primarily aimed at clauses in consumer contracts, it would also ban mandatory arbitration clauses in employment agreements governed by the Federal Arbitration Act.\textsuperscript{528}

In 2007, a Florida court ruled that a county is liable for attorney's fees owed by a county commissioner who successfully defends himself against criminal charges where the case stems from performance of official duties.\textsuperscript{529}

Another Florida court in 2007 reversed the issuance of a temporary injunction to enforce a non-competition clause in an employment contract because it was issued without notice and did not allege that irreparable harm would result before defendant could be heard.\textsuperscript{530}

V. EMPLOYMENT DISCRIMINATION

A. Generally

A 2007 report found substantial growth in the filing of employment class actions alleging job discrimination, wage inequities, and post-employment benefits.\textsuperscript{531}

In 2006, the United States Supreme Court ruled that the fifteen-employee requirement for assessing whether an employer is covered by Title VII is not a jurisdictional matter that can be raised as a defense at any point

\textsuperscript{526} Greg Gordon & Margaret Talev, Political Hirings Alleged, MIAMI HERALD, May 7, 2007, at 3A.

\textsuperscript{527} Angela Tablac, Bill Would Nullify Contract Clauses, MIAMI HERALD, July 25, 2007, at 1C.

\textsuperscript{528} Id.

\textsuperscript{529} See Leon County, Fla. v. Dobson, 957 So. 2d 12, 13–14 (Fla. 1st Dist. Ct. App. 2007) (per curiam).

\textsuperscript{530} See Lewis v. Sunbelt Rentals, Inc., 949 So. 2d 1114, 1115 (Fla. 2d Dist. Ct. App. 2007).

of litigation. Instead, the fifteen employee threshold is a substantive element of plaintiff’s claim.

In 2007, the United States Supreme Court ruled that it did not have jurisdiction to review the appeal from the office of a United States Senator seeking review of a District of Columbia Circuit Court ruling denying it immunity under the speech or debate clause from suit by a former worker alleging employment discrimination.

In 2006, a federal district court ruled that the Florida Civil Rights Act extends to Florida residents working outside the state.

In 2006, a federal district court applied eight factors to distinguish between an employee and an independent contractor for purposes of Title VII coverage.

B. Race

In 2007, a law professor studied “a government survey of 2,084 legal immigrants [in the] United States . . . and found that those with the lightest skin earned [on] average 8 percent to 15 percent more than [comparable] immigrants with [far] darker skin.”


C. National Origin

The Eleventh Circuit Court of Appeals ruled that national origin discrimination, by its nature, does not invariably implicate race discrimination, thereby rendering such claims cognizable under 42 U.S.C. § 1981.
According to federal regulations, a blanket ban on non-English speech at the workplace may "create an atmosphere of inferiority, isolation and intimidation ... which could result in a discriminatory working environment." In 2007, the Mayor of Nashville, Tennessee, vetoed an ordinance "that would have made [english] the official language of" the city, warning it was unconstitutional, unnecessary, and mean-spirited.

D. Affirmative Action

A 2007 study "found that more diverse companies also have more customers, a [bigger] share of their markets and greater profitability." Of course, "it may also be [the case that firms] that are successful to begin with" make more of an effort to recruit and retain minorities. Not only do minorities bring new perspectives to the workplace, but they also cause their white co-workers "to think in new ways."

In 2000, Congress enacted the Women's Procurement Program aimed at growing the participation of women-owned small business concerns in the federal procurement marketplace. A 2007 Rand Corporation study found, however, that women-owned small businesses remain underrepresented among companies doing business with the federal government. Under a 1999 federal law, every federal agency is urged to award at least "3 percent of their contracts to businesses owned by service-disabled veterans.

Even after Florida abolished affirmative action in 1999, "the state's spending on contracts with businesses owned by minority group members and women ha[d] ... tripled" by the end of 2006. In 1999, Governor Jeb Bush ended affirmative action programs and replaced it with his "One Florida initiative" which merely urges state agencies to promote minority business spending. While the Department of Corrections increased its female
and minority contractor spending by 75%, the legislature registered a 70.7% decline.550

A 2007 lawsuit filed against Broward County alleges that its affirmative action program is unconstitutional because it forces contractors “to hire sub-contractors based on race, ethnicity or sex—not quality.”551 An earlier suit forced Miami-Dade County to abolish its minority set-aside program on equal protection grounds.552 Recent United States Supreme Court rulings have rendered minority set-aside programs highly suspect.553

E. Gender

A study found “that teen [sexual harassment] cases [rose] from two percent of all sexual harassment cases in 2001 to about eight percent in 2004.”554 In 2007, the United States Supreme Court ruled, in Ledbetter v. Goodyear Tire & Rubber Co.,555 five to four against a woman who failed to file her sex-based pay discrimination “lawsuit within the 180-day statute of limitations from when her first paycheck showed” the existence of the wage disparity.556 “Employee-oriented organizations called [the decision] a severe weakening of civil rights.”557

In 2007, a federal jury found that the Florida Department of Corrections condoned the “sexual harassment of its female nurses by male inmates.”558 The nurses alleged “they were harassed on daily rounds [while] examining inmates and [dispensing] medicine to sick prisoners.”559 In 2007, the Eleventh Circuit upheld the dismissal of sexual harassment and retaliation claims since the victim failed to cooperate with her employer’s proposed remedy.560

Acting to shield themselves from sexual harassment lawsuits, some employers are urging senior executives to sign “love contracts” whereby co-workers disclose romantic relationships.561 By openly declaring their ro-

550. Id.
551. Amy Sherman, Lawsuit: White Males Cheated, MIAMI HERALD, Mar. 29, 2007, at 1B.
552. Id.
553. See id.
556. Stafford, supra note 215.
557. Id.
558. 12 Prison Nurses Win Jury Award, MIAMI HERALD, Jan. 28, 2007, at 6B.
559. Id.
560. Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1301 (11th Cir. 2007).
mance to be "voluntary" and "consensual," these contracts should render employers immune from liability—should the relationship go sour.\(^{562}\) By one estimate, "43 percent of [United States employees] admit to having dated a co-worker."\(^{563}\)

In 2007, the city manager of Largo, Florida was fired after disclosing he was undergoing a sex change operation.\(^{564}\) Largo city commissioners defended their position by "saying they doubted his integrity and ability to lead the city and its 1200 employees."\(^{565}\) Although the fired city manager can appeal, his contract makes it clear that he can be dismissed without cause.\(^{566}\) While transsexuals are generally unprotected under federal civil rights laws,\(^ {567}\) a few recent cases give limited protection under Title VII.\(^ {568}\) Legislation proposed at the federal level, the Employment Non-Discrimination Act of 2007, would ban "employment discrimination on [grounds] of sexual orientation or gender identity."\(^ {569}\) In 2007, an attempt was made to add legal protections for transgender people in Broward County.\(^ {570}\) Some gay rights activists oppose the timing of the ordinance, fearing that "adding 'gender identity and expression' ... will jeopardize [protection for all gay men and women] already on the books."\(^ {571}\)

F. Age

Despite the ban on mandatory retirement under the federal Age Discrimination in Employment Act (ADEA),\(^ {572}\) the average retirement age in

\(^{562}\) Id.

\(^{563}\) Id.

\(^{564}\) Tere Figueras Negrete, Fired Transgender Vies for Sarasota Job, MIAMI HERALD, May 15, 2007, at 8B.

\(^{565}\) Tere Figueras Negrete, Town Rocked by Sex-Change Case, MIAMI HERALD, Mar. 4, 2007, at 1A.

\(^{566}\) Phil Davis, Firing Begins over Sex Change, MIAMI HERALD, Mar. 1, 2007, at 8B.

\(^{567}\) See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).

\(^{568}\) See, e.g., Schroer v. Billington, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (holding that a transsexual rejected for a job failed to state a Title VII claim that she was discriminated against for not conforming to gender stereotypes, but she may claim she was denied employment because of her sex).

\(^{569}\) Id.

\(^{570}\) Beth Reinhard, GLBT Rights Activist Pulls Back on the 'T', MIAMI HERALD, Aug. 4, 2007, at 1B.

\(^{571}\) Id.

2007 is sixty-two.\textsuperscript{573} "[O]nly 27 percent of Americans retire at age 65 or later, according to the Employee Benefit Research Institute."\textsuperscript{574}

In \textit{General Dynamics Land Systems, Inc. v. Cline},\textsuperscript{575} the United States Supreme Court ruled that the ADEA does not bar employers from favoring older workers over relatively younger ones who are also protected by the Act.\textsuperscript{576} In response, on August 4, 2006, the EEOC proposed regulations making clear that the ADEA does not bar employers from favoring older workers over younger ones—also over age forty.\textsuperscript{577} In addition, the EEOC revised a portion of 29 C.F.R. § 1625.4(a) that barred job advertisements favoring older persons to make it clear that it is permissible to encourage older applicants to apply.\textsuperscript{579}

A 1990 amendment to the ADEA, the Older Workers Benefit Protection Act (OWBPA), spelled out some of the ground rules for employers framing early retirement programs.\textsuperscript{580} In 2006, the Eleventh Circuit Court of Appeals ruled that the OWBPA only requires employers to give discharged workers detailed information about layoffs in their own department—not nationwide.\textsuperscript{581} In 2007, the Federal Aviation Administration disclosed "that it will review its rule forcing airline pilots to retire at age sixty," after the "International Civil Aviation Organization [rose] the age to [sixty-five]."\textsuperscript{582} Any rule change, however, would be prospective only, leaving pilots already retired, but under sixty-five, out of luck.\textsuperscript{583}

G. Disability

The Americans with Disabilities Act (ADA) generally prohibits employment discrimination against the disabled, not only at the hiring and dismissal stages, but also involving promotions, transfers, compensation, train-

\textsuperscript{574} \textit{Id.}
\textsuperscript{575} 540 U.S. 581 (2004).
\textsuperscript{576} \textit{Id.} at 600.
\textsuperscript{578} 29 U.S.C. § 631(a) (2000).
\textsuperscript{579} 29 C.F.R. § 1625.4(a) (2006).
\textsuperscript{580} 29 U.S.C. § 623(f).
\textsuperscript{581} Burlison v. McDonald’s Corp., 455 F.3d 1242, 1248 (11th Cir. 2006).
\textsuperscript{583} Wald, \textit{supra} note 582.
ing, and virtually every other term and condition of employment. In 1800 out of 2000 ADA complaints, the Justice Department, between the years 2001 and 2006, forced public and private employers to comply with the Act by enlisting mediation and ruling out penalties.

In 2007, a United States House of Representatives committee approved a measure aimed at preventing "discrimination by employers and insurers against people based on genetic information." In 2006, the Eleventh Circuit Court of Appeals ruled that retraining a disabled employee is not a reasonable accommodation under the ADA. "With 21 million American diabetics, . . . [employers] are struggling . . . with confusion [over] whether diabetes is a legitimate disability and with concern [over] whether it is [unduly costly], hazardous and disruptive to accommodate the illness."

Disability claims may also be litigated under Florida’s civil rights laws. A 2007 Florida case concluded that the Florida Civil Rights Act “does not require proof that a plaintiff’s HIV [positive] condition amounts to a . . . disability.” The law bans bias “based upon even the ‘perceived results’ of an HIV test, [no matter] the physical condition of the employee.” Under Florida and federal laws, anyone with a history of epilepsy is prohibited from driving certain commercial vehicles. Under the law, commercial truck "drivers must undergo a physical every two years to [confirm] they do not have any medical conditions that could [impair] their driving."

584. 42 U.S.C. § 12112(a) (2000). A law review article found that plaintiffs claiming mental or psychiatric impairments under the ADA are less successful than plaintiffs alleging bias based on physical disabilities. Jeffrey Swanson et al., Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?, 66 MD. L. REV. 94, 95 (2006).

585. Joshua Freed, Most ADA Violators Escape Penalties, MIAMI HERALD, Oct. 6, 2006, at 6A.


591. Id. at 927–28.

592. Kathleen McGrory & Breanne Gilpatrick, Trucker Drove Despite Epilepsy, MIAMI HERALD, Nov. 29, 2006, at 1B.

593. Id.
H. Religion

The two governing sources of law for analyzing religious issues arising in the workplace are the religious clauses of the First Amendment, which apply only in the public sector, and Title VII, which protects both public and private employees against religious discrimination. At least one court has noted the similar nature of protection afforded by the First Amendment and Title VII: "the [F]irst [A]mendment protects at least as much religious activity as Title VII does." 594

Employers intent upon creating "faith-friendly" workplaces must strike a delicate balance between seeming to favor "one religion over another," and treating all faiths, even atheists, even-handedly. 595 It is one thing for an employer to tolerate "well-known faiths such as Judaism, Christianity or Islam, but" the law dictates equal tolerance for Santeria, Wicca, and other marginal religions. 596

Under Title VII and the First Amendment, employers owe a duty to reasonably accommodate the religious beliefs and practices of their employees. 597 For example, in 2007, a Florida park ranger resigned from his job after his employer denied his request for "Sundays off to go to church." 598 Ultimately, facing a lawsuit, the county offered the park ranger "his job back and back pay." 599 Similarly, when Muslim cashiers working for Target "refuse[d] to ring up pork products [on] religious [grounds]" the store accommodated these Muslim cashiers by transferring them "to other jobs at the stores." 600 What is left unclear, however, is whether wages would be identical at the new jobs. 601 What the case illustrates is the employer's legal duty to strike a balance between "the religious rights of its employees with customer demands for service." 602

"Legal cases involving workers claiming religious discrimination on the job have [increased], especially since the Sept. 11, 2001 terrorist attacks" and

596. Id.
599. Id.
601. See id.
602. Id.
many of these claims involve Muslim employees.\textsuperscript{603} For example, threequarters of the taxi drivers serving the Minneapolis-St. Paul Airport are Muslims and recently many of them refuse, on religious grounds, to carry passengers carrying alcohol.\textsuperscript{604} "[E]ven blind people with guide dogs have been" turned away by the religious cabbies in light of Islamic law "that the saliva of dogs is unclean."\textsuperscript{605} In response, the city proposes "a 30-day suspension for a first offense" and a two year license revocation for repeat offenders.\textsuperscript{606} Similarly, in 2005, Christian pharmacists "refus[ed] to fill prescriptions for the 'morning after' anti-contraception pill" on religious grounds.\textsuperscript{607}

After a Muslim Congressman announced that he planned to carry the Koran in one hand and the Bible in the other when he took his oath of office, another Congressman warned that "more Muslims will follow" if Congress failed to adopt strict immigration laws.\textsuperscript{608}

The constitutionality of state-paid legislative chaplains was largely upheld by the United States Supreme Court in 1983 in \textit{Marsh v. Chambers}.\textsuperscript{609} The Court relied on evidence that the First Amendment framers embraced the practice of government chaplains—indeed, the First Congress had installed chaplains in both houses.\textsuperscript{610} In 2007, "[t]he Army National Guard [had] 310 chaplain vacancies."\textsuperscript{611} One explanation for the shortage is the fact that "chaplains [are not] covered by a federal law protecting [veterans'] jobs while they are deployed."\textsuperscript{612} One legally questionable practice, however, is that the National Guard makes exceptions to the age range for chaplains, such as for Roman Catholic priests.\textsuperscript{613}

Quite apart from state-paid chaplains is the emerging trend of private corporations nationwide "bringing chaplains into the workplace."\textsuperscript{614} Because these chaplains work for the employers, critics charge, they do nothing to

\begin{itemize}
\item \textsuperscript{603} Boodhoo, \textit{Having Faith}, supra note 595.
\item \textsuperscript{604} Leonard Pitts Jr., \textit{Muslim Cabbies' Spirited Refusal Is Intolerable}, MIAMI HERALD, Jan. 22, 2007, at 1B.
\item \textsuperscript{605} Id.
\item \textsuperscript{606} Id.
\item \textsuperscript{607} Id.
\item \textsuperscript{608} Rob Hotakainen, \textit{Lawmaker's Letter Irks Muslim Group}, MIAMI HERALD, Dec. 21, 2006, at 12A.
\item \textsuperscript{609} 463 U.S. 783, 794 (1983).
\item \textsuperscript{610} Id. at 787–88.
\item \textsuperscript{611} Nafessa Syeed, \textit{Guard Deals with Chaplain Shortage}, MIAMI HERALD, Feb. 18, 2007, at 6A.
\item \textsuperscript{612} Id. (citing 31 U.S.C. § 3730(e)(4)(B) (2000)).
\item \textsuperscript{613} Id.
\item \textsuperscript{614} Neela Banerjee, \textit{At Bosses' Invitation, Chaplains Come into Workplace and onto Payroll}, N.Y. TIMES, Dec. 4, 2006, at A14.
\end{itemize}
challenge labor law violations, even when they are blatant.\textsuperscript{615} Even if company chaplains steer clear of evangelizing, they run the risk of looking like the boss favors a particular religion.\textsuperscript{616} "[D]iscussions between chaplains and employees are confidential, unless the [employee poses] an imminent [threat] to himself or others."\textsuperscript{617}

Another emerging trend that may bode well for employers but is problematic for employees is the hands-off approach toward "religious organizations—especially religious schools—to manage their affairs with [minimal] interference from the government and their own employees."\textsuperscript{618} Under the so-called ministerial exception, judges rarely hear a case calling into question church "doctrines, governance, discipline or hiring preferences of any religious faith."\textsuperscript{619} What is new and troubling, however, is that some judges are expanding the ministerial exception sanctioned by Title VII to refuse to intervene "when religious groups have [fired] lesbians, unwed mothers and adulterous couples" because they run counter to their employers' religious beliefs.\textsuperscript{620}

A former Broward Community College (BCC) instructor convinced a federal judge in 2007 that the instructor's Catholic faith played a substantial role in his being passed over for full-time jobs and that the college "favored evangelical Protestants in hiring, promotion and class assignments."\textsuperscript{621} A Miami Herald editorial took BCC to task for refusing to say it has begun "hiring based on academic, not religious, credentials."\textsuperscript{622} As a taxpayer-funded public college, the editorial intoned, "[t]he public has the right to know."\textsuperscript{623}

I. Remedies

In 2006, the EEOC recovered "$274 million in monetary" benefits for victims of employment discrimination.\textsuperscript{624}

\textsuperscript{615} Id.
\textsuperscript{616} Id.
\textsuperscript{617} Id.
\textsuperscript{619} Id.
\textsuperscript{620} Id.
\textsuperscript{621} Natalie P. McNeal, BCC May Pay for Bias in Favor of Evangelicals, Miami Herald, July 17, 2007, at 1B.
\textsuperscript{622} Clean House in Religion Department, Miami Herald, Aug. 2, 2007, at 14A.
\textsuperscript{623} Id.
In 2007, the United States Supreme Court ruled, in *Sole v. Wyner*,\(^{625}\) that a plaintiff who secures a preliminary injunction that is dissolved when the merits of the case are finally decided against her is not a “prevailing party” entitled to receive attorneys’ fees under 42 U.S.C. § 1988(b).\(^{626}\)

In calculating reasonable attorneys’ fees under Florida’s Civil Rights Act, a Florida court ruled that it is an error to apply a multiplier to enhance a lodestar fee in an anti-retaliation case.\(^{627}\)

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\(^{625}\) 127 S. Ct. 2188 (2007).

\(^{626}\) *Id.* at 2196.

\(^{627}\) *Haines City HMA, Inc. v. Carter*, 948 So. 2d 904, 908 (Fla. 2d Dist. Ct. App. 2007).

FRAN L. TETUNIC*

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I. INTRODUCTION AND BACKGROUND

"A man without ethics is a wild beast loosed upon this world."  
– Albert Camus

Society depends on the ethical conduct of its members. The June 2007 disbarment of Durham district attorney Michael B. Nifong exemplifies the havoc wreaked when an individual authorized to act on behalf of the citizenry abuses power and breaks canons of ethics. The ethics panel investigating Mr. Nifong blamed him for the "fiasco" in which innocent young men were charged [with sexual assault] and the legal system suffered disrepute. Society demonstrates a broad interest in ethical conduct which includes promulgating laws and codes of conduct, investigating potential violations, sanctioning wrongdoing, and advising individuals on ethical conduct in their daily lives. The Ethicist, a regular column in the New York Times Magazine, answers questions on matters as mundane and complex as telling the truth and dividing living expenses.
Members of society who depend on the ethical behavior of judges, law enforcement officials, and lawyers in the public manifestations of our legal system also depend on the ethical behavior of mediators in the more private process of mediation. A mediation succeeds not because the parties resolved their dispute, but because the mediator conducted the mediation within ethical standards giving the parties an opportunity to meaningfully participate in the process and exercise self-determination. The legislation of ethical conduct, investigation of alleged violations, sanctioning of wrongdoing, and answering of ethical questions that permeates the conduct of lawyers and judges is mirrored in Florida's ethical standards for mediators.

Florida is in the forefront of states that have taken initiatives to develop ethical guidelines for use in mediation. "Florida was the first jurisdiction to develop mediator standards of conduct which include enforcement provisions, [and the first state] to establish a panel to render advisory opinions on ethical issues arising in mediation." The Florida Legislature and judiciary have created "one of the most comprehensive court-connected mediation programs in the country." Over the past twenty-five years, the use of mediation has steadily increased to become a vital component of the court system. Interestingly, mediation has seen its largest growth in the private sector for both court-ordered cases and matters without court involvement. Increasingly, attorneys and parties directly participate in mediator selection. "[O]ver 90 percent of the parties agree on a mediator," allowing them to base their selection not only on certification status, but also mediation style, skill, knowledge, and ethical comportment.


7. Id.


10. Id. Private sector refers to private mediators hired by the parties, not mediators employed by or through court-connected programs. See id.

11. See Fla. R. Civ. P. 1.720(f). Parties have ten days from the trial court's order referring a case to mediation to mutually agree on a mediator, who may or may not be certified. Id.

“As mediation has grown in popularity over the past few decades as an alternative to costly and protracted litigation, a whole new field of professional ethics—mediation ethics—has emerged.”13 The many and diverse ethical issues within this field range from practical matters such as business and conflict of interest, to more abstract matters such as confidentiality and the nature and scope of the mediation process.14 A mediator’s ethics affect not only the quality of the mediation process, but also the viability of the mediation agreement.15 The ethical precepts governing Florida’s more than 500016 mediators require them to abide by the Florida Rules for Certified and Court-Appointed Mediators.17 Mediators subject to these rules must also “comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.”18 Additionally, some mediators must follow other ethical codes by virtue of additional professional callings.19 These multi-faceted obligations may, at times, seem perplexing or contradictory.

In 1994, the Supreme Court of Florida created a nine member committee to respond to written ethical questions20 posed by mediators subject to the Florida Rules for Certified and Court-Appointed Mediators.21 From 1994 to

14. Id.
15. See id. at 480. “[T]he mediator is no ordinary third party . . . .” Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1099 (Fla. 4th Dist. Ct. App. 2001). “During a court-ordered mediation, the mediator is, [in effect,] an agent of the court carrying out an official court-ordered function.” Id. Therefore, “the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of judicially-prescribed mediation procedures.” Id. A mediator is accountable to the referring court with ultimate authority over the case, and the court may overturn a mediated agreement entered into based on significant mediator misconduct. Id; see also Fran L. Tetunic, Florida Mediation Case Law: Two Decades of Maturation, 28 NOVA L. REV. 87, 124 (2003).
16. PRESS, supra note 8, at iii (stating that there were 5241 certified mediators as of May 2007).
20. Mediators address their questions to Mediator Ethics Advisory Committee, c/o Florida Dispute Resolution Center, Supreme Court Building, Tallahassee, FL 32399.
21. Florida State Courts, Mediator Ethics Advisory Committee (MEAC) Opinions: Summaries from 1994–2007,
August 2007, the committee, presently known as the Mediator Ethics Advisory Committee (MEAC), issued 114 opinions. Each opinion represents the concurrence of all deliberating committee members and, in true mediator fashion, no member has ever issued a dissenting opinion.

MEAC opinions do not carry the weight of law. They do serve as advisory opinions upon which mediators may rely in good faith. While such reliance will not constitute a defense in a disciplinary action, the Mediator Qualifications Board (MQB) may consider it as evidence of the mediator’s good faith in its determination of guilt or in mitigation of punishment. The opinions respond directly to the written questions posed to the committee in the context of the applicable law and ethical rules in effect at the time.

The ethical standards found in the Florida Rules for Certified and Court-Appointed Mediators apply to all mediations conducted by a certified mediator, and all court-appointed mediators whether or not certified. The applicability of the professional standards to any given situation will depend on whether the activity falls within the rubric of “mediation.” Individuals who are mediators perform many non-mediator functions. A mediator who negotiates a car sale on behalf of a spouse or a business matter for a town council would act in the role of advocate, not mediator. Similarly, during mediation, actions taken by an attorney or party, who also happens to be a mediator, will not “be judged as if they were the actions of a mediator.”

http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/Index%20of%20Opinions%20-%202007_web.pdf [hereinafter MEAC Summaries]. The rules apply to Supreme Court of Florida certified mediators as well as mediators appointed by the state courts. FLA. R. CERT. & CT. APPTD. MEDIATORS 10.200. Mediators who violate the rules are subject to disciplinary action as determined by the Mediator Qualifications Board. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200 comm. notes, 10.700–880.

22. MEAC Summaries, supra note 21. MEAC was previously known as the Mediator Qualifications Advisory Panel (MQAP). FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.900 comm. notes. The Committee will be referred to as MEAC in the text of this article. The advisory opinions will identify either MQAP or MEAC before the opinion number.

23. The Mediator Qualifications Board (MQB) hears grievances filed against certified mediators and reviews mediator “good moral character” issues. PRESS, supra note 8, at iii. The Mediator Qualifications Board has entertained grievances filed against non-certified mediators who were appointed by the court. See id. The Florida Rules for Certified and Court-Appointed Mediators pertain to both certified mediators and mediators who are not certified but are court-appointed. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200, 10.700.

27. See id.
Nonetheless, "[a] certified mediator is subject to a good moral character requirement and is prohibited from performing any act which would compromise the mediator's integrity." 31

In a dozen years and over one hundred opinions, there have been multiple amendments to the Florida Rules for Certified and Court-Appointed Mediators, in addition to multiple statutory changes—the most significant being the 2004 passage of the Mediation Confidentiality and Privilege Act (Act). 32 While the body of MEAC opinions has withstood the test of time, some opinions warrant attention given the statutory and rule changes. This article organizes and summarizes the MEAC opinions, and identifies those subject to modification or reconsideration. Even though portions of three opinions have been rescinded, and other opinions require amendments to conform to current rules and law, the overwhelming majority still represents the best practices for mediators. For each rescinded opinion, as well as for those subject to modification or reconsideration, this article identifies the relevant statutory or rule changes, and analyzes their significance and effect on the opinion. Each of the issued opinions is referenced in the hope of offering a convenient summary and analysis for mediators, for attorneys when selecting mediators and representing clients, and for participants in the mediation process.

II. MEDIATION CONFIDENTIALITY

A. Developments and Background

Mediators have an ethical obligation to maintain confidentiality, the bedrock of the mediation process. 33 Effective August 1, 2006, the ethical rule governing mediator confidentiality changed. 34 Previously, the rule directed a mediator to "maintain confidentiality of all information revealed during mediation, except where disclosure is required by law." 35 Presently, "[a] media-

31. Id. Good moral character is a prerequisite to certification and a requirement for continuing certification. Fla. R. Cert. & Ct.-Apptd. Mediators 10.110(b).
35. Fla. R. Cert. & Ct.-Apptd. Mediators 10.360(a) (2005). Although not addressed in this rule, then as now, if the parties waived their privilege of confidentiality, mediators were no longer obligated to maintain confidentiality. Fla Stat. § 44.405(4)(a)(1) (2007). The
tor shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties."36 This amendment "was proposed in response to the 2004 adoption of the Mediation Confidentiality and Privilege Act, sections 44.401–44.406, [Florida Statutes] (2005)."37 The Supreme Court of Florida amended the rule governing the scope of confidentiality to be consistent with the language in the Act.38

This significant rule change, permitting more disclosure by the mediator, may have less practical effect than the word change would initially suggest. The Act delineates required and permissive exceptions based on the type of disclosure.39 For example, the mandatory reporting of abuse and neglect of children and vulnerable adults applies "solely for the purpose of making the mandatory report to the entity requiring the report."40 Similarly, communication to report, prove, or disprove professional misconduct or professional malpractice occurring during mediation is limited to the internal use of the body conducting the misconduct, investigation, or the professional malpractice proceeding.41 Another exception applies "for the limited pur-

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36. *Petition*, 931 So. 2d at 883; FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a) (amendment effective Aug. 1, 2006). Rule 10.420(a)(3) was also amended to be consistent with the Act, requiring a mediator to notify parties that communications during mediation are confidential except where required or permitted by law. *Petition*, 931 So. 2d at 883.

37. *Id.* at 882. The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy recommended changing the rule to read: "A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law or is agreed to by all parties or where a mediation communication is willfully used to threaten a crime of violence." *In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators*, No. SC05-998, slip op. at 7 (Fla. 2005) (proposed FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a)), available at http://www.floridasupremecourt.org/clerk/comments/2005/SC05-998_PublicationNotice.pdf [hereinafter Proposed Official Draft 2005].

38. *Petition*, 931 So. 2d at 882–83. The rule as amended tracks the Act’s language and provides far broader exceptions to the mediator’s mandate to maintain confidentiality than the rule change proposed by the Committee on Alternative Dispute Resolution Rules and Policy. See *id.*; FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a) (Proposed Official Draft 2005). The Act delineates six exceptions (four permissive exceptions, in addition to the required reporting of child and vulnerable adult abuse and neglect, and privilege waiver by the parties). FLA. STAT. § 44.405(4)(a) (2007). The committee rule would have added the one exception for communication willfully used to threaten a crime of violence. Proposed Official Draft 2005, *supra* note 37.

40. FLA. STAT. § 44.405(4)(a)(3) (2007).
41. *Id.* § 44.405(4)(a)(4).
pose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation." 42

While still too early to determine whether mediator disclosure of mediation communications will significantly increase following the August 1, 2006 rule change, the mediator’s own threshold determination of the existence of exceptions will prove crucial. The Act does not provide guidance as to when, how, or by whom an exception determination is made. 43 In the past, mediators reported abuse and neglect based on the threshold established in the mandatory reporting statutes; 44 that remains the same. Similarly, then and now, parties may waive the confidentiality privilege they hold. 45 As before, mediators should obtain documentation of the waiver so as not to unwittingly breach confidentiality. 46 Also, as before, a signed written mediated agreement is not confidential “unless the parties agree otherwise.” 47

Although the Act applies to all mediation participants, mediators alone are bound by the Rules for Certified and Court-Appointed Mediators, and are therefore subject to heightened ethical obligations and scrutiny. 48 While the rule requiring confidentiality is less restrictive than before, the other ethical obligations to which a mediator must adhere, such as impartiality, remain constant. 49 Mediators continue to have an ethical obligation to maintain the confidentiality of information revealed during mediation. 50 Nonetheless, now as before, parties may waive their statutory privilege and have the mediator disclose mediation communications, 51 and courts may order mediators to disclose mediation communications for legally recognized purposes, such as voiding or reforming a settlement agreement. 52 Many mediators still continue to wait for court direction to disclose information so as not to make

42. Id. § 44.405(4)(a).5.
43. See id. § 44.405.
44. Id. §§ 39.201, 415.1034.
45. FLA. STAT. § 44.405(4)(a)1. “A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.” Id. § 44.405(2).
46. See id. § 44.402(2).
47. Id. § 44.405(4)(a).
48. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200. “These Rules provide ethical standards of conduct for certified and court-appointed mediators . . . to both guide mediators in the performance of their services and instill public confidence in the mediation process.” Id.
50. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).
51. FLA. STAT. § 44.405(4)(a)1. Parties, not the mediator, hold a statutory privilege and may choose to waive it. Id.
"legal" decisions and run afield of ethical obligations. For these mediators, the rule change will have little appreciable effect.

Notably, the rule change may well alter the way in which mediators, subject to two or more ethical codes of conduct, interpret their possibly inconsistent ethical obligations. For example, a lawyer governed by the Rules Regulating The Florida Bar, "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority."53 At the same time, the lawyer-mediator is obligated to maintain mediation confidentiality pursuant to the Rules for Certified and Court-Appointed Mediators.54 In this context, the rule change allowing mediators to make disclosures permitted by law allows the lawyer-mediator to reconcile both ethical obligations. The next section summarizes the MEAC opinions on confidentiality and discusses the ethical rule changes as they relate to MEAC opinions, including those on concurrent ethical obligations.

B. Scope of Confidentiality

Even before the Act's passage, one of the MEAC's early opinions painted a broad scope for mediation confidentiality, applying confidentiality before the parties came to the mediation table. In this 1997 opinion, the MEAC advised that "[i]nformation obtained from the parties prior to the commencement of mediation, which would be confidential if obtained during the mediation" is confidential.55 The Act comports with prior practice in identifying the beginning of mediation, for confidentiality purposes, as when a court orders the mediation,56 or "when the parties agree to mediate, or as required by agency rule, agency order, or statute, whichever occurs earlier."57 Additionally, the Act provides for the confidentiality of communications made in furtherance of mediation.58 The Act "appl[ies] to any mediation...[r]equired by statute, court rule, agency rule or order, oral or written

53. R. REGULATING FLA. BAR 4-8.3(a). The "rule does not require disclosure of information...protected by rule 4-1.6 or information [obtained] while participating in an approved lawyers assistance program." R. REGULATING FLA. BAR 4-8.3(c); see also R. REGULATING FLA. BAR 4-8.3(d).
56. FLA. STAT. § 44.404(1) (2007).
57. Id. § 44.404(2).
58. Id. § 44.405.
case-specific court order, or court administrative order"⁵⁹ conducted under the Act "by express agreement of the mediation parties"⁶⁰ or "facilitated by a mediator certified by the Supreme Court [of Florida], unless the mediation parties expressly agree" otherwise.⁶¹ However, the parties may agree in writing that some sections of the Act "will not apply to all or part of [their] mediation."⁶² As a general statement, matters that fall within the definition of mediation communication,⁶³ but not within any of the enumerated statutory exceptions,⁶⁴ remain confidential.⁶⁵ Therefore, a written apology given during a mediation that was not included in the agreement, waived by the parties, or otherwise falling within a statutory exception, met the definition of mediation communication.⁶⁶

Two MEAC opinions clarify the applicability of the Act.⁶⁷ "[I]f a mediation falls within the scope of the Mediation and Confidentiality and Privilege Act, then all mediation participants⁶⁸ are obligated to adhere to its provisions."⁶⁹ Additionally, "[e]ach co-mediator is to be treated as a mediator subject to the . . . Act" and "many of the communications made to [staff in] the mediation unit would be included under the umbrella of confidentiality."⁷⁰

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⁵⁹. Id. § 44.402(1)(a).
⁶⁰. Id. § 44.402(1)(b).
⁶¹. FLA. STAT. § 44.402(1)(c).
⁶². Id. § 44.402(2). "The . . . parties may agree in writing that any or all of [sections] 44.405(1), 44.405(2) or 44.406 will not apply to all or part of [their] mediation . . . ." Id.
⁶³. Id. § 44.403(1). The definition of a "mediation communication" by the Florida Statutes is as follows:

"Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.

Id.
⁶⁴. FLA. STAT. § 44.405(4)(a).
⁶⁵. Id. § 44.405(1).
⁶⁸. "Mediation participant' means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means." FLA. STAT. § 44.403(2).
C. Rule Changes Suggest Updating Opinions

Two changes to the ethical rules regarding confidentiality may require modification of several MEAC opinions to make them consistent with the amended rules.71 The opinions track the language of the then existing rules and, if answered today, would necessarily track the language of the current rules. One significant rule change no longer requires mediators to maintain confidentiality if the law permits disclosure.72

Prior to August 2006, a mediator had an ethical obligation to maintain mediation confidentiality “except where disclosure [was] required by law.”73 The present amended ethical rule advises that “[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.”74 In 1995, the MEAC advised mediators “to preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information.”75 The then cited authority for this opinion is no longer applicable. Now, mediators must make disclosures required by law and must make decisions on whether to make disclosures permitted by law.76 Additionally, the Mediation Confidentiality and Privilege Act specifically permits mediators to communicate with a party’s counsel.77 However, an act not legally prohibited is not necessarily an advisable act. Interestingly, the options presented by the MEAC in 1995 remain sound advice, even with the rule and statutory changes.78 Similarly, in 2005 MEAC again advised a mediator to maintain confidentiality unless required by law.79 The opinion dealt with a document given during mediation which, as a mediation communica-

72. Petition, 931 So. 2d 877, 883 (Fla. 2006). See also supra discussion accompanying notes 36–37.
73. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a) (2005); Petition, 931 So. 2d at 883.
74. Id.
76. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).
77. FLA. STAT. § 44.405(1) (2007).
78. See Advisory Op. 95-010, supra note 75. The question posed to MEAC dealt with a party’s phone call to his attorney’s office during a break in mediation. Id. Following the phone call, the party told the mediator that he had spoken with the attorney’s assistant who advised him that he would not have to pay any attorney’s fees and the attorney for the other side was “known to ‘rape’ his clients financially.” Id. MEAC offered two options to the mediator: “inform the party that he or she may wish to speak with his/her attorney, rather than a member of the attorney’s staff,” or “advise the party to contact his/her attorney to inform the attorney of [the assistant’s advice].” Id.
tion not subject to statutory exception, remained confidential. For this opinion, the rule change alters neither the result nor the reasoning.

Presently, a mediator also has an ethical obligation to inform the participants that "communications made during the process are confidential, except where disclosure is required or permitted by law." Prior to August 1, 2006, a mediator only needed to inform the participants of the exception as required by law. Consequently, one MEAC opinion issued in 2001 should be updated to reflect the permissive disclosure. As before, a mediator need not "'go into detail as to any specific statutory provisions.'" Mediators are also advised to remind a party, who wishes to make a phone call to aid decision-making during mediation, of the confidentiality privilege. This is increasingly important, for following passage of the Act, a "mediation participant who knowingly and willfully discloses a [confidential] mediation communication" is subject to civil penalties. Additionally, mediators should not provide information that would lead a participant to breach confidentiality. Accordingly, it would be unethical for a mediator to "sugg[est] that a party, without the consent of all parties, discuss mediation communications with someone who does not attend the mediation" for the mediator's suggestion could lead the party to breach confidentiality.

D. Disclosure of Information by Mediator

Under no circumstances should a mediator report to the court that a party failed to mediate in good faith, as there is no requirement that a party me-
diate in good faith. 89 "A mediator’s report should be limited to only those matters authorized by applicable court rule."90 Pursuant to the rules, the mediator’s report should not contain the reason for the mediation’s cancellation or postponement.91 However, a mediator may complete a statistical form so long as the mediator does not reveal any confidential communications from the mediation.92 Similarly, “any mediator notes which relate to confidential information cannot be part of a file which is open to the public.”93

Mediators must maintain the confidentiality of mediation communications made during caucus94 unless the party consents to disclosure.95 “[A] mediator may establish as a ground rule for the mediation that nothing in caucus will be deemed confidential unless a party specifically indicates that it should be confidential, if the party has expressly consented to such a procedure.”96 However, the MEAC advised that the better practice would be for the mediator to get the party’s consent for specific communications before disclosing them to a party who was not present during the caucus.97 This would relieve the party from the burden of having to identify each and every sentence he did not want communicated, and allow the mediator to confirm the substance and form of the purposeful communications.

MEAC opinions over the last decade have addressed the confidentiality of mediator testimony, affidavits, and reports of threats. In 1997, the MEAC advised that a mediator should neither voluntarily report nor testify about threats made during mediation.98 This opinion warrants discussion given the 2006 rule change.99 The Mediation Confidentiality and Privilege Act states there is no confidentiality or privilege for any mediation communication that is “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.”100 The Act does not offer guidance in determining when a communication meets this statutory
exception. Some mediators may wait to be ordered by the court to provide information. Others may view the statutory exception as disclosure “permitted by law.” Those mediators should also take into account their other ethical obligations, notably, maintaining impartiality and responsibility to the profession, and weigh the need for immediate communication against waiting for the legal determination of whether the communication was willfully used for criminal activity or to threaten violence. Mediators well know that the same words, differently conveyed through voice and body language, take on markedly different meanings and are subject to the interpretation of the listener. Determining when a mediation communication fits within this exception may not be an easy task.

Many mediators are bound by ethical codes in addition to the Rules for Certified and Court-Appointed Mediators. In 1997, the MEAC advised that a psychologist-mediator did not have a duty to warn an individual of a threat which became known to the mediator during mediation. The opinion considered case law, the Florida statutory privilege for psychologists, and the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct in reaching its opinion. The MEAC reasoned that the mediator’s primary obligation was to follow the ethical rules for mediators in the event of inconsistency with other ethical obligations.

101. See id.
102. Advisory Op. 96-005, supra note 98.
103. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).
106. See FLA. STAT. § 44.405(4)(a)(2) (2007).
109. FLA. STAT. § 490.0147 (1997). The statute has not been amended since 1997. See FLA. STAT. § 490.0147 (2007). Similar provisions for mental health professionals were and are found at Florida Statutes section 491.0147. Id.
112. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.030(b) (1997) read: “Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards, not in conflict with these rules, which may be imposed upon a mediator by virtue of the mediator’s professional calling.” The current (renumbered) rule on concurrent standards reads: “Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over conflicting ethical standards to which a mediator may otherwise be bound.” FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.650.
As mediators were then required to maintain confidentiality unless disclosure was required by law, and reporting threats was not required, mediators were obligated to maintain confidentiality. Now, however, mediators are ethically required to maintain confidentiality, "except where . . . required or permitted by law." Psychologists may report a clear and immediate probability of physical harm to the patient or other individuals and a statutory exception exists for mediation communications threatening violence. The mediator is then left to determine whether the specific mediation communication was fully used to threaten violence. In an earlier opinion, the MEAC also stated that, based on the rules and statutes governing mediation, "a mediator had no duty to warn because the [facts presented] did not rise to the level of imminent harm." To date, the MEAC has not offered an opinion on a realistic threat of imminent harm made during mediation.

Mediators may testify in court if all parties waive their privilege; if ordered to testify by the court, mediators should abide by the court order. Further, "if subpoenaed, [the mediator] should either file a motion for protective order, or notify the judge . . . that the mediator is statutorily required to maintain the confidentiality." "A mediator should always determine what, if any, statutory confidentiality provisions are applicable."

Predating the Act’s determination that a mediation participant may disclose a mediation communication to another mediation participant’s counsel, the MEAC, in 1999, advised that "a mediator may, under certain conditions, disclose to the party’s attorney(s) the factual circumstances surrounding the mediation agreement.” However, the MEAC cautioned that it would be inappropriate for the mediator to offer a personal opinion about the case. The Act codifies and broadens permissible communication with parties’ attorneys by allowing mediation participants to disclose mediation communi-
cations to other participants and their counsel.\textsuperscript{124} Also predating the Act, a MEAC opinion, issued in 2000, advised that a mediator was not ethically prohibited from signing an agreement to mediate stating that the mediator agrees not to voluntarily testify unless a mediation participant engages in behavior specifically identified in the mediation agreement as excluded from confidentiality.\textsuperscript{125} The question dealt with a U. S. Postal Service mediation program which excluded “genuine threat[s] of physical harm,” “suspected child or elder abuse,” as well as reports of criminal activity on or “fraud or abuse of postal property.”\textsuperscript{126} The MEAC further advised that, if an issue listed in the agreement was revealed during mediation, the mediator could “report the activity without committing an ethical violation.”\textsuperscript{127}

The Act, in addition to delineating confidentiality exceptions, also allows for parties to opt-out of confidentiality provisions.\textsuperscript{128} On two occasions in 2001, and once again in 2006, the MEAC addressed the confidentiality of bar grievances.\textsuperscript{129} Most recently, the MEAC advised that “the filing of a grievance with The Florida Bar [is] . . . not prohibited by the statutory and rule confidentiality requirements.”\textsuperscript{130} In contrast, in two earlier opinions, both pre-Act and pre-rule change, the MEAC advised mediators not to voluntarily agree to testify in a bar grievance proceeding to preserve the statutory and court rule confidentiality provisions,\textsuperscript{131} and advised the non-attorney mediator not to disclose communications made during a Florida Bar Grievance mediation session, even if such testimony might be relevant in a subsequent proceeding.\textsuperscript{132} In reconciling these opinions, three critical factors are operative: statutory law, ethical rules, and whether the mediator is a non-lawyer.\textsuperscript{133}

Mediators maintain the confidentiality of mediation, except where required or permitted by law. The Act only requires disclosure for abuse and

\textsuperscript{124} FLA. STAT. § 44.405(1) (2007).

\textsuperscript{125} Mediator Ethics Advisory Comm., Op. 2000-002 (June 27, 2000).

\textsuperscript{126} Id. The agreement is signed by everyone who participates in the mediation. Id.

\textsuperscript{127} Id.

\textsuperscript{128} FLA. STAT. § 44.402(2).


\textsuperscript{130} Advisory Op. 2006-005, supra note 129.

\textsuperscript{131} Advisory Op. 2001-002, supra note 129; see Advisory Op. 2001-005, supra note 129.


neglect of children and vulnerable adults. Therefore, disclosure of professional misconduct is not required by statute. However, a Florida lawyer is obligated to report another lawyer who he knows has "committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Further, the mediator rules covering concurrent standards advise that, although "[o]ther ethical standards to which a mediator may be professionally bound are not abrogated, ... [i]n the course of performing mediation services, [mediation] rules prevail over any conflicting ethical standards." Accordingly, the lawyer-mediator may resolve the apparently conflicting ethical dilemma by deciding that the rules for mediators permit disclosure as required by the rules for lawyers. This is consistent with the Act, which states there is no confidentiality or privilege for any mediation communication, "[o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct." On the other hand, the non-lawyer, having no obligation to report, may wait to be ordered to testify.

III. CONFLICT OF INTEREST

A. Developments and Background

The Florida Rules for Certified and Court-Appointed Mediators governing conflict of interest were last amended in 2000 to require mediators to decline or withdraw from mediation entailing a clear conflict of interest. While previously, conflicts were subject to waiver by the parties following disclosure by the mediator, presently, a clear conflict is not subject to waiver under any circumstances. The Rules Regulating the Florida Bar saw significant pertinent amendment in 2006, when third-party neutrals were in-
cluded in the rule regarding conflict of interest,\textsuperscript{140} and a new rule for third party neutrals was added.\textsuperscript{141}

The Rules of Professional Conduct provide that, “a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a . . . mediator,”\textsuperscript{142} and parallel the preexisting rule governing representation by a former judge.\textsuperscript{143} In significant contrast with the mediator rules, The Florida Bar rules do permit representation, if “all parties to the proceeding give informed consent, confirmed in writing.”\textsuperscript{144} Reconciling the difference, the Bar rules acknowledge “[a] Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.”\textsuperscript{145} Further, the mediator rules establish that while other ethical standards are not abrogated, “[i]n the course of performing mediation services,” the mediator “rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.”\textsuperscript{146} The newly issued Rules Regulating The Florida Bar, do not alter the MEAC opinions regarding lawyer mediators. As a result, lawyers may be precluded from representing a client based not only on the rules regulating lawyers, but on the rules regulating mediators.

B. Required Disclosure by Mediator

Mediators, prohibited from mediating matters that present clear conflicts of interest, are also prohibited from mediating matters that present undisclosed conflicts of interest.\textsuperscript{147} The burden to disclose potential conflicts of interest rests on the mediator, who shall disclose them as soon as practical after the mediator becomes aware of a potential conflict.\textsuperscript{148}

Several MEAC opinions provide guidance on permissive and mandatory disclosure. An early MEAC Opinion advised that a mediator may disclose that she has mediated with an attorney, claims representative, or other

\textsuperscript{140} R. REGULATING FLA. BAR 4-1.12. The amended rule governs arbitrators, mediators and other third-party neutrals. \textit{Id.}

\textsuperscript{141} R. REGULATING FLA. BAR 4-2.4.

\textsuperscript{142} R. REGULATING FLA. BAR 4-1.12(a). The rule forbids representation unless all parties to the proceedings give informed consent in writing. See R. REGULATING FLA. BAR 4-1.12 cmt.

\textsuperscript{143} R. REGULATING FLA. BAR 4-1.12 cmt. (stating rule generally parallels R. REGULATING FLA. BAR 4-1.11).

\textsuperscript{144} R. REGULATING FLA. BAR 4-1.12(a).

\textsuperscript{145} R. REGULATING FLA. BAR 4-1.12 cmt.

\textsuperscript{146} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.650.


\textsuperscript{148} \textit{Id.}
parties, but is not required to do so unless there is a "close personal relationship" or other circumstances specifically referenced in the rules. In contrast, in 2001, the MEAC advised that a mediator must disclose former associations, such as previous employment, but need not withdraw unless such past relationship constitutes a clear conflict. If the conflict is not clear, the mediator must still disclose prior referral relationships and, if all parties consent, may proceed with the mediation. Similarly, in 2003, the MEAC cautioned a mediator to be mindful of the extent of her relationship with a particular adjuster or carrier and determined "that a mediator who is routinely selected by a particular carrier or adjuster, is obligated to disclose this to the other side . . . and may only continue to serve if all parties agree." In contrast, if the extent of the relationship does create a clear conflict, the conflict would be non-waivable. Clear "conflicts occur when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality" and are "not resolved by mere disclosure to, or waiver by, the parties." Distinguishing a waivable and non-waivable conflict, the MEAC determined that a father would not be able to mediate a case his attorney daughter was handling because it represented a clear conflict not subject to waiver. However, a case handled by the daughter's firm, if she had no involvement with the case, might be subject to waiver by the parties after disclosure. The mediator is ultimately responsible for determining whether a conflict is clear or waiv-

149. Mediator Qualifications Advisory Panel, Op. 98-004 (Aug. 7, 1998); see also FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340. Potential conflicts of interests which require disclosure include the fact of a mediator's membership on a related board of directors, full or part time service by the mediator as a representative, advocate, or consultant to a mediation participant, present stock or bond ownership by the mediator in a corporate mediation participant, or any other form of managerial, financial, or family interest by the mediator in any mediation participant involved in a mediation. A mediator who is a member of a law firm or other professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in a mediation.


151. Id.


153. Id.

154. FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340 comm. notes. "Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual." FLA. R. CERT & CT.-APPTD. MEDIATORS 10.330(a).


157. Id.
able. 158 "[I]f a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties" to proceed. 159

C. Lawyer-Mediator Conflicts

The MEAC opinions identify clear conflicts prohibiting a lawyer from subsequent representation of a prior mediation party. In its second issued opinion, the MEAC confirmed that an attorney who mediated a case may not subsequently serve as co-counsel regarding the same case. 160 Predictably, in the MEAC's next issued opinion, it reaffirmed that serving as counsel following service as a mediator for the same case was not permitted. 161 It is similarly impermissible "for a mediator to represent either party in [a] . . . proceeding or in any matter arising out of the subject mediation." 162 The prohibition against future representation is not solely based on having mediated the same subject matter for the same parties. A mediator who meets with prospective mediation parties to discuss their case, yet never mediates their case, may not ethically represent either party in their pending legal matter. 163 In these fact patterns presented to the MEAC, the mediator may have been privy to confidential information that might work to a party's detriment. 164 In all three fact patterns, the mediator is precluded from representing one of the parties for whom the mediator previously provided mediation services. 165 For these matters, the ethical rules for mediators preclude representation regarding the same or related legal matter. 166

Lawyer mediators need to be mindful that the ethical rules for mediators may mandate greater restrictions on representation than do the ethical rules for lawyers. The amended rule governing conflict of interest for lawyers who serve as mediators provides that the "lawyer shall not represent anyone

159. FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340(c).
166. Id. Same subject matter does not refer to case category, such as automobile collisions generally, but rather the specific automobile collision. Same subject matter would refer to a post dissolution action following the same parties' dissolution of marriage. See Mediator Ethics Advisory Comm., Op. 2004-007 (Nov. 22, 2004).
in connection with a matter in which the lawyer participated personally and substantially as a... mediator, ... unless all parties to the proceeding give informed consent, confirmed in writing.”

Written, informed consent will not permit a certified or court-appointed mediator to represent a party regarding any matter arising from the subject mediation. The provision of services, albeit limited and preliminary to formal mediation, precludes the attorney from representing a party regarding the same subject matter. This heightened ethical standard for mediators is sanctioned in the Rules Regulating the Florida Bar, which provide in the commentary: “[a] Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.”

Mediators subject to multiple ethical codes follow all codes to the extent they are consistent. When inconsistent, the mediator code prevails regarding mediation matters.

Reversing the order of events so representation precedes mediation does not change the result. An attorney, who has acted as an advocate for a party, may not ethically conduct mediation for the same parties and same subject matter involved in the initial matter, irrespective of waivers from the parties. Similarly, an attorney whose firm has contemporaneous cases—in addition to the mediation matter—pending against a mediation party would have a clear conflict of interest precluding mediation of a case with the party.

Some consecutive work as lawyer then mediator, or mediator then lawyer, is ethically permissible. A mediator may handle legal work on a matter other than the subject of the mediation. However, having done so, the mediator would be precluded from re-mediating with the original parties regarding the original subject. The MEAC has advised that “[p]rior representation of a party to a mediation, which involved different parties, a differ-

167. R. REGULATING FLA. BAR 4-1.12(a).
170. R. REGULATING FLA. BAR 4-2.4.
172. Id.
ent case or different subject matter would be subject to disclosure and may be waivable based on a case by case determination.”

Highlighting the importance of analyzing each situation with careful attention to the factual and relational variables, the MEAC gave different answers to two similar questions posed by one mediator. “A mediator (who is also an attorney) engaged in an ongoing legal relationship with a third party administrator must not serve as a mediator in cases involving the third party administrator because it is a clear, non-waivable conflict of interest.” The MEAC noted that “some third party administrators are vested with full decision-making authority and hire counsel.” For purposes of determining mediator conflict of interest, the third party administrator is, in essence, the attorney’s client. In contrast, “[a] mediator (who is also an attorney) may serve [as a mediator] in cases involving a reinsurer, . . . if the relationship is disclosed and the parties waive any potential conflict . . . .” Unlike the third party administrator, the reinsurer is not a “party” to the case and does not have decision-making authority.

D. Other Potential and Actual Conflicts of Interest

A mediator who had a prior professional relationship with individuals, who are now parties to mediation, will not automatically be precluded from mediating for the parties. The MEAC has advised that mediating for parties who have been marriage counseling clients of the mediator, or for whom the mediator provided training, is permissible, if following disclosure by the mediator, the parties request the mediator’s service. Similarly, “[a] mediator is not precluded from mediating a case in which one of the parties [previously] attended a parenting course taught by the mediator.” When the relationship does not create a clear conflict, the mediator discloses the relationship, and all parties request the mediator’s service, the mediator may

179. Id.
180. Id.
181. Id. The result depends on finding that no clear conflict exists. Id.
ethically mediate for the parties. However, some relationships create clear, non-waivable conflicts requiring the mediator to decline or withdraw from the mediation. Service as an evaluator of the parent and guardian in a dependency case is such a conflict, thus precluding the evaluator from mediating the case.

The MEAC has often addressed whether a person's primary employment prohibited him from becoming a certified mediator, or privately mediating cases. In two opinions, the MEAC advised that a guardian ad litem is not expressly prohibited from becoming a certified mediator and serving as a dependency mediator. Additionally, the rules do not prohibit a full-time mediator, who is employed by the county, from mediating privately on her own time. Consistently, a mediator's employment as a Deputy Clerk does not inherently cause ethical problems, and working as a judicial assistant does not automatically prohibit one from mediating. Notably, mediators have an on-going obligation to determine on a case by case basis that the matters they mediate do not present either clear or undisclosed conflicts of interest.

IV. PROCESS

A. Developments and Background

"A mediator is responsible for safeguarding the mediation process." Whether the case actually settles is secondary to the mediator confirming that each case is suitable for mediation and conducting the mediation "in an informed, balanced, and timely fashion." Mediators have responsibilities to the parties, the courts, the profession, and the process. Virtually all

of the MEAC opinions have an impact on the mediation process. Some
opinions clearly fit within one subject heading, while others may fall under
two or more subjects. To avoid duplication, with few exceptions, this article
discusses the MEAC opinions in only one subject section. Therefore, refer-
tence to the other subjects in this article will provide a broader overview of
the mediation process.

Over the past few years, Florida has seen significant changes in media-
tion law, including passage of the Act, amendments to the Florida Rules for
Certified and Court-Appointed Mediators, and amendments to the Rules Re-
gulating the Florida Bar related to mediation. Accordingly, in 2006 the
MEAC for the first and only time changed a published position, thereby re-
sinding portions of three previously issued opinions. Changes in the
statutory law governing confidentiality necessitated a change in the MEAC’s
position that approved a mediator reporting to the court that a party who
lacked full settlement authority failed to appear for mediation. This section
will discuss the changed position, identify opinions subject to reconsidera-
tion, and summarize the remaining MEAC opinions relating to the process of
mediation.

B. Changed Position—Lack of Full Settlement Authority

In several opinions, the MEAC advised that a party who appeared for
mediation without the requisite settlement authority had not appeared for
mediation, and his lack of appearance could be reported to the court. This
conclusion was premised on the applicable Florida Rule of Civil Procedure,
which defined appearance as requiring the individual to have full settlement
authority. While seemingly illogical that one who physically appears has
not legally appeared, case law interpreting the procedural rule supports this
conclusion. The law remains the same regarding the individual’s obliga-

197. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.600.
199. Compare Mediator Ethics Advisory Comm., Op. 2006-003 (July 24, 2006), with
95-009 (Dec. 22, 1995).
201. FLA. R. CIV. P. 1.720(b).
tion to appear for mediation. The law regarding the mediator’s reporting such nonappearance has changed.

The Mediation Confidentiality and Privilege Act provides that all mediation communications are confidential unless the parties agree otherwise or the statute provides an exception. For confidentiality purposes, mediation commences when the court orders mediation, the parties agree to mediate, or as required by agency or statute. Therefore, by the time the participants appear for the scheduled mediation and advise the mediator of less than full settlement authority, the mediation has commenced and the mediator has the ethical obligation to maintain confidentiality unless required or permitted by law or the parties agree to the disclosure. No statutory exception to confidentiality exists for advising the court of lack of settlement authority learned by the mediator during the course of the mediation. Therefore, it is a confidential communication unless the parties agree to its disclosure. Admittedly, a participant positioned to be sanctioned by the court for his nonappearance is likely disinclined to grant permission for the mediator to communicate this information.

In MEAC 2006-003, the Committee states the reasons for its departure from its previous position and rescinds portions of three previously issued opinions. In two earlier opinions, the MEAC distinguished between information learned by the mediator in caucus as opposed to joint session. Previously and presently, the information learned in caucus necessitated confidentiality because an ethical rule prohibited the mediator from disclosing this information without party permission. The same analysis now applies to information regarding settlement authority learned of in joint session; statutory law requires the mediator to keep the communication confidential absent a legally recognized exception. Therefore, the mediator’s obligation to maintain confidentiality is now consistent and not altered by whether information was learned in caucus.

203. FLA. R. CIV. P. 1.720(b)(1); see also Mediator Ethics Advisory Comm., Op. 2002-001 (Mar. 22, 2002) (stating that a party’s appearance requirement is not satisfied by appearance of party’s counsel or in-house counsel).
204. FLA. STAT. § 44.405(1) (2007).
205. Id. § 44.404(1).
206. FLA. R. CIV. P. 1.720(b). “If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys’ fees and other costs, against the party failing to appear.” Id.
C. Appearance, Authority to Settle

Mediators may report lack of appearance by a party when the party does in fact fail to physically appear.\footnote{Mediator Ethics Advisory Comm., Op. 2006-008 (Mar. 29, 2007); Advisory Op. 2006-003, \textit{supra} note 200; see also Mediator Ethics Advisory Comm., Op. 2007-001 (Mar. 29, 2007). Parties, at times and as appropriate, may attend a mediation by telephone, video conference, or other electronic means. FLA. STAT. § 44.403(2) (2007).} Failing to appear is not a mediation communication\footnote{See FLA. STAT. § 44.403(1). "Mediation communication means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation." \textit{Id}.} and may be reported to the court. A mediator's "report to the court regarding nonappearance should not include any reason for the nonappearance."\footnote{Mediator Ethics Advisory Comm., Op. 2005-007 (Apr. 6, 2006).}

A mediator lacks the authority to compel attendance at mediation and does not have an affirmative duty to inquire about settlement authority.\footnote{See Mediator Ethics Advisory Comm., Op. 2003-009 (Oct. 22, 2003). Parties should be advised that their failure to appear may lead to court sanctions. \textit{See FLA. R. CIV. P} 1.720(b).} Nonetheless, if an attorney-in-fact appears for a party found to be incompetent to proceed in criminal court, the legal authority of the representative should be resolved before proceeding with the mediation.\footnote{Mediator Qualifications Advisory Panel, Op. 98-007 (Jan. 28, 1999).}

Notably, although parties may be court-ordered to mediation, no rule requires a party to "negotiate in good faith."\footnote{Advisory Op. 95-009, \textit{supra} note 90.} Thus, a mediator should not report failure to mediate in good faith and should limit reported matters to those authorized by applicable court rule.\footnote{Advisory Op. 2004-006, \textit{supra} note 90.} Further, a mediator has the affirmative obligation to decline to mediate if the order of referral to mediation requires the mediator to report to the court whether the parties mediated in good faith.\footnote{Id.}

"When the mediation is court ordered, the parties are required to appear at mediation."\footnote{Advisory Op. 95-009, \textit{supra} note 199.} In 1995, the MEAC advised that if a party leaves prior to the mediator completing an opening statement, the mediator may report nonappearance.\footnote{Id.} However, eleven years later the MEAC receded from the opinion "relating specifically to the mediator's report to the court based on
nonappearance.” MEAC has not been asked to revisit this opinion since the passage of the Act; it is not known whether the MEAC would continue to maintain that failure of a party to sit through the opening statement is tantamount to a party’s failure to appear.

D. Advice and Forms

While prohibited from giving legal advice, mediators must at times advise parties of their right to counsel. “When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.” However, a mediator does not have a duty to advise a party of the specific legal ramifications of a considered agreement. Similarly, a mediator has no ethical obligation to advise a party who does not have counsel in a family mediation to take the signed agreement to an attorney for review. The mediator does have a duty to advise the parties of the importance of understanding the legal consequences of an agreement and giving the parties an opportunity to seek advice if they desire. The applicable Rule Regulating the Florida Bar reads:

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

225. Mediator Ethics Advisory Comm., Op. 2003-002 (May 22, 2003). See also Kalof v. Kalof, 840 So. 2d 365, 366 (Fla. 3d Dist. Ct. App. 2003) (limiting Fla. Fam. L. R. P. 12.740(f)(1) to the unusual situation in which a party’s counsel leaves the mediation before the agreement is ready for signature and the client remains to sign the mediated agreement). Under these circumstances, party’s counsel would have ten days from service of a copy of the agreement to serve a written objection on the mediator. See id. at 366–67.
227. R. Regulating Fla. Bar 4-2.4(b). The Florida Bar has withdrawn Florida Bar Ethics Opinion 86-8, see Fla. Bar Prof’l Ethics Comm., Op. 07-2 (Sept. 7, 2007), which required attorneys who mediate to “explain the risks of proceeding without independent counsel and advise the parties to consult independent counsel during the course of the mediation and before signing any settlement agreement.” Fla. Bar Prof’l Ethics Comm., Op. 86-8 (Oct. 15,
The commentary to the rule further provides that disclosure will vary based on the parties, subject matter, and dispute resolution process.  

Mediators may, while maintaining their impartiality and preserving party self-determination, provide information they are qualified by training and experience to provide. Mediators are, however, strictly prohibited from predicting how the court will rule, and from directly or indirectly giving legal advice. Posing questions rather than making statements does not negate the impropriety of the legal advice. For example, inquiring whether a party is aware that the agreement provides for a significantly higher interest rate than would a judgment is inappropriate. Similarly, a mediator may not inform a party of a right to make a claim. A mediator may not ask why a claim is not being made, but should determine the competency of the party to enter into negotiations and proceed without counsel. Consistently, if a party is unaware of a potential cause of action, a mediator is precluded from pointing this out as doing so would be giving legal advice. Inappropriate advice may also arise in a mediator’s provision of additional services. For example, “[d]rafting pleadings and providing advice on how to file them would be an inappropriate additional service not directly related to the mediation process.”

“While a mediator may assist the parties in completing authorized forms, a mediator should stop short of ‘drafting’ the Petition for Dissolution, Answer, or other pleadings.” “[A]ssisting pro se litigants with filling out forms approved by the Supreme Court of Florida after a mediation is not a per se violation of the mediator ethical standards.” However, a mediator should exercise caution “to ensure compliance with mediation rules and other professions’ standards of conduct.” Additionally, non-lawyer mediators

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1986). As this opinion is now withdrawn, Florida mediator ethics and attorney ethics appear consistent in this area.

228. R. REGULATING FLA. BAR 4-2.4 cmt.
232. Id.
233. Id.
235. Id.
238. Id.
239. Id.
must be cautious not to give legal advice so as to engage in the unlicensed practice of law—a third degree felony. 241

E. Withdrawing from, Declining, and Discontinuing Mediation

Mediators are, at times, ethically required to decline to mediate, withdraw from the mediation, adjourn, or terminate the mediation. A mediator should decline to mediate when the court order “contains provisions contrary to the mediator’s role and requires the mediator to act in a manner inconsistent with the mediator’s ethical rules.” 242 For example, a court order requiring the mediator to advise the court if the parties are not mediating in good faith would create an irresolvable ethical dilemma for the mediator. 243 Further, a mediator is also ethically obligated to withdraw if a party requests that he no longer continue or the mediator is no longer impartial. 244 However, if the parties agree, the mediator may continue the mediation in a different format such as a co-mediation or a bifurcated proceeding. 245

A mediator is required to adjourn or terminate a mediation if he believes it “entails fraud, duress, absence of bargaining ability, or unconscionability.” 246 Upon the request of a party, “[a] mediator should declare an impasse, . . . but need not immediately cancel a mediation because a party calls an attorney or other . . . advisor.” 247 Significantly, a mediator should not prematurely declare an impasse based on arbitrary time limits or because a judge requests that the mediation be concluded. 248 “While a judge may interrupt the mediation and request that it be concluded,” the mediator should not declare impasse unless the parties have in fact reached impasse. 249 “The appropriate report to the court should be an ‘adjournment’ if the parties will return at a future time, or ‘termination by the court’ if the parties will not return to mediation.” 250 Mediation emphasizes self-determination, 251 the

241. FLA. STAT. § 454.23 (2007).
243. Id.
244. Advisory Op. 2005-005, supra note 67. For discussion of MEAC opinions on conflict of interest requiring the mediator to withdraw, see supra Part III B.
246. Mediator Ethics Advisory Comm., Op. 2004-009 (Mar. 18, 2005); see also Advisory Op. 2003-001, supra note 152 (advising the mediator to “adjourn or terminate a mediation where there is a complete absence of bargaining ability”).
249. Id.
250. Id.
parties' needs and interests, fairness, and procedural flexibility.\textsuperscript{252} “Decisions made during a mediation are to be made by the parties.”\textsuperscript{253} Should a mediator decide an impasse is reached based on arbitrary time limits, it would violate “the parties’ self-determination and the mediator’s responsibility to protect such self-determination.”\textsuperscript{254}

F. \textit{Scheduling Mediation}

When scheduling cases, a “mediator must allow ‘sufficient’ and ‘appropriate’ time for completing mediation, and should not double . . . book mediations.”\textsuperscript{255} Although a mediator may schedule a mediation without the advance agreement of all parties, a party may request that the mediation be rescheduled.\textsuperscript{256} As a general rule, “[i]f a party [requests] that the mediation be rescheduled for ‘good cause,’ the mediation should be rescheduled to a mutually convenient time.”\textsuperscript{257} A mediator may violate ethical rules through scheduling mediations by: 1) “[i]nitiating the mediation process without the required judicial involvement;” 2) “[r]eferencing sanctions for failure to participate in a mediation” when the case was not “court-ordered to mediation;” or 3) “[b]y contracting with only one party in a dispute,” possibly violating the impartiality requirement.\textsuperscript{258}

G. \textit{Non-Party Participants and Contact with Parties}

Early MEAC opinions addressed a mediator’s permissible contact with the parties, stating that a “mediator is not prohibited from having contact


\textsuperscript{252} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.230.

\textsuperscript{253} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310.

\textsuperscript{254} Advisory Op. 2001-007, supra note 251. The mediator asked whether a judge, using a bailiff, may interrupt the mediation after a specific period of time, based on the judge’s determination that if the matter was not resolved within a time frame determined by the judge, an impasse should be declared with the parties signing a statement of non-agreement. \textit{Id}.


\textsuperscript{256} Advisory Op. 2005-007, supra note 216.

\textsuperscript{257} \textit{Id}.

\textsuperscript{258} Mediator Ethics Advisory Comm., Op. 2003-004 (May 22, 2003). The facts presented to the MEAC stated that the mediator was hired by the attorney of one party. \textit{Id}. The mediator then sent a letter to the unrepresented party stating that by Administrative Order, the party was required to attend mediation. \textit{Id}. The mediator also gave the date of the scheduled mediation and advised that failure to participate in mediation prior to trial may result in sanctions. \textit{Id}.
with either party . . . before or after the mediation."259 Objection of a party’s counsel to have contact with his client does not prohibit the mediator from contact with the party, but the mediator should consider the impact of the action.260 Additionally, with the consent of counsel, the parties, and stipulation of confidentiality, contact with the parties after mediation in an effort to resolve the case was also permissible.261

Parties, in their exercise of self-determination, decide who will attend their mediation. Accordingly, a mediator is not permitted to dictate who attends the mediation.262 If all parties agree on the attendance of non-party participants, the participants would be bound by confidentiality pursuant to the Act.263 If the parties agree, a non-lawyer may participate and assist a party during mediation.264

Significantly, as both the number and types of cases going to mediation increase, parties are increasingly making decisions about who will participate in their mediation. In criminal matters, parties may choose to proceed with a deputy inside or right outside the mediation room.265 However, in responding to a question regarding a civil case, the MEAC advised that if an armed guard is a necessary ingredient to a mediation and the mediator believes there is an absence of bargaining power or a troubling power imbalance, “the mediator should suspend or terminate the mediation.”266

H. Mediated Agreements

“[A] mediator is obligated to see that a mediated agreement is reduced to writing,” but a mediator is not obligated to personally draft the agreement.267

This rule is consistent with the statutory provision requiring a family mediator to prepare a consent order because the statute merely requires that the mediated agreement be incorporated into the consent order the mediator prepared.268 A mediator does have the obligation to see that the agreement is properly memorialized.269 “While a mediator cannot compel parties who

263. Id.
266. Id.
268. Id.
269. Id.
have reached an agreement to put such agreement in writing, the mediator
does have the obligation to ‘discuss with the parties and counsel the process
for formalization and implementation of the agreement.’

Having mediated a case, the mediator may not escape ethical obligations by claiming to
act as scrivener rather than mediator. Additionally, when memorializing the “agreement, a mediator must observe the ethical rules regarding impartiality, professional advice, and other professions’ standards, such as the unauthorized practice of law.” It is not appropriate for a mediator to routinely attach a copy of the mediated agreement to the Mediation Disposition Report which is submitted to the court. It is never “the mediator’s role to make substantive decisions for the parties.”

V. BUSINESS

A. Developments and Background

“A mediator’s business practices should reflect fairness, integrity and impartiality” and “[a] mediator is responsible for maintaining . . . forthright business practices.” These obligations appear in the Florida Rules for Certified and Court-Appointed Mediators in the sections governing mediators’ responsibilities to the parties and the profession, respectively. Such obligations underscore the importance of business matters in the ethical performance of mediation. Approximately twenty-five percent of the ethical questions posed to the MEAC regard business matters. This section organizes, summarizes, and discusses the business MEAC opinions issued over the last thirteen years.

270. Id.
273. Mediator Ethics Advisory Comm., Op. 2007-002 (May 1, 2007). The parties may agree to have a copy of the mediated agreement attached to the report which is submitted to the court. Id.
278. This section on Business MEAC opinions includes 29 of the 114 opinions issued through August 2007.
279. Although the 2006 Rules were amended to substantially change mediator certification requirements, MEAC’s jurisdiction does not include certification matters and therefore they will not be addressed in this section. See Mediator Ethics Advisory Comm., Op. 2006-001 (Apr. 6, 2006). The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy filed a petition with the Supreme Court of Florida proposing amendments to the Florida
B. Referral and Selection

"A mediator may not compensate another for merely making a referral, but may compensate a colleague or mediation service for actual work performed . . . ." 280 The MEAC provided examples of actual work subject to compensation that included "scheduling and noticing mediations, and billing [and] collecting mediation fees." 281 This opinion reaffirms the mandate that "[n]o commissions, rebates, or similar remuneration shall be given or received by a mediator for a mediation referral." 282

In a second opinion regarding referrals, the MEAC addressed the matter of attorney-mediators referring cases to and receiving referrals from a firm for a fee. 283 The questioner stated that, he occasionally both referred cases for which he received referral fees and accepted cases for which he paid referral fees. 284 The MEAC opinion does not discuss the ethics of attorneys taking or receiving referral fees—for this is clearly not within its limited jurisdiction. Attorneys, as mediators, are prohibited from taking or receiving referral fees. 285 They may give and receive compensation for actual work performed. The questioner may well have used the term "referral attorney fees" loosely, and the work may have justified the financial transaction. As with all matters having to do with ethical considerations based on codes of conduct for other professions, the professional is governed by the applicable code of conduct. 286 Notably, in the case of attorney-mediators, the codes are consistent in prohibiting fees for the mere referral of cases. 287

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Rules for Certified and Court-Appointed Mediators. Petition, 931 So. 2d 877, 878 (Fla. 2006) (per curiam). With some modification, the Court adopted the proposed amendments which replace the previous mediator certification requirements. Id. at 879. The Supreme Court of Florida adopted the Committee's recommendation that certification for Circuit Civil mediators no longer require Florida Bar membership. In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to the Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, slip op. at 1 (Fla. Nov. 15, 2007), available at http://www.floridasupremecourt.org/decisions/2007/sc05-998.pdf.


281. Id. This opinion also states that "a mediator may compensate another for [the] use of office space." Id.


283. Advisory Op. 2001-009, supra note 147. The MEAC advised that "[r]eferring cases to [and] receiving referrals from a firm for a fee may constitute a [clear] conflict" necessitating the mediator's withdrawal. Id. Additionally, the MEAC advised that a mediator must disclose former associations, such as previous employment. Id.

284. Id.

285. Fla. R. Cert. & Ct.-Apptd. Mediators 10.380(e); R. Regulating Fla. Bar 4-1.5.

286. See R. Regulating Fla. Bar 4-1.12 cmt.

287. See Fla. R. Cert. & Ct.-Apptd. Mediators 10.380(e); R. Regulating Fla. Bar 4-1.5.
Mediators, in addition to getting referrals, often get cases by court appointment or agreement of the parties.\textsuperscript{288} In 1998, the MEAC advised that the rules of procedure "[do] not contemplate the court appointing a corporation" as a mediator; however, courts may and do appoint individuals associated with a mediation group.\textsuperscript{289} During the same year, also regarding mediation referrals, the MEAC advised that pre-suit mediation agreements that "name a specific individual as the exclusive mediator" are suspect.\textsuperscript{290}

Two MEAC opinions address the propriety of mediators working with mediation services corporations or organizations.\textsuperscript{291} In 1999, it advised that a non-lawyer may start a private mediation network of certified mediators, both lawyers and non-lawyers, who conduct mediations across the state.\textsuperscript{292} Accordingly, the non-lawyer may pay the lawyer and non-lawyer mediator based on a flat fee arrangement for the mediation services they render.\textsuperscript{293} However, even if an entity solicits business and handles bookings and payment arrangements, the individual mediator is the one bound to abide by all the ethical rules and "adhere to the highest standards of integrity, impartiality, and professional competence."\textsuperscript{294} Similarly, a law firm may maintain a mediation department within the firm as long as the mediation practice is conducted in conformity with the Rules of Professional Conduct. Under Florida Bar ethical constraints, non-lawyers "may not have an ownership interest in either the law firm or [its] mediation department," and the attorney advertising rules apply to the firm's mediation department.\textsuperscript{295}

Mediator networking also raises ethical issues. An early MEAC opinion identified problems with the networking organization described in the posed question.\textsuperscript{296} The concerns included "mediator impartiality, fee arrangement, and [mediator] integrity."\textsuperscript{297} The MEAC noted the critical distinction between the allowable administrative fee and the prohibited referral

\textsuperscript{288} See Advisory Op. 2000-007, supra note 187 (advising when the appointment of non-certified mediators violates procedural rules).
\textsuperscript{292} Advisory Op. 99-011, supra note 291.
\textsuperscript{293} Id.
\textsuperscript{294} Fla. R. CERT. & CT.-APPTD. MEDIATORS 10.030 (1999); Advisory Op. 99-011, supra note 291. This opinion does not address the matter of appropriate business solicitation and should be read in conjunction with MQAP 98-003 regarding courts not appointing corporations as mediators. See Advisory Op. 99-011, supra note 291; Advisory Op. 98-003, supra note 289.
\textsuperscript{296} Advisory Op. 96-001, supra note 196.
\textsuperscript{297} Id.
fee banning remuneration for the "referral of clients for mediation or related services."\textsuperscript{298} Also troubling to the MEAC was the company’s hope of entering into business relationships with "attorneys, businesses, [and] insurance companies" as their "exclusive purveyor of [mediation and arbitration] services."\textsuperscript{299} The MEAC cautioned the mediator against entering into a relationship resulting in a financial connection that might cause "the mediator [to] lose objectivity and impartiality."\textsuperscript{300} It also cautioned that a mediator’s use of questionable marketing strategies—in derogation of the traditional court system—might raise questions about the mediator’s integrity, for a mediator is charged with "adher[ing] to the highest standards of integrity" and prohibited from "undertak[ing] any act ... compromis[ing] the mediator’s integrity."\textsuperscript{301}

C. Advertising and Soliciting

A Supreme Court of Florida certified mediator must "ensure that 'all advertising ... represent[s] honestly the services to be rendered [and makes] ... claims of specific results or promises which imply favoritism to one side ... for the purpose of obtaining business.'"\textsuperscript{302} Additionally, "'[a] mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications.'"\textsuperscript{303} It is therefore unethical to advertise that mediation is "'a dispassionate evaluation by a neutral party,'" as this definition is inaccurate and inconsistent with the statutory definition of mediation.\textsuperscript{304} Consequently, it would be misleading and unethical

\begin{itemize}
  \item \textsuperscript{298} Id. (citing FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.100(c) (1996)). The applicable rule following the 2000 Revision is 10.380(e). FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.380(e).
  \item \textsuperscript{299} Advisory Op. 96-001, supra note 196.
  \item \textsuperscript{300} Id.
  \item \textsuperscript{301} Id. (quoting FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.030(a)(1) (1996)). The applicable rule following the 2000 Revision is 10.620. FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.620.
  \item \textsuperscript{302} Advisory Op. 96-001, supra note 196, (quoting FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.130 (1996)). The applicable rule following the 2000 Revision is 10.610. FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.610.
  \item \textsuperscript{303} Id. (quoting FLA. R. CERT. \& CT.-APPTD. MEDIATORS 10.130 (1996)).
  \item \textsuperscript{304} Mediator Qualifications Advisory Panel, Op. 95-007 (Oct. 5, 1995). Florida’s statutory definition of mediation reads:

  "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.
\end{itemize}
"for mediators to advertise that they are providing evaluation services under the guise of mediation."

The MEAC has addressed several questions regarding the content of advertisements. It has advised that a certified mediator should not use the state seal or the seal of the Supreme Court of Florida "on any advertisement without express permission" to do so. Additionally, "[t]he generic designation, ‘certified mediator,’ is inherently misleading," and its use without identifying the specific areas of mediation certification is violative of the ethical rule governing advertising. Also misleading and violative of the rule, is the use of letterhead which includes two names and the statement "Circuit Court Mediation," where only one of the named parties is a certified circuit court mediator. Similarly, a mediator’s advertisement in which the mediator is referred to as a judge, "may confuse or mislead the public," requiring the mediator to include clarifying information for use of the term judge to be permissible.

Mediators are permitted to send letters to attorneys and other individuals advertising their services. They may also send follow-up letters with information about their available services after the mediation has ended. The letters must be consistent with the advertising requirements and the requirement for mediator impartiality. Additionally, mediators are not prohibited from soliciting letters of reference from persons for whom they have mediated. These evaluations are not categorically prohibited in advertising, so long as the advertising is truthful.

The MEAC has also answered questions about mediator sponsored events and the purchase of items and meals, determining "that logo embossed items of minimal value are permissible forms of advertising," whereas items of greater value "may create the appearance of mediator bias and

FLA. STAT. § 44.1011(2) (2007).
305. Advisory Op. 95-007, supra note 303.
309. Mediator Ethics Advisory Comm., Op. 2004-001 (May 14, 2004) (citing FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.610). The MEAC was asked about a part-time judge from another state, who in an advertisement for mediation services "was described in part as a Family Court Judge." Id.
312. Id.
314. Id.
raise doubts as to the mediator's neutrality."315 "[L]unches and golf outings [paid for by the mediator] for the purpose of developing goodwill and attracting . . . clients can create the appearance of bias," and therefore, are inappropriate activities.316 However, sponsoring a sports tournament which is open to the public or holding a silent auction to raise money for charity, while incorporating the name of a mediation firm in advertising the event, is permissible if consistent with the rules for impartiality, conflict of interest, advertising, and integrity.317

While mediators may not use the mediation process to solicit future business,318 they may provide information such as a mediator's business card.319 Specifically, a mediator may respond to a party's request for a business card as they walk back to the court following mediation, even if the other party is not a witness to the request.320 The mediator could have provided the card at a point in time earlier in the mediation, and is also allowed to do so at a later time.321

Mediators may use creative means that are consistent with ethical requirements to advertise. For example, a mediator may produce a television show with real parties in a live mediation, so long as "the parties are informed of their statutory right to confidentiality and they waive that right."322 However, if a mediator was not competent to handle the cases for which he is advertising, or he provided information that was false or misleading, then the advertisement would violate rule 10.610 of the Florida Rules for Certified and Court-Appointed Mediators.323

D. Fees and Payment

"A mediator must comply with ethical and procedural rules in relation to charging fees for mediation."324 Failure to do so [results in] an ethical vio-

316. Id. A mediator is not precluded "from giving or accepting de minimis gifts or incidental items . . . to facilitate the mediation." FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.330(c) comm. notes.
320. Id.
321. Id.
Accordingly, a mediator must notify the parties of payment terms “within a reasonable period of time prior to the mediation.” A mediator who participates in a program, such as the Department of Business and Professional Regulation’s Homeowners Association Program, providing for fee allocation, must disclose the fee allocation sufficiently before mediation begins to give the parties the opportunity to either agree to the allocation or negotiate another fee arrangement. Additionally, a mediator who agreed “to perform services for a specified fee [via court order, must] perform such services at that fee unless relieved of that duty by the court.” Like other professionals, mediators who are not paid for services they rendered, “may seek payment in any lawful manner.”

E. Notes and Records

On two occasions, the MEAC declined to answer questions regarding retention or disposal of mediation records, stating the matter was not ethical in nature, and therefore, not within the scope of its jurisdiction. The MEAC has replied to two questions regarding mediation notes, advising that “[t]here is no statutory rule or requirement that a mediator’s notes taken during a family mediation be kept in the [court] file.” To the contrary, any “notes which relate to confidential information [shall not] be part of a [public] file.” “[T]he voluntary disclosure of a mediator’s notes . . . is fraught with potential risks and hazards.” While a mediator does have discretion with regards to providing his or her notes upon request of a party, “a mediator should carefully weigh the benefits and perils of sharing this information, and should proceed with the utmost caution.”

325. Id.
330. Mediator Qualifications Advisory Panel, Op. 95-004 (Oct. 5, 1995). The MEAC did not find an ethical obligation requiring a mediator to retain mediation files. Id. The MEAC did advise that mediators are required “to maintain adequate records to support charges for [rendered] services.” Id.; see also Fla. R. CERT. & CT.-APPTD. MEDIATORS 10.380(d). In 1998 when MEAC was again asked about the length of time necessary to store mediation records, it referred to Advisory Op 95-004. Mediator Qualifications Advisory Panel, Op. 98-002 (August 7, 1998).
332. Id.
334. Id.
F. Mentorship, CME, and Gifts

Certified mediators have an ethical obligation to allow a minimum of two observations of their mediations per year, but are not obligated to allow co-mediation or supervised mediation. Flo. Mediator Qualifications Advisory Panel, Op. 2000-001 (Mar. 16, 2000). "An experienced mediator should cooperate in training new mediators, including serving as a mentor." Id.; see also Fla. Admin. Order No. AOSC06 -9 (Fla. May 11, 2006) (on file with Clerk, Fla. Sup. Ct.).

"[A] certified mediator is required to preserve the quality of the profession, to maintain forthright business practices, . . . [refrain from] provid[ing] any service that would compromise [his] integrity or impartiality, . . . and . . . support the advancement of mediation by participating in public education." Mediation Ethics Advisory Comm., Op. 2004-012 (Mar. 18, 2005).

Consistent with these provisions, charges for continuing mediator education programs may be determined by the competitive market. Mediator Ethics Advisory Comm., Op. 2004-012 (Mar. 18, 2005).

In 1999, the MEAC wrote that the rules imply mediators may not give gifts to court personnel. Mediator Qualifications Advisory Panel, Op. 99-005 (Aug. 23, 1999). However, subsequent to that opinion, the 2000 Revision Committee Notes read, "[g]iving gifts to court personnel in exchange for case assignments is improper. De minimis gifts generally distributed as part of an overall business development plan are excepted." Fla. R. Cert. & Ct.-Apptd. Mediators 10.530 comm. notes. The impropriety seems to arise from the intent to improperly influence court personnel, rather than the giving of generally distributed de minimis gifts. Additionally, a mediator has an affirmative obligation to maintain impartiality, including "neither giv[ing] nor accept[ing] a gift, favor, loan, or other item of value . . . [d]uring the mediation process." Fla. R. Cert. & Ct.-Apptd. Mediators 10.330(c).

VI. CONCLUSION

Florida stands squarely in the forefront of the establishment and enforcement of mediator ethical standards. With over two decades of experience with court-connected mediation, a vast body of mediation case law, statutes, rules of procedure, and finely tuned ethical rules, Florida offers a wealth of information to attorneys, mediators, and mediation participants. Building on the firm foundation of the comprehensive Act, the 2006 amendments to the Rules for Certified and Court-Appointed Mediators and Rules Regulating the Florida Bar provide further direction regarding concurrent ethical standards, and go a long way in providing mediators with ethical

337. Id.
guideposts. Yet, there will always be some unmarked and unforeseen forks in the road. The MEAC opinions provide a roadmap of past questions asked and answered to assist with present and future decisions. This article is part of the continuing dialogue in which mediators engage to identify ethical issues, consider and evaluate options, and reach satisfactory resolution. The MEAC opinions serve as additional signage for mediators to locate and follow the highest road.
PLEASE LEAVE A MESSAGE AFTER THE TONE: HOW FLORIDA LAWYERS SHOULD APPROACH THE "MINI-MIRANDA" WARNING REQUIREMENT OF THE FAIR DEBT COLLECTION PRACTICES ACT

SHERA ERSKINE*

I. INTRODUCTION

In the world of consumer debt collection in the State of Florida, the boundaries within which a debt collector may communicate with a debtor in an attempt to collect a consumer debt are proscribed by both the Federal Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act. This paper explores the implications of the "Mini-Miranda" warning requirement under the Fair Debt Collection Practices Act (FDCPA) and its impact on Florida lawyers.

II. THE FOTI V. NCO FINANCIAL SYSTEMS, INC. DECISION AND ITS EFFECT ON FLORIDA LAWYERS

The Foti v. NCO Financial Systems, Inc. decision provides insight into the application of the FDCPA in Florida, highlighting the significance of the "Mini-Miranda" warning.

III. THE UNDERLYING PURPOSE OF THE FAIR DEBT COLLECTION PRACTICES ACT

The primary purpose of the FDCPA is to protect consumers from abusive debt collection practices. This section discusses the protections provided by the FDCPA, including the "Mini-Miranda" warning.

IV. WHAT CONSTITUTES "COMMUNICATION" UNDER THE FDCPA?

The definition of "communication" under the FDCPA is crucial for debt collectors. This part examines what constitutes "communication" in the context of the FDCPA.

V. THE PROTECTION OF CONSUMERS VIA RESTRICTIONS ON COMMUNICATION WITH A DEBTOR IN AN ATTEMPT TO COLLECT A DEBT

This section delves into the protections provided by the FDCPA for debt collectors and consumers. It also covers the protections provided by the Florida Consumer Collection Practices Act.

A. Protections Provided by the Fair Debt Collection Practices Act

B. Protections Provided by the Florida Consumer Collection Practices Act

VI. POTENTIAL PRIVACY ISSUES ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT'S "MINI-MIRANDA" WARNING REQUIREMENT

Privacy issues arise when debt collectors communicate with debtors, especially when the"Mini-Miranda" warning is not properly given.

VII. POTENTIAL TORT LIABILITY ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT'S "MINI-MIRANDA" WARNING REQUIREMENT

Tort liability can occur when debt collectors fail to provide the "Mini-Miranda" warning, leading to legal consequences.

A. Public Disclosure of a Debt as an Invasion of Privacy

B. Intrusion upon an Individual's Seclusion

VIII. THE CONSTRUCTIVE EXCLUSION OF TECHNOLOGY FROM METHODS AVAILABLE FOR DEBT COLLECTORS TO COLLECT DEBT MAY CONSTITUTE INFRINGEMENT UPON ONE'S RIGHT TO EARN A LIVING

The use of technology in debt collection may infringe upon an individual's right to earn a living.

IX. CONCLUSION

In conclusion, Florida lawyers should be aware of the "Mini-Miranda" warning requirement and its implications for debt collection practices. Compliance with the FDCPA is essential to avoid legal repercussions and protect consumers from abusive debt collection practices.
Debt Collection Practices Act (FDCPA), and the Florida Consumer Collection Practices Act (FCCPA). In order to avoid a lawsuit for improper communication with a debtor, a Florida attorney acting as a debt collector must comply with the communication provisions of both the federal and state statutes. The FDCPA only invalidates state laws dealing with consumer debt collection if such laws are inconsistent with the federal statute. State consumer debt collection statutes that provide more protection for the consumer than the federal statute are not considered inconsistent for the purposes of preemption.

A dilemma exists, however, when the FDCPA meets modern technology—the FDCPA "was enacted in 1977," prior to the common usage of answering machines. Thus, the limited types of communication made compliance with the FDCPA's communication restrictions fairly straightforward. The technological advances that have occurred over the past three decades, however, have made compliance with the FDCPA difficult. These compliance issues have, "for the most part, . . . been [left] unaddressed by case law." With answering machines being "used in more than 77 percent of all [United States] households," debt collectors are unsure as to whether leaving a message would violate various provisions of the FDCPA. In light of the

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3. Id.
6. Salvo, supra note 5.
7. Id.
8. Id.
9. Id. Debt collectors are required to provide meaningful disclosure as to their purpose and identity, however, may not disclose information regarding the debt to a party other than the debtor, thus creating a dilemma when leaving a message on an answering machine. Id. (citing 15 U.S.C. §§ 1692c(b), 1692d(6) (2000)).
technological advances, especially in the communication arena, the FDCPA is "a technological dinosaur that should be updated to include directives aimed at the new technology."¹⁰  Categorized as "static legislation,"¹¹ the FDCPA is no longer serving its purpose in the rapidly advancing technological world.¹²

Without any congressional or court directives regarding compliance with the FDCPA and the recent technological advances, debt collection attorneys also face the issue of simultaneous compliance with state law.¹³ The solution for Florida attorneys, however, may lay in the preemption provision of the FDCPA.¹⁴ This provision expressly states that the FDCPA does not preempt any state statute concerning debt collection if that statute provides more protection for the consumer.¹⁵ The FCCPA does not explicitly require a communication from a debt collector to disclose that it is an attempt to collect a debt, rather requires the debt collector to disclose his or her identity and purpose only upon being asked to do so.¹⁶ This appears to provide more protection for the consumer in the form of upholding their expectations of privacy by preventing disclosure of private information to third parties.¹⁷

This paper will explore the reasons why Florida attorneys acting as debt collectors should follow the FCCPA, rather than the FDCPA, because it provides more protection for the debtor or consumer. Part II of this paper will

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10. Salvo, supra note 5. "With recent advances in computer and information technology, the acquisition and distribution of private information has created new and perplexing privacy issues. Technology has created these issues faster than the courts are able to address them." Robert H. Thornburg, Florida Privacy Law: Potential Application of Intentional Tort Principles and Florida's Constitutional Right of Privacy as Safeguards to Governmental and Private Dissemination of Private Information, 4 FLA. COASTAL L.J. 137, 137 (2003).
12. Id. at 723–24. This could be due to the fact that the FDCPA's purpose is currently to correct harassment associated with debt collection that "haunted the country's debt-collection industry before its enactment." Id. at 723.
15. Id. Despite the fact that the Legislature is scheduled to convene in October 2007 to tackle the anti-technology nature of this statute, their efforts may be delayed by other political maneuvers such as the "war in Iraq" or the 2008 Presidential election. Caitlin Devitt, The Mid-Year Washington Outlook; Reviewing the FDCPA Will Be a Major Issue, COLLECTIONS & CREDIT RISK, June 2007, at 30. At this hearing, the legislature intends to review data collection practices, including the new communication technology available. Id.
17. Id. § 559.72(5). The FCCPA prohibits disclosure of the debtor's information to third parties without express consent from the debtor. See id.
discuss the *Foti v. NCO Financial Systems, Inc.* decision and its effect on Florida attorneys acting as debt collectors. Part III of this paper will discuss the underlying purpose of the FDCPA. Part IV of this paper will discuss exactly what constitutes "communication" within the statutory meaning provided by the FDCPA. Part V will outline the consumer protections provided by the FDCPA via its restrictions on communication with the consumer or debtor in comparison with the protections provided by the FCCPA. Part VI will discuss the FDCPA’s meaningful disclosure requirement and the potential of infringement of consumer or debtor privacy rights. Part VII will discuss potential tort liability that attorneys may face in dealing with the Fair Debt Collection Practices Act. Part VIII will briefly discuss how the Fair Debt Collection Practices Act constructively excludes attorneys’ use of technology when practicing under the Fair Debt Collection Practices Act and how this constructive exclusion may constitute an infringement upon one’s right to earn a living. Part IX will provide the author’s conclusion as to why the FCCPA provides consumers or debtors with more protection than the FDCPA.

II. THE *FOTI V. NCO FINANCIAL SYSTEMS, INC.* DECISION AND ITS EFFECT ON FLORIDA LAWYERS

A debt collector\(^{19}\) receives instructions from a client to recover a balance left unpaid by a debtor.\(^{20}\) In response to these instructions, the debt collector sends a letter to the debtor followed by two phone calls consisting of a pre-recorded, standardized message.\(^{21}\) The pre-recorded, standardized message consisted of a greeting and a request for the debtor to return the phone call as it dealt with "a personal business matter that requires ... immediate attention."\(^{22}\) The debt collector was then sued by the debtor for vio-

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   The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

21. *Id.* at 648.
22. *Id.* The exact message was as follows: "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention."
lating various sections of the FDCPA, specifically, for a failure to identify to the debtor that the message was in fact from a debt collector.\textsuperscript{23}

In an attempt to defend against the allegations made, the debt collector asserted that the messages left on the debtor’s answering machine did not constitute “communication” as defined by the FDCPA.\textsuperscript{24} Thus, the debt collector argued that he was not required to provide notice to the debtor that the message was an attempt to collect a debt.\textsuperscript{25} The debt collector also attempted to argue that even if the message was considered a “communication” for the purposes of the FDCPA,\textsuperscript{26} that the provision requiring the debt collector to identify to the debtor that the message was an attempt to collect a debt owed would “[place] debt collectors in a virtual ‘Hobson’s choice.’”\textsuperscript{27} The debt collector went on to suggest that a debt collector could not simultaneously comply with the notification requirement of the FDCPA and the provision of the FDCPA prohibiting any disclosure of information to a third party without violating either provision.\textsuperscript{28} The court disagreed with both arguments proposed by the debt collector, holding that the messages left were “communications” for the purpose of FDCPA, and thus the debt collector failed to comply with the notification requirement.\textsuperscript{29} In addition, the court held that the debt collector could avoid the issue surrounding disclosure of the debtor’s information to third parties by utilizing a debt collection method other than leaving messages on answering machines.\textsuperscript{30}

\begin{footnotesize}
\footnote{Please call back 1-866-701-1275, once again please call back, toll-free, 1-866-701-1275, this is not a solicitation.” \textit{Id.}}
\footnote{\textit{Id.} at 649–50 (citing 15 U.S.C. § 1692e(11)).}
\footnote{\textit{Foti}, 424 F. Supp. 2d at 654. “The term ‘communication’ means the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).}
\footnote{\textit{Foti}, 424 F. Supp. 2d at 654.}
\footnote{15 U.S.C. § 1692a(2).}
\footnote{\textit{Foti}, 424 F. Supp. 2d at 658. “Hobson’s choice” is defined as “an apparently free choice when there is no real alternative.” \textsc{Merriam-Webster’s Colliegate Dictionary} 551 (10th ed. 1999).}
\footnote{See \textit{Foti}, 424 F. Supp. 2d at 658 (citing 15 U.S.C. §§ 1692e(b), 1692e(11)).}
\footnote{\textit{Foti}, 424 F. Supp. 2d at 659 (“Debt collectors, however, could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters.”); see also \textit{Hosseinzadeh}, 387 F. Supp. 2d at 1112 (citing Joseph v. J.J. MacIntyre Cos., 281 F. Supp. 2d 1156, 1164 (N.D. Cal. 2003) (discussing how “disclosure to third parties was ‘less likely’ in the context of a [message being placed] to a debtor’s residence’)). “The collector was ‘cornered between a rock and a hard place, not because of any contradictory provisions of the FDCPA, but because the method they have selected to collect debts has put them there.’” \textit{Court Rakes Collector Over Misleading Prercorded Messages}, \textsc{Consumer Fin. Servs. L. Rep.}, Oct. 18, 2006, at 1 [hereinafter \textit{Court Rakes Collector}] (quoting \textit{Leyse v.}}
\end{footnotesize}
Following this recent court decision, debt collection attorneys throughout the country have been faced with whether to leave a message or not—an issue which the Federal Trade Commission has declined to address. This refusal by the Federal Trade Commission is surprising because the overall number of complaints submitted by consumers in regards to harassing debt collection practices has quadrupled between 2001 and 2006. In addition to the growing number of complaints, the number of debt collectors continues to grow, thus leaving debtors and debt collectors alike confused about the ability to leave a message in an attempt to collect a debt.

While plaintiff attorneys feel that “[i]t’s not difficult for someone who wants to comply to stay in the straight and narrow,” debt collection attorneys feel that it is not so simple, and rather that the “vague and broad language” of the FDCPA leaves them especially vulnerable to lawsuits. The FDCPA seems to “cause[] honest and diligent debt collectors” difficulty in complying with its ambiguous provisions. Even further, some debt collection attorneys feel that the abundance of litigation alleging violations of the FDCPA is a tactic employed by plaintiff attorneys in order “to get their clients out from under lawful debt-collection activities.” Regardless of the reason behind the increase in litigation against debt collection firms, debt collectors are left in the dark as to how to keep up with technology without violating multiple provisions of the FDCPA.

Corporation Collection Servs., Inc., No. 03 Civ. 8491 (DAB), 2006 WL 2708451, at *5 (S.D.N.Y. Sept. 18, 2006)).

31. Bedard, supra note 13, at 146-47.

33. Lanford & Lanford, supra note 32.
35. Id.
36. Goldberg, supra note 11, at 723.
37. Qualters, supra note 34.
38. See Salvo, supra note 5.
III. THE UNDERLYING PURPOSE OF THE FAIR DEBT COLLECTION PRACTICES ACT

The purpose of the FDCPA is expressly stated within the statute as being "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 39 "[More] specifically, the FDCPA 'prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures.'" 40 This purpose is justified by Congressional findings that debt collectors were utilizing "abusive, deceptive, and unfair" practices in their attempts to collect debt. 41 Congress further found that these "abusive, deceptive, and unfair" practices were contributing factors in "personal bankruptcies, [] marital instability, . . . loss of jobs, and [] invasions of individual privacy." 42 Thus, the FDCPA was enacted as a remedial statute, 43 based on the additional congressional finding that the existing laws and remedies at the time were "inadequate to protect consumers." 44 Thus, "[t]he FDCPA establishes a civil cause of action against 'any debt collector who fails to comply with any provision of this subchapter with respect to any person,'" 45 and allows for parties to enforce the legislation through private litigation. 46

In considering claims under the FDCPA, including claims dealing with "communications," the court should analyze the claim from the perspective of the "least sophisticated [consumer]" standard. 47 In applying this objective

42. Id.
44. 15 U.S.C. § 1692(b).
46. Burnham, supra note 39, at 183.
standard, the court must analyze "whether a hypothetical least sophisticated consumer would be deceived or misled by the debt collector's practices." The hypothetical "least sophisticated consumer" can, however, be supposed to possess a basic amount of comprehension about the world. "The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." This standard has been held to be "consistent with 'basic consumer-protection principles.'"

The "least sophisticated consumer" standard, while applicable to most claims under the FDCPA, does not apply directly to FDCPA claims dealing with the placement of telephone calls by a debt collector without meaningful disclosure of his or her identity. Thus, courts view these claims from the viewpoint of "a consumer whose circumstances makes [sic] him relatively more susceptible to harassment, oppression or abuse." This standard is analogous to the "least sophisticated consumer" standard. Further, when looking to whether a debt collector has failed to provide meaningful disclosure, the court should look to the context of and the inferences drawn from the message at issue.

IV. WHAT CONSTITUTES "COMMUNICATION" UNDER THE FDCPA?

In order to invoke the protections provided by the FDCPA, correspondence between the debt collector and the debtor must be considered a "communication" within the meaning set out by the statute. The FDCPA broadly defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In addition, the FDCPA should be broadly construed because it serves as a remedial statute. In interpreting and applying the meaning of legislation,
""[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.""59

Here, the plain meaning of the term "communication" appears to be consistent with the underlying purpose of the FDCPA.60 This apparent consistency, however, has been called into question when the issue of whether a message left on an answering machine constitutes a "communication" within the statutory meaning.61 Even if a message left on an answering machine does not specifically mention detailed information regarding a debt, that message still constitutes a "communication" as defined by the FDCPA because it "indirectly" conveys information about the debt.62 Courts have reasoned that such a message is conveying information regarding a debt based on the underlying purpose of getting the debtor to return the call and discuss the debt owed.63 Some courts, on the other hand, have recently held that a communication in which a debt is not specifically mentioned is not a "communication" within the aforesaid statutory meaning.64 The lack of judicial consistency may be due to the statute's "misdirected and poorly drafted" cause it is designed to protect consumers, the FDCPA is . . . liberally construed in favor of consumers to effect its purpose.").


60. Id. (citing Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996)).


62. Hosseinzadeh, 387 F. Supp. 2d at 1116. "15 U.S.C. § 1692d(6) applies 'equally to automated message calls and live calls.'" Id. at 1111 (quoting Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1163 (N.D. Cal. 2003)) (reasoning that the plain language indicates that the statutes "prohibit the placement of telephone calls without meaningful disclosure."). In addition, the Federal Trade Commission (FTC) has addressed the issue of contacts in which the debt collector does not specifically mention the debt and has come to the conclusion that a communication in an attempt to collect a debt can still violate the FDCPA because the communication "indirectly" conveyed information regarding a debt, "even if the obligation [was] not specifically mentioned." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collections Practices Act, 53 Fed. Reg. 50,097, 50,099 (FTC Dec. 13, 1988).


64. Horkey v. J.V.D.B. & Assocs., 179 F. Supp. 2d 861, 868 (N.D. Ill. 2002) (denying "[p]laintiff's motion for summary judgment" for claim involving defendant's violation of FDCPA because defendant's contacts did not constitute "communications" within the statutory definition). Additionally, one court has found that a fax was not communication because it did not convey any information about a debt. Fava v. RRI, Inc., No. 96-CV-629 RSP/DNIH, 1997 WL 205336, at *6 (N.D.N.Y. Apr. 24, 1997). Later courts, however, have avoided upholding this finding by labeling it as dicta. See Belin, 2006 WL 1992410, at *4.
nature, despite the fact that the number of complaints against debt collectors has decreased since 1970.65

The reasoning behind such a school of thought is based on the notion that if it were to be construed any other way, it would create a loophole allowing debt collectors to avoid the disclosure requirement,67 as well as other provisions of the FDCPA, by not conveying specific details regarding the debt.68 Further, courts rationalize that messages left on an answering machine in an attempt to collect a debt are "intended to initiate further dialogue regarding [the debtor's] . . . debt, and therefore constitute 'communications.'"69 Thus, in a majority of jurisdictions, the restrictions imposed by the FDCPA apply to all debt collection-related contacts, regardless of whether or not the debt is specifically mentioned.70

V. THE PROTECTION OF CONSUMERS VIA RESTRICTIONS ON COMMUNICATION WITH A DEBTOR IN AN ATTEMPT TO COLLECT A DEBT

The primary foundation upon which both the FDCPA and the FCCPA are premised is the protection of the privacy and reputation of the consumer or debtor,71 as well as the prevention of harassing debt collection practices.72 In order to promote the underlying purpose, each statute provides the debtor with a certain degree of protection.73 Subsection A will discuss the protection provided by the Fair Debt Collection Practices Act, and subsection B will discuss the same for the Florida Consumer Credit Practices Act.

A. Protections Provided by the Fair Debt Collection Practices Act

The FDCPA places restrictions upon how, when, and why a debt collector may contact or communicate with a debtor in order to preserve the deb-

65. See Goldberg, supra note 11, at 722–23.
66. Court Rakes Collector, supra note 30. "Under such an exception, debt collectors would be able to abuse and harass consumers with phone calls and other forms of correspondence so long as there is no express mention of the consumers' debts." Id.
tor's privacy and reputation, as well as prevent loss of employment. As per the FDCPA, a debt collector may not, without prior consent from the debtor, communicate with the debtor in connection with the collection of a debt "at any unusual time or place" if the "debt collector knows that the [debtor] is represented by an attorney;" or at the debtor's "place of employment if the debt collector knows... that the... employer prohibits... such communication." In addition, "a debt collector, may not communicate, [in an attempt to collect a debt,] with a third party... without the prior consent of the consumer, the express permission of a court, or unless reasonably necessary to effectuate a post-judgment judicial remedy." An attempt to obtain location information about the debtor is the only exception to the prohibition against third party disclosure. Further, the FDCPA "expressly prohibits a debt collector from mentioning that 'the consumer owes any debt' and from identifying himself as a debt collector when he [or she] seeks location information." If a debt collector attempts to contact a third party in violation of the statute's provisions, such contacts are considered to be illegitimate collection practices.

In addition to the FDCPA's restrictions on who a debt collector can communicate with, the FDCPA requires a debt collector to provide a "meaningful disclosure" of his or her identity.

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78. 15 U.S.C. § 1692b; Mathis, 2006 WL 1582301, at *5. In attempting to collect location information, the debt collector may only state that he or she is "confirming or correcting location information, and may not identify his [or her] employer unless expressly asked to do so." Mike Voorhees & Sharon Voorhees, The Fair Debt Collection Practices Act, Communications, and Privacy Issues, 58 CONSUMER FIN. L. Q. REP. 78 (2004).
79. Henderson, 2001 WL 969105, at *2 (quoting 15 U.S.C. § 1692(b)). Contacting a third party for information regarding the whereabouts of a debtor is further limited by the "one-contact" rule. Goldberg, supra note 11, at 721 n.64. As per the "one-contact" rule, a debt collector may not contact a third party more than once. Id. "The debt collector is permitted to contact the third party more than once upon the third party's request or if the collector 'reasonably believes that the earlier response of such person is erroneous or incomplete and that correct or complete information is now available.'" Id. (quoting David A. Schulman, The Effectiveness of the Federal Fair Debt Collection Practices Act (FDCPA), 2 BANKR. DEV. J. 171, 174 (1985)).
80. Goldberg, supra note 11, at 722.
82. Id. § 1692d(6).
The "meaningful disclosure" required by section 1692d(6) has been made if an individual debt collector who is employed by a debt collection company accurately discloses the name of [his or] her employer and the nature of [his or] her business and conceals no more than [his or] her real name.83

The meaningful disclosure requirement also requires the debt collector to disclose that the communication is an attempt to collect a debt.84 This "meaningful disclosure" requirement is "often referred to as the [m]ini-Miranda" warning.85 The "mini-Miranda" warning applies to the initial written communication with the debtor or consumer.86 If the initial communication is oral, the warning is required for that communication as well.87 The debt collector must make a proper disclosure in every communication subsequent to the initial communication.88 Failure to provide proper disclosure renders the communication a "false, deceptive, or misleading representation or means" in attempting to collect a debt.89

Though aimed at protecting the debtor, the "mini-Miranda" warning requirement loses its appeal when left as a message on an answering machine, able to be overheard by someone other than the consumer or debtor.90 Courts have held that the disclosure requirement is applicable to answering machine messages despite the risk of disclosure to third parties.91


87. NEWBURGER & BARRON, supra note 84, ¶ 1.05[2].

88. Id.

89. Id. The Sixth Circuit has even held that attorneys must give the requisite warning in post-judgment communications. Id. (citing Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992)).

90. Id. (quoting 15 U.S.C. § 1692e) (quotations omitted). A message left on a debtor’s answering machine urging the debtor to call the same day or the next day was deceptive within the statutory meaning, because it "created a false sense of urgency." Court Rakes Collector, supra note 30.


have also avoided providing debt collectors with the appropriate means to utilize the answering machine technology without violating at least one provision of the FDCPA. In essence, the courts have cut off an efficient technological avenue while simultaneously blaming the FDCPA's inadequacies on the debt collectors. Thus, a gap exists in the FDCPA's protections because it is unlikely that debt collectors will stop using available technology. It is thus up to the legislature to fill this void.

B. Protections Provided by the Florida Consumer Collection Practices Act

The Florida Consumer Collection Practices Act (FCCPA) "is a remedial statute . . . designed to prohibit certain conduct." The FCCPA allows a debtor to bring an action against "any person" who violates any provision of the FCCPA. Courts have interpreted the broad "any person" language of the FCCPA to permit a debtor to sue "persons generally," includ-

93. See Foti, 424 F. Supp. 2d at 659 n.26; Bedard, supra note 13, at 147; Salvo, supra note 5.
94. Bedard, supra note 13, at 147.
95. The new technologies available, such as sophisticated "phone systems and computer software," make it inefficient for a debt collector to adhere to the historical door-to-door means of debt collection. Goldberg, supra note 11, at 729–30.
96. Cox Communications has reported that eighty to eighty-five percent of their outbound collections calls end up as voicemail messages. VMS Makes a Quiet Entrance, COLLECTIONS & CREDIT RISK, Sept. 2004, at 22. [hereinafter VMS]. But, as stated by Judge Deborah A. Batts, U.S. District Court, Southern District of New York, "[t]he Court has no authority to carve an exception out of the statute just so [a debt collector] may use the technology they have deemed most efficient." Court Rakes Collector, supra note 30 (quotations omitted).
97. FLA. STAT. §§ 559.55-.785 (2007).
ing corporations, and law firms. Further, the FCCPA continues to be updated and amended by the legislature—unlike the FDCPA—in ways which provide additional protection for the debtor. One possible reason as to why the updates to the FCCPA continue to provide significant protection is that the FCCPA is much "narrower in scope than" its federal counterpart.

Similar to the Fair Debt Collection Practices Act, the FCCPA prohibits disclosure of information regarding the debt to anyone other than the debtor or his or her family. In order to state a valid cause of action for violation of this provision, a debtor need only show "that there was a disclosure of information to [someone] other than" the debtor or his or her family; "that such person [did] not have a legitimate business need for the information; and . . . that such information affected the debtor's reputation." Courts are very strict with this provision in that a debt collector cannot even disclose information to an intimate friend cohabiting with the debtor.

Also similar to the FDCPA, the Florida Consumer Collection Practices Act prohibits communications so frequent in nature that they constitute harassment. Specifically, the FCCPA makes it a violation to:

103. Id. "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." FLA. STAT. § 1.01(3) (2007).

104. See Williams v. Streeps Music Co., 333 So. 2d 65, 67 (Fla. 4th Dist. Ct. App. 1976) (holding that defendant music store violated a provision of the FCCPA by attempting to collect a debt that had already been satisfied).


110. Id. at 654. The meaning of the word "family," however, "has been extended beyond marital or blood relationships to include families 'in fact.'" Id. To qualify as a family "in fact," the homestead must consist of "(1) [a] legal duty to maintain arising out of the relationship [or] (2) a continuing communal living by at least two individuals under circumstances where one is regarded as the person in charge." Id.

111. FLA. STAT. § 559.72(7).
THE MINI-MIRANDA WARNING

[w]illfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family. 112

Courts have further held that communication with a debtor regarding the debt which has passed the point of negotiation or persuasion constitutes harassment within the statutory meaning. 113

Unlike its federal counterpart, the FDCPA only requires a debt collector to disclose his or her purpose and identity when asked to do so. 114 Specifically, the statute makes it a violation to "[r]efuse to provide adequate identification of herself or himself or her or his employer or other entity whom she or he represents when requested to do so by a debtor from whom she or he is collecting or attempting to collect a consumer debt." 115 This allows debt collectors to utilize available technology while still protecting the privacy and reputation of the debtor—the risk of third party disclosure via an answering machine would no longer exist. From this perspective, the FCCPA permits the use of available technology without compromising the protection of the debtor’s privacy or reputation.

VI. POTENTIAL PRIVACY ISSUES ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT’S “MINI-MIRANDA” WARNING REQUIREMENT

By requiring debt collectors to provide a “meaningful disclosure,” 116 the “mini-Miranda” warning requirement of the FDCPA yields a number of potential privacy issues. Specifically, there is a high risk of disclosure of information to a third party when a debt collector opts to use an answering machine as a means of contacting a debtor. 117 This is especially true since a large number of debtors are college students living with a roommate. 118

112. Id.
115. Id.
117. See Fed. Trade Comm’n v. Check Enforcement, No. Civ. A. 03-2115 (JWB), 2005 WL 1677480, at *8 (D.N.J. July 18, 2005). "[T]he Court acknowledges that disclosure during an automated call could compromise the debtor’s privacy if another party such [as] a neighbor or relative inside the home picks up the debtor’s phone and hears the automated call." Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1163–64 (N.D. Cal. 2003).
In *Federal Trade Commission v. Check Enforcement*, the court held that messages left by a debt collector on the debtor's home answering machine were a violation of the FDCPA. The court found that the messages, which were attempts to obtain payments from an alleged debtor, were overheard by family members of the debtors and other third parties. Because there is no way of knowing whether the "debtor will answer the phone," the chance of violating the federal statute is high. In order to violate the prohibition against third party disclosure provision of the FDCPA—and thus invade the privacy of the debtor—communication need only be "in connection with the collection of any debt."

The Florida Constitution sets forth a much broader right to privacy than that set forth in the Federal Constitution. "Florida's right to privacy 'embraces more privacy interests, and extends more protection to the individual in those interests, than does the Federal Constitution.'" Florida is one of only a handful of states wherein the state constitution includes an independ-

undergraduate students was $2,169, with seven percent of undergraduate students carrying a debt of $7,000 or more. *Id.* at 7–8. For Florida debt collectors, a large number of debtors are undergraduate college students based on the fact that seventy-eight percent of undergraduate students in the southern region of the United States carry credit cards, with sixteen percent of those students carrying a balance between $3,000 and $7,000. *Id.* at 10. Including undergraduate college students, the number of unmarried households—which includes unrelated persons such as roommates—has steadily increased. Thomas F. Coleman, *Unmarried Households in the United States*, UNMARRIED AMERICA, Sept. 12, 2007, http://www.unmarriedamerica.org/Census_1990-2001/unmarried-majority-table.htm. In Florida, 52.1% of households were unmarried as of 2005. *Id.* This number leaves debt collectors with difficulty in determining who will actually be listening to any given answering machine message. The risk of disclosure to a third party is especially great when multiple roommates share an answering machine:


120. *Id.* at *8.
121. *Id.*
122. *VMS, supra* note 96. If the debtor is not the person answering the phone, the debt collector placing the call risks violating FDCPA provisions. *Id.*
124. Bd. of County Comm'rs of Palm Beach v. D.B., 784 So. 2d 585, 588 (Fla. 4th Dist. Ct. App. 2001) (citing Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).
125. *Id.* (quoting In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989)).
ent, freestanding Right of Privacy Clause.” 126 The Florida Constitution explicitly grants “Floridians the right of privacy.” 127 Under this right of privacy, each person has a “right to ‘determine for themselves when, how and to what extent information about them is communicated to others.” 128 This explicit grant of privacy, however, only protects Floridians from governmental intrusion, as does the Federal Constitution. 129 In applying it to the FDCPA’s “mini-Miranda warning,” on the other hand, a debtor could argue that the provision was enforced by a state or federal judge—either of which is considered to be a state actor. 130 A state actor, such as a judge, enforcing an unconstitutional statute constitutes governmental action. 131 An action against a state official to enjoin the enforcement of an unconstitutional federal statute is a viable cause of action. 132

Thus, in applying the right of privacy to the FDCPA’s “mini-Miranda” warning requirement, this provision could pose a variety of claims against the government, as well as attorneys. The “mini-Miranda” warning, being enforced by courts, contradicts one of the FDCPA’s underlying purposes—to protect the debtor’s privacy. 133

126. Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 206 (Fla. 2007) (quoting N. Fla. Women’s Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634 (Fla. 2003)).
128. Id. (quoting Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989)).
The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government. . . . A[n] action brought against a state official to enjoin the enforcement of an unconstitutional state statute is not a suit against a State barred by the Eleventh Amendment.
Id. at 684.
132. See Crespo, 486 F. Supp. 2d at 689 n.7. “[T]he Court will review the . . . claims under the Fifth Amendment because this case involves state action by the federal government . . . enforcing . . . a federal statute.” Id.
VII. POTENTIAL TORT LIABILITY ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT’S “MINI-MIRANDA” WARNING REQUIREMENT

"The Supreme Court of [Florida] has recognized the right of privacy as a . . . tort” in addition to a constitutional guarantee. Generally, where the right to privacy is recognized, the “oppressive treatment of a debtor” in an attempt to collect a debt may constitute “an invasion of privacy.” In addition, “oral communication . . . accompanied by sufficient publicity” can create a cause of action for invasion of privacy. "In some torts the entire injury is to the peace, happiness or feelings of the plaintiff . . . ." The FDCPA “was enacted [in order] ‘to eliminate abusive debt collection practices’ which ‘contribute to . . . invasions of individual privacy.’” Thus, if required to adhere to the “mini-Miranda warning,” debt collection attorneys may open themselves up to pendent state law claims concerning the privacy of the debtor in addition to undermining the purpose of the FDCPA.

Part A of this section will discuss public disclosure of a debt as an invasion of privacy, and part B of this section will discuss the tort of intrusion upon an individual’s seclusion.

A. Public Disclosure of a Debt as an Invasion of Privacy

Unreasonable publicity given to a private debt has generally been “recognized as an actionable invasion of the debtor’s right of privacy.” Courts have held that a debtor has a valid cause of action where a debt collector has placed “calls to the debtor’s relatives or neighbors.” The extent of the

134. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10–11 (5th Cir. 1962) (citing Cason v. Baskin, 20 So. 2d 243, 247 (Fla. 1944)).
135. Id. at 11.
136. Id.
137. Id. at 11–12 (quoting Goodyear Tire & Rubber Co. v. Vandergriff, 184 S.E. 452, 454 (Ga. Ct. App. 1936)).
140. J.L. Litwin, Annotation, Public Disclosure of Person’s Indebtedness as Invasion of Privacy, 33 A.L.R. 3d 154, 156 (1970); see also RESTATEMENT OF TORTS § 867 (1939). “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others . . . is liable to the other.” RESTATEMENT OF TORTS § 867. The tort of invasion of privacy “has generally been more successful for debtors than . . . the tort of intentional infliction of emotional harm.” DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 13:4 (2007).
141. Litwin, supra note 140, at 156.
publicity, even via oral communication, determines whether the debtor has a cause of action for invasion of privacy.\textsuperscript{142} In Florida, all communications accompanied by sufficient publicity are sufficient to support a debtor harassment case.\textsuperscript{143} In addition, a creditor is liable for invasion of privacy where he or she has divulged information about the debt to one who had no legitimate interest in the information.\textsuperscript{144}

A number of states have ruled that an oral declaration can constitute an invasion of one’s privacy.\textsuperscript{145} In particular, Florida courts are split on this concept.\textsuperscript{146} In other states, courts have reasoned that “the oral publication of a private matter with which the public has no proper concern may be just as devastating and damaging as a written communication.”\textsuperscript{147}

“A person who unreasonably and seriously interferes with another’s interest in not having his [or her] affairs known to others . . . is liable to the other.”\textsuperscript{148} This rule protects an individual’s interest in living with some privacy.\textsuperscript{149} This tort is particularly applicable to the “mini-Miranda” warning insofar as “liability exists . . . if the defendant’s conduct was such that he [or she] should have realized that it would be offensive to” a reasonable person.\textsuperscript{150} In order for an action for invasion of privacy to be viable, there must have been a disclosure of private information.\textsuperscript{151} Private information includes an individual’s “financial dealings”\textsuperscript{152} or “debts.”\textsuperscript{153}

\textsuperscript{142} Id. at 157.
\textsuperscript{143} Id. at 165.
\textsuperscript{144} See id. at 156.
\textsuperscript{146} See Sacco v. Eagle Fin. Corp. of N. Miami Beach, 234 So. 2d 406, 408 (Fla. 3d Dist. Ct. App. 1970) (recognizing communication of insults to public regarding debt as possible invasion of privacy); Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 11 (5th Cir. 1962) (recognizing that an oral communication could invade a person’s right to privacy if “accompanied by sufficient publicity” of such communication); but see Cason v. Baskin, 20 So. 2d 243, 252 (Fla. 1944) (“mere spoken words cannot afford a basis for an action based on an invasion of the right of privacy”).

In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law.

\textit{Cason, 20 So. 2d at 251.}

\textsuperscript{147} Schiffres, \textit{supra} note 145, at 1322 (quoting Biederman’s of Springfield, Inc. v. Wright, 322 S.W.2d 892, 897 (Mo. 1959)).
\textsuperscript{148} \textit{Restatement of Torts} § 867 (1939).
\textsuperscript{149} See id.
\textsuperscript{150} Id. Thus, a cause of action only exists when the defendant knew or should have known of the offensive nature of his or her act. \textit{Id.}
\textsuperscript{151} Id.
\textsuperscript{152} Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 839 (Mo. Ct. App. 1982).
includes oral communications. While public disclosure usually requires communication to a large number of persons, such disclosure can also occur where one merely initiates the process of the information eventually being disclosed to a large group of people.

Generally, "[c]ommunication regarding a debt" to a third person—including the debtor's family—"is . . . found to be an invasion of the debtor’s privacy."

B. Intrusion upon an Individual's Seclusion

Because Florida's Constitution explicitly does not provide for protection against the unauthorized distribution of private information by private entities, courts have identified four privacy torts in order to protect the citizens of Florida. The four privacy torts recognized by the State of Florida include: "1) the misappropriation of an individual's name or likeness; 2) the intrusion upon an individual's seclusion; 3) the right of publicity; and 4) false light invasion of privacy." Out of the four recognized privacy torts, "the . . . intrusion upon [an individual's] seclusion" is most applicable to the FDCPA's potential privacy issues.

To establish a claim for the intrusion upon seclusion theory of invasion of privacy, a debtor must prove three separate elements: "1) an intentional intrusion, physical or otherwise, 2) upon the plaintiff's solitude or seclusion or private affairs or concerns, 3) which would be highly offensive to a reasonable person." This particular tort is aimed at "protecting the privacy surrounding the activities inside the home." The tort of intrusion upon
seclusion "requires proof of an actual invasion of 'something secret, secluded or private pertaining to the plaintiff . . . .'''

Intrusion upon seclusion "consists of a collector's interference with a debtor's interest in solitude or seclusion." When telephone calls to a debtor become "repeated with such persistence and frequency as to amount to a course of hounding the [debtor], . . . privacy is invaded." Further, courts have held that a message left with debtor's sister-in-law and wife constituted a "wrongful intrusion" invasion of privacy. In applying the "intrusion upon seclusion" tort to debt collection,

[the mere efforts of a creditor . . . to collect a debt cannot without more be considered a wrongful and actionable intrusion. A creditor has and must have the right to take reasonable action to pursue his [or her] debtor and collect his [or her] debt. But the right to pursue the debtor is not a license to outrage the debtor.] 167

One court has further held that a single call made to a debtor in an attempt to collect a debt may constitute an invasion of privacy by intrusion upon one's seclusion. 168

VIII. THE CONSTRUCTIVE EXCLUSION OF TECHNOLOGY FROM METHODS AVAILABLE FOR DEBT COLLECTORS TO COLLECT DEBT MAY CONSTITUTE INFRINGEMENT UPON ONE'S RIGHT TO EARN A LIVING

"The right to work, earn a living and acquire and possess property from the fruits of one's labor is an inalienable right." The Florida Constitution

168. Diaz v. D.L. Recovery Corp., 486 F. Supp. 2d 474, 479 (E.D. Pa. 2007). The court reasoned that "the important point [of the tort] is not that the intrusions be persistent, but that . . . [they] rise to the level of 'highly offensive'" to a reasonable person. Id. at 480; see also RESTATEMENT (SECOND) OF TORTS § 652B (1977).
169. Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953). To illustrate, a court has found that a real estate resolution prohibiting a real estate broker to employ any real estate salesman who worked a second job was unlawful. Id. at 254.
provides that citizens have an inalienable right "to be rewarded for [their] industry."\textsuperscript{170} Therefore, the right to earn a living is recognized in Florida as a fundamental right.\textsuperscript{171} Where one is negatively impacted by a rule restricting his or her profession an injury in fact exists.\textsuperscript{172} Statutes which restrict "the right to earn a living" pose a serious threat to due process.\textsuperscript{173} Thus, the "mini-Miranda" warning provision of the FDCPA, which essentially prohibits the use of answering machines, negatively impacts debt collectors and therefore an injury in fact exists.\textsuperscript{174}

**IX. CONCLUSION**

Simultaneous compliance with both the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act is near impossible for Florida debt collectors, keeping in mind the technological advances which have occurred since the creation of the FDCPA.\textsuperscript{175} Specifically, the "mini-Miranda" warning is clearly at odds with not only the technological advances,\textsuperscript{176} but with the remainder of the Fair Debt Collection Practices Act, as well.\textsuperscript{177} The only answer for Florida debt collectors—until the FDCPA is updated with technology in mind—is utilizing the preemption provision of the FDCPA.\textsuperscript{178} The FDCPA explicitly states that it does not preempt any state collection law which affords the consumer greater protection.\textsuperscript{179}

Because federal courts in a variety of states\textsuperscript{180} have held that a message left on an answering machine is a "communication" within the statutory meaning,\textsuperscript{181} debt collectors must properly disclose their identity when leav-

\textsuperscript{170.} \textit{FLA. CONST.} art. I, § 2.  
\textsuperscript{171.} \textit{Id.} "All natural persons, female and male alike, are equal before the law, and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . ." \textit{Id.}  
\textsuperscript{172.} \textit{Ward v. Bd. of Bd. of Trs. of the Internal Improvement Trust Fund}, 651 So. 2d 1236, 1237 (Fla. 4th Dist. Ct. App. 1995). "A real and sufficiently immediate injury in fact has been recognized where the challenged rule or its promulgating statute has a direct and immediate effect upon one's right to earn a living." \textit{Id.; see also} Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st Dist. Ct. App. 2005) (citing Fla. Med. Ass'n, Inc. v. Dep't. of Prof'l Reg., 426 So. 2d 1112, 1113–14 (Fla. 1st Dist. Ct. App. 1983)).  
\textsuperscript{173.} \textit{Callier v. Dir. of Revenue}, 780 S.W.2d 639, 644 (Mo. 1989) (Blackmar, C.J., dissenting).  
\textsuperscript{174.} See \textit{Ward}, 651 So. 2d at 1237.  
\textsuperscript{175.} See \textit{Thornburg, supra} note 10, at 137.  
\textsuperscript{176.} See \textit{id.}  
\textsuperscript{178.} \textit{Id.} § 1692n.  
\textsuperscript{179.} \textit{Id.}  
\textsuperscript{180.} See cases cited \textit{supra} note 30.  
ing a message. 182 With the growing number of people living with persons other than their "family," 183 the chances of disclosing private financial information to a third party is nearly inevitable. 184 The reality of this risk opens debt collectors up to a variety of federal and pendent state law claims. 185 Debt collectors may be left vulnerable to invasion of privacy claims, 186 as well as actions for violation of the FDCPA provision prohibiting disclosure to third parties. 187

Debt collectors are not the only ones left vulnerable by the "mini-Miranda" warning requirement; 188 the government may be subjected to claims for invasion of privacy, as well. 189 Judges are state actors, 190 and a state actor enforcing a statute which invades the privacy of a citizen is a violation of both the Florida and United States Constitutions. 191

Not only does the "mini-Miranda" warning open debt collectors up to a variety of liabilities, and place the government in a difficult situation, it lessens the protection to the consumer, as well. With the disclosure requirement in place, consumers now have no control over who may be informed of their financial situation, especially with the utilization of new technologies. With the potential for disclosure of private financial information, consumers are left in a bad situation. 192 The FCCPA, unlike the FDCPA, does not require disclosure of a debt collector's identity unless requested by the consumer. 193 This gives the consumer more control over the disclosure of information without infringing upon the debt collector's ability or right to earn a living. This solution leaves everyone in a "win-win" situation.

In conclusion, Florida debt collectors should adhere to the FCCPA disclosure requirement when attempting to collect a debt because it provides

182. NEWBURGER & BARRON, supra note 84, ¶ 1.05[2].
183. Coleman, supra note 118.
186. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10–11 (5th Cir. 1962) (citing Cason v. Baskin, 20 So. 2d 243, 250–51 (Fla. 1944)). The right to privacy claims include four distinct privacy torts, namely intrusion upon one’s seclusion. Thornburg, supra note 10, at 138, 141 (citing Cason, 20 So. 2d at 250–51).
188. See NEWBURGER & BARRON, supra note 84, ¶ 1.05[2].
191. See Crespo, 486 F. Supp. 2d at 689 n.7.
193. FLA. STAT. § 559.72(15).
consumers with more protection, thus avoiding the FDCPA preemption provision.
MEDICAL PEER REVIEW IN FLORIDA: IS THE PRIVILEGE UNDER ATTACK?

TALIA STORCH*

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I. INTRODUCTION

In a time when quality health care is essential and medical malpractice befalls patients on a daily basis,1 peer review has become an institutionalized practice,2 while information generated in the process has become a hot and controversial commodity in legal discovery proceedings.3 As an integral part

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of today’s health care industry, “[p]eer review serves as one of medicine’s most effective risk management and quality improvement tools.”4 By engaging physicians in a review process of their colleagues’ work,5 the “incompetence in the medical profession” is weeded out, inevitably leading to better patient care and a decrease in health and medical expenses.6 Serving to applaud excellent medical care and uncover that which is inferior and sub par,7 peer review has truly made a name for itself in the medical community.8

It is with the help of statutory protection that this practice has become a reality.9 Peer review statutes are geared toward guaranteeing participants confidentiality, immunity, and/or privileges,10 so as to stimulate sincere and reliable discussions.11 However, this security is gradually starting to erode as information, documents, and records linked to the peer review sessions reach the public through the discovery process.12

While the purpose of peer review statutes appear to be sound and guileless, courts are still laboring to stabilize the particulars regarding discovery

4. Lisa M. Nijm, Pitfalls of Peer Review: The Limited Protections of State and Federal Peer Review Law for Physicians, 24 J. LEGAL MED. 541, 541 (2003). Peer review occurs in other areas besides just hospitals. Susan O. Scheutzow, State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?, 25 AM. J.L. & MED. 7, 7 n.1 (1999). The process is also administered “by nonhospital institutional providers such as freestanding surgery centers, and by third-party payers of health care expenses.” Id. Nevertheless, hospitals still make the most frequent use of the process. Id.


8. See Scheutzow & Gillis, supra note 2, at 169.


10. Nijm, supra note 4, at 546.

11. Love II, 599 So. 2d at 114.

[T]he purpose of a statute that shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions is to promote candor and Frank exchange in peer-review proceedings, and that a statute protecting the proceedings, records, and files of medical review committees from discovery in civil actions was intended to provide broad statutory protection and was based on legislative appreciation that a high level of confidentiality is necessary for effective medical peer review.

81 AM. JUR. 2D Witnesses § 537 (2004).

12. See Brandon Reg’l Hosp. v. Murray, 957 So. 2d 590, 590 (Fla. 2007) (holding that a hospital’s list of a physician’s privileges is discoverable). “[P]eer review information might fall vulnerable to discovery for claims brought under federal law, because no federal peer review privilege exists.” Nijm, supra note 4, at 542.
of peer review documents and records as to be employed in legal actions.\(^{13}\) Naturally, there are those who advocate for peer review and the good they believe it brings\(^{14}\) while there are those who criticize the process for the negative effects they allege it causes.\(^{15}\) As a result, "an aura of controversy has surrounded the idea of allowing health care personnel to police themselves."\(^{16}\)

To date, a peer review statute of some kind has been passed in almost every state.\(^{17}\) Notwithstanding the fact that most statutes are read and interpreted differently, they still uniformly strive to further the same goals.\(^{18}\) Historically, Florida peer review statutes have been construed extremely broadly.\(^{19}\) Litigants seeking materials during discovery that were generated in peer review sessions were hard pressed to recover anything.\(^{20}\) Such a statutory interpretation allowed physicians and hospitals to freely partake in the peer review process without the looming fear of litigation and liability haunting them in the future.\(^{21}\)

Recently, however, these consistent Florida rulings of denying production of materials associated with peer review during discovery have suddenly come to a standstill. Bending the shield of statutory protection, the Supreme Court of Florida has taken an atypical approach in resolving a recent case.\(^{22}\) Widening the eyes of both proponents and critics of peer review, the Supreme Court of Florida granted the release of hospital records containing physician privileges.\(^{23}\) In addition to serving as a great stride for litigants

\(^{13}\) Graham, supra note 3, at 111.

\(^{14}\) See Moore et al., supra note 7, at 1177.

\(^{15}\) Bassler, supra note 6, at 695.


\(^{17}\) Bassler, supra note 6, at 694; see also Scheutzow & Gillis, supra note 2, at 198–217. These pages provide a list of each state that furnishes a statute relating to peer review. See Scheutzow & Gillis, supra note 2, at 198–217. The chart accompanying the list provides a "[s]ummary of [s]tate [p]eer [r]evie[w] [s]tatutes" and includes information about the state, their statute, and whom and what it protects. Id.

\(^{18}\) See Nijm, supra note 4, at 546.

\(^{19}\) Karen O. Emmanuel, The Peer Review Privilege in Florida, FLA. B.J., July/Aug. 1994, at 64; see also Tenet HealthSystem Hosps., Inc. v. Taitel, 855 So. 2d 1257, 1258 (Fla. 4th Dist. Ct. App. 2003).


\(^{21}\) Moore et al., supra note 7, at 1178.

\(^{22}\) See Brandon Reg'l Hosp. v. Murray, 957 So. 2d 590, 595 (Fla. 2007). The Supreme Court of Florida granted the release of a hospital's list of physician privileges during discovery. Id. at 590. In the past, it has restricted discovery of most materials related to peer review. See, e.g., Cruger v. Love (Love II), 599 So. 2d 111, 114 (Fla. 1992).

\(^{23}\) Murray, 957 So. 2d at 590.
seeking certain discovery materials in medical malpractice suits, this case awakens attention to the split between the district courts in Florida.

This article will examine peer review in Florida, focusing on a recent case from the Supreme Court of Florida that has generated a split among the district courts. The first section discusses the history, background, and general statutory protection surrounding peer review. It will additionally probe into the opinions of both proponents and critics of the process. Part III specifically outlines the history of peer review in Florida and looks at the relevant statutes that govern the process today. Additionally, this section explores the case of Brandon Regional Hospital v. Murray. Part IV discusses the split among the Florida district courts and explicitly looks into the holdings of certain cases. Part V considers the implications of each side of the split, scrutinizing both the benefits and consequences.

II. THE PEER REVIEW PROCESS

Peer review is a process whereby specifically qualified medical associates of a hospital evaluate “the qualifications, training, and experience” of other practicing medical physicians and personnel, as well as monitor their “medical outcomes and professional conduct.” The medical review staff seeks to ascertain whether the aforesaid physicians and personnel are capable and competent to practice medicine in the hospital and, in the event that they are, what the boundaries and limitations of their practice consist of. Despite the fact that a hospital makes the final judgment as to whether or not a doctor may practice and, if so, to what extent, it is peer review reports and analysis which provide the foundation for such a hospital decision. Consequently, a hospital’s choice to authorize admittance to their medical staff, as

25. Murray, 957 So. 2d at 591–93.
26. Id. at 590.
27. Nijm, supra note 4, at 543.
28. Scheutzow, supra note 4, at 13. The initial portion of the process is generally known as “credentialing.” Id. at 14. Once a physician has been granted privileges and they begin practicing, the peer review process additionally includes an evaluation of “quality assurance data, diagnostic and laboratory utilization reports, and other information regarding each staff member’s actual practice at the hospital.” Id. Typically, a physician must undergo peer review of their hospital privileges every two years; nevertheless, if concerns arise regarding their behavior before said time, a review will be in order. Id.
29. Id. at 7.
30. Newton II, supra note 9, at 725.
well as grant or deny certain privileges, is largely influenced by the peer review process, committee, and their findings.  

A. History of Peer Review

A general survey of medical peer review history reveals that in 1918, the American College of Surgeons established the Hospital Accreditation Program, which ultimately grew into the Joint Commission on Accreditation of Health Care Organizations (JCAHO). JCAHO mandates that hospitals have an abiding system by which physicians are to be evaluated. "[T]o receive JCAHO accreditation, hospitals must" partake in certain procedures which will ensure quality health care, including but not limited to, peer review. "Accreditation plays a vital role in the economic survival of a hospital, as eligibility for federal funds, such as Medicare and Medicaid, depends upon it." In addition to JCAHO and the assistance it provides in attempting to improve the health care industry, Congress has addressed the issue by passing federal legislation known as the Health Care Quality Improvement Act of 1986 (HCQIA). Concerned with the "overriding national need to provide incentive and protection for physicians engaging in effective professional peer review," Congress enacted HCQIA as an initial step toward a solution. Operating with the specific function of promoting "good faith peer review," and medical care, the Act fosters two chief objectives.  

31. Scheutzow, supra note 4, at 13.  
32. Bassler, supra note 6, at 691. In an effort to address the inferiority of patient health care, the Hospital Accreditation Program was enacted. Id. "[T]his organization attempted to combat the problem by establishing minimum standards of quality." Morter, supra note 16, at 1116.  
34. Nijm, supra note 4, at 544.  
35. Id.  
36. Id.  
37. Moore et al., supra note 7, at 1179. Before Congress passed HCQIA, the only protection afforded to medical peer review was that provided by the states. Scheutzow & Gillis, supra note 2, at 177. Currently, federal law does not provide "a medical peer review privilege." Nijm, supra note 4, at 542.  
39. Morter, supra note 16, at 1120. HCQIA is the only piece of federal legislation on the issue of peer review. Scheutzow & Gillis, supra note 2, at 177.  
most, HCQIA grants immunity from damages to those individuals actively involved and contributing in the peer review process.\(^{42}\) However, it "does not grant a federal evidentiary privilege to the records and deliberations of the peer review process."\(^{43}\) Furthermore, HCQIA was implemented to generate the National Practitioner Data Bank (NPDB), a "national clearinghouse of information."\(^{44}\) By making it obligatory that hospitals submit reports concerning physicians and medical staff who have had disciplinary problems\(^ {45}\) and clinical privileges reduced or removed, NPDB prevents incompetent individuals from moving to other hospitals without exemption from punishment.\(^ {46}\)

B. **Statutory Scheme Overview**

For peer review to be an effective tool in the health care industry there must be regulations that accompany its use.\(^ {47}\) While the purpose of peer review is to generate better patient care and improve the quality of physi-

42. Scheutzow, *supra* note 4, at 9. The peer review board must satisfy four procedural criteria to become eligible for immunity from damages. 42 U.S.C. § 11111(a)(1) (2000). First, the board's actions must have been exercised with a sound belief that it was fostering quality health care. *Id.* § 11112(a)(1). Second, in acquiring the facts, the board must have employed a reasonable effort. *Id.* § 11112(a)(2). Third, the board must provide the physician with sufficient notice and a hearing or other measures which under the circumstances are just. *Id.* § 11112(a)(3). Last, after complying with the aforementioned requirements, the board must believe that the actions they took were reasonably justifiable. *Id.* § 11112(a)(4). It is presumed that the peer review board's actions satisfy the four procedural criteria; however, this is a "rebuttable presumption." Anthony W. Rodgers, *Procedural Protections During Medical Peer Review: A Reinterpretation of the Health Care Quality Improvement Act of 1986, 111 PENN ST. L. REV. 1047, 1053 (2007). If it can be illustrated through a preponderance of the evidence that at least one of the four criteria have not been complied with, a physician may disprove this presumption. *Id.* at 1053-54; *see also* 42 U.S.C. § 11111(a).

43. Scheutzow, *supra* note 4, at 9-10. The question of whether the "'peer review privilege' applies to the discovery of documents created during the peer review process" is still lingering as unanswered. Graham, *supra* note 3, at 112.

44. Scheutzow, *supra* note 4, at 10.

45. Moore et al., *supra* note 7, at 1180. Disciplinary actions include when a physician's privileges are reduced, temporarily withdrawn, or entirely recalled. *Id.*

46. Scheutzow, *supra* note 4, at 10. In addressing the nationwide quandary of incompetent physicians traveling from state to state to practice medicine, HCQIA demands that hospitals and other medical personal report to the NPDB "peer review actions resulting in limitations to a physician's medical staff or clinical privileges and to report when physicians voluntarily surrender their medical staff privileges in lieu of facing a peer review investigation." *Id.* Additionally, the punitive and corrective measures that a physician is sanctioned with must be communicated to the NPDB. Graham, *supra* note 3, at 112.

47. *See* 42 U.S.C. § 11101(5).
In the past, physicians have been averse to participating in peer review. While currently, the process appears to be sound, the possibility of future consequences is a brewing fear. Physicians do not want to find themselves entangled in a web of legal action initiated by an unhappy medical associate who was given poor reviews or had privileges revoked. The negative repercussions that may strike a physician after a substandard review can have lasting effects, including but not limited to, a damaged reputation, loss of income, patients, and malpractice insurance, the stigma of having received negative reviews, and possibly the inability to find employment elsewhere. The aforesaid reasons are all ammunition for future lawsuits and no physicians would choose to partake in a process that would leave them behind the barrel of a loaded gun. "While a physician may be willing to chastise a physician in private and, for example, suggest sanctions such as remedial training, the physician almost assuredly would not like his comments aired on the six o’clock news."

As a result, almost every state has fashioned some version of a peer review statute in which they guarantee privileges, immunity, and/or confidentiality. "In granting these protections, legislatures have determined that limiting the rights of physicians to seek damages for peer review actions and denying malpractice plaintiffs and other litigants information relevant to their lawsuits are justified in order to encourage effective peer review."

49. See 81 AM. JUR. 2d Witnesses § 537 (2004).
51. See 42 U.S.C. § 11101(5).
52. Newton II, supra note 9, at 726.
53. Scheutzow, supra note 4, at 16.
54. See Newton II, supra note 9, at 727.
55. Rodgers, supra note 42, at 1049-51.
56. Scheutzow & Gillis, supra note 2, at 174.
58. Nijm, supra note 4, at 546.
59. Scheutzow, supra note 4, at 8.
1. Privileges

An authorized privilege in law safeguards particular information from discovery and use in civil litigation.\(^6\) The court assumes the role of “balanc[ing] privilege against a plaintiffs right to due process and the judicial need for the fair administration of justice.”\(^6\) Accordingly, a court acknowledging the existence of a privilege is essentially saying, without speaking, that “it values that social policy goal [of keeping information free from discovery or use in civil litigation] over and above the potential impact of the privilege on the truth-seeking process.”\(^6\) As a result, a judicially granted privilege functions as an exemption from the everyday liability one would incur in having to provide information during a judicial proceeding.\(^6\)

2. Confidentiality

Confidentiality mandates that a party abstain from revealing any and all information pertaining to, and discussed in, the peer review process, outside a court of law.\(^6\) A party may be obliged “to keep information confidential” by means of law or contract.\(^6\) This requirement absolves physicians of the fear that their direct and blunt communications will be exposed to those be-

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\(^6\) Nijm, supra note 4, at 546. To be specific, “forty-eight states and the District of Columbia have” passed statutes dealing with the peer review privilege. Bassler, supra note 6, at 694. In the discovery process, when a party to a lawsuit asserts the peer review privilege the burden of proof rests on them to demonstrate that the information requested is statutorily protected. 81 AM. JUR. 2D Witnesses § 537 (2004).

\(^6\) Nijm, supra note 4, at 547. In Trammel v. United States, the United States Supreme Court proclaimed that “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’” 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). As a result, the United States Supreme Court has warned courts dealing with privileges to be prudent, as granting them endorse a strong social message. See Scheutzow & Gillis, supra note 2, at 180. “Even in discussing the widely accepted attorney-client and priest-penitent privileges, the Court has urged caution in their application.” Id.

\(^6\) Scheutzow & Gillis, supra note 2, at 192.


\(^6\) Scheutzow & Gillis, supra note 2, at 192. While many states claim to protect confidential information through statutory law, they provide no punishment or remedy should such information be revealed. Nijm, supra note 4, at 548–49. Nonetheless, there are eight states which do impose sanctions for a violation of confidentiality statutes. Id. at 549.
ing reviewed. 66 Generally, information which is privileged is also confidential. 67

3. Immunity

Immunity operates as a shield for participants from civil litigation that may emerge in the future. 68 When a physician is unhappy with the outcome of his or her peer review session, his actions are unpredictable and may result in a lawsuit. 69 As such, the grant of immunity may range from hospitals, to the peer review board, and anyone who may submit evidence to the board. 70 However, while immunity may protect participants from civil suits, it does not automatically protect the information generated in the session. 71

C. Two Sides to Every Story

For as long as it has been around, peer review has been an issue of dispute. 72 The discipline and regulation of medical professionals is a sensitive matter and must be handled with the utmost justice. 73 Debates surrounding whether peer review is the correct and best way to manage the health care industry have been argued at length. 74 Debates surrounding the discoverability of peer review materials are more recent arguments but nonetheless seem to be the new black of medical malpractice disputes. 75 As with everything, there are two sides to every story!

1. Proponents of Peer Review

Advocates of medical peer review urge that “physicians possess the specialized knowledge necessary to make accurate medical judgments and

66. See Newton II, supra note 9, at 729.
67. Scheutzow & Gillis, supra note 2, at 192.
68. Scheutzow, supra note 4, at 17. To be specific, forty-seven states and the District of Columbia have passed statutes dealing with peer review immunity. Id. at 28.
69. See id. at 10–11.
70. Newton II, supra note 9, at 730.
71. Cate, supra note 48, at 483–84. “While the notion of immunity is somewhat consistent in the law, the status of peer review information as privileged information is not.” Id. at 484.
72. Moore et al., supra note 7, at 1182.
73. See id.
74. Scheutzow, supra note 4, at 16.
75. See Graham, supra note 3, at 111; see also infra notes 110, 112 and accompanying text.
can routinely observe one another in the workplace setting."\textsuperscript{76} It is this proficient and expert knowledge that makes the peer review process superior to other procedures, such as, "lay review boards or judicial oversight."\textsuperscript{77} The judgments rendered during these sessions inexorably lead to first rate patient care, safer medical procedures, and doctors who are truly equipped to practice medicine.\textsuperscript{78} Additionally, peer review impels doctors to practice with a greater and more sophisticated degree of care and attention.\textsuperscript{79}

Peer review offers an incentive for similarly trained physicians working in the same environment to identify colleagues with knowledge gaps or deficiencies in technical skills, facilitate their remediation, and monitor their progress and performance, in preference to external parties assuming this responsibility. In addition, when serious problems are identified, appropriate steps can be taken to limit doctors' contact with patients well before government agencies are involved or can act. Peer review may also lead physicians to seek and accept help for medical, psychiatric, or impairment issues. Finally, peer review groups can promptly refer safety and quality issues they identify to committees or authorities empowered to address them within an institution.\textsuperscript{80}

Above and beyond the aforementioned benefits of peer review is that of protecting a hospital's reputation.\textsuperscript{81} Although hospitals open themselves up "to antitrust liability when" they engage in the peer review process,\textsuperscript{82} the salutary effect it has in discovering and controlling "incompetent physicians" before a medical malpractice suit is filed is sensational.\textsuperscript{83} Consequently, a hospital can deal with the physician accordingly, before problems escalate and the hospital begins to build a horrible reputation or worse, finds itself vicariously liable in a lawsuit.\textsuperscript{84}

\textsuperscript{76} Nijm, \textit{supra} note 4, at 543.
\textsuperscript{77} Morter, \textit{supra} note 16, at 1118.
\textsuperscript{78} Jorstad, \textit{supra} note 5, at 693.
\textsuperscript{79} Moore et al., \textit{supra} note 7, at 1177.
\textsuperscript{80} \textit{id.} at 1177-78.
\textsuperscript{82} \textit{id.} at 409.
\textsuperscript{83} \textit{id.} at 411.
\textsuperscript{84} \textit{id.} at 410.
2. Critics of Peer Review

In spite of the rah-rah that surrounds peer review there are still those who have their doubts. Arguing that peer review performs a great disservice to the general public, critics base their reasoning on "a 'conspiracy of silence' that [they believe] enables health care practitioners to cover up evidence of neglect." Subsequently, the court system feeds into this conspiracy by denying those patients seeking to prosecute ill practicing hospitals and physicians, materials produced during peer review. As a result, peer review and its accompanying statutes end up concealing information during discovery, which could make or break a medical malpractice case. Additionally, those opposed to peer review contend that it "does not adequately improve healthcare quality and safety" as the process does not tackle true areas of concern and is never fully followed through with. Quite often two situations present themselves: 1) physicians facing severe consequences simply resign instead of complying with the peer review board's disciplinary orders; or 2) a hospital will recognize a doctor's resignation as quid pro quo for silence. To add insult to injury, many times when a hospital accepts a physician's resignation they fail to inform the NPDB about such incidents, consequently eliminating its purpose. Moreover, many critics urge that peer review "is used as a tool for economic or political motives—in essence a review performed in bad faith, or with malice." However, despite such opposition to the peer review process and the limitations it places on discoverable material, critics are slowly getting what they wished for as the barriers blocking information generated in peer review are collapsing little by little.

85. Bassler, supra note 6, at 695.
87. Moore et al., supra note 7, at 1182.
88. See id. at 1183; see also Columbia/JFK Med. Ctr. Ltd. P'ship v. Sanguonchitte, 920 So. 2d 711, 712 (Fla. 4th Dist. Ct. App. 2006).
89. Moore et al., supra note 7, at 1186.
90. Id.
91. Newton II, supra note 9, at 732.
92. Moore et al., supra note 7, at 1186.
94. Graham, supra note 3, at 114.
95. See Brandon Reg'l Hosp. v. Murray, 957 So. 2d 590, 590 (Fla. 2007).
Having been legislatively cultivated, the peer review privilege is not acknowledged as being a product of any common law principles. Consequently, the protection afforded to hospitals and physicians are rooted in the statutory protection that each state provides. Currently, such statutory security is “inconsistent” among the states. Where some states impart a heavy safeguard against peer review information being accessed during discovery, others provide mild assurance that confidential information will not be readily available to the public.

As it stood until recently, Florida acquiesced to the group of states which yielded strong protection against peer review information, or that related to it, being procurable during discovery. Pioneering the idea of the “expansive privilege approach” with regard to the peer review statute, Florida has been a forerunner in the enactment of legislation concerning this matter. Long before peer review legislation was a thought in the mind of Congress or other states, Florida had already passed statutes pertaining to the subject; these statutes have since been restructured and revised.

Historically, case law in Florida has supported the proposition of broadly construing peer review statutes. Insisting that peer review records, information, and documents remain privileged and confidential, it has been difficult for anyone bringing a lawsuit against a hospital, physician, or peer review committee to gain access to said information in the discovery process. The Supreme Court of Florida in Holly v. Auld stated, “[w]e must

96. Scheutzow & Gillis, supra note 2, at 181.
97. Nijm, supra note 4, at 546.
98. Scheutzow & Gillis, supra note 2, at 171.
99. See JONATHAN P. TOMES, MEDICAL STAFF PRIVILEGES AND PEER REVIEW: A LEGAL GUIDE FOR HEALTHCARE PROFESSIONALS 133 (1994); Scheutzow & Gillis, supra note 2, at 198–217; Bassler, supra note 6, at 694; see also supra note 17 and accompanying text.
100. Emmanuel, supra note 19, at 61; Graham, supra note 3, at 125–26; see also infra note 112 and accompanying text.
101. Id.
102. Id.
103. Emmanuel, supra note 19, at 64.
104. Hillsborough County Hosp. Auth. v. Lopez, 678 So. 2d 408, 409 (Fla. 2d Dist. Ct. App. 1996) (holding that even though the information was not kept confidential by the hospital, the records of the medical peer review committee were privileged); Love v. Cruger (Love I), 570 So. 2d 362, 362–63 (Fla. 4th Dist. Ct. App. 1990), aff’d 599 So. 2d 111, 114 (Fla. 1992); Love v. Cruger (Love II), 629 So. 2d 1210, 1212 (Fla. Dist. Ct. App. 1993), aff’d 675 So. 2d 302 (Fla. 1996).
assume that the legislature balanced this potential detriment [of preventing disclosure of material in discovery] against the potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight.\textsuperscript{106} However, as will be seen in the later analysis of \textit{Brandon Regional Hospital v. Murray}, this steady cornerstone of Florida judicial case law is slowly starting to change, permitting the discovery of certain information.\textsuperscript{107}

\section*{A. Statutory Protection}

\textit{Florida Statutes} section 766.101 provides for the peer review privilege.\textsuperscript{108} Moreover, sections 395.0191 and 395.0193 encompass information which serves to protect "hospital investigations and proceedings pertaining to medical staff membership, clinical privileges, and disciplinary actions by hospitals against members of its medical staff."\textsuperscript{109} The pertinent part of \textit{Florida Statutes} section 766.101 states:

\begin{quote}
The investigations, proceedings, and records of a committee as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil or administrative action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof.\textsuperscript{110}
\end{quote}

\textsuperscript{105} 450 So. 2d 217 (Fla. 1984).
\textsuperscript{106} Id. at 220.
\textsuperscript{107} Brandon Reg’l Hosp. v. Murray, 957 So. 2d 590, 595 (Fla. 2007).
\textsuperscript{108} FLA. STAT. § 766.101 (2007).
\textsuperscript{109} Emmanuel, supra note 19, at 61; see also FLA. STAT. §§ 395.0191, .0193 (2007).
\textsuperscript{110} FLA. STAT. § 766.101(5). Subsection five of this statute also states that:
[[Information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his or her knowledge, but the said witness cannot be asked about his or her testi-}
Florida Statutes section 395.0191 states:

The investigations, proceedings, and records of the board, or agent thereof with whom there is a specific written contract for the purposes of this section, as described in this section shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by such board, and no person who was in attendance at a meeting of such board or its agent shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such board or its agent as to any findings, recommendations, evaluations, opinions, or other actions of such board or its agent or any members thereof.\textsuperscript{111}

The aforesaid two statutes have been utilized by hospitals and peer review committees as a perpetual weapon to combat discovery requests made by malpractice victims.\textsuperscript{112} Because Florida’s past interpretation of these statutes has

\begin{itemize}
  \item Id.
  \item \textsuperscript{111} Fla. Stat. § 395.0191(8). Subsection eight of this statute also states that:
  \begin{itemize}
    \item Information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such board; nor should any person who testifies before such board or who is a member of such board be prevented from testifying as to matters within his or her knowledge, but such witness cannot be asked about his or her testimony before such a board or opinions formed by him or her as a result of such board hearings.
  \end{itemize}
  \item \textsuperscript{112} See Columbia/JFK Med. Ctr. Ltd. P‘ship v. Sanguonchitte, 920 So. 2d 711, 713 (Fla. 4th Dist. Ct. App. 2006) (holding in a suit for medical malpractice that section 766.101(5) protects information and documents regarding a physician’s credentials); Tenet HealthSystem Hosps., Inc. v. Taitel, 855 So. 2d 1257, 1258 (Fla. 4th Dist. Ct. App. 2003) (holding in medical malpractice action that blank forms created by the peer review committee for examining and assessing a nurse’s capability to practice medicine were protected by Florida Statute section 766.101(5)); Columbia Hosp. Corp. of So. Dade v. Barrera, 738 So. 2d 505, 505–06 (Fla. 3d Dist. Ct. App. 1999) (holding that under section 766.101(5) and section 395.0191(8) a hospital is not required to produce a physician’s application for staff privileges in discovery); Ornda Healthcorp. v. Berghof, 722 So. 2d 961, 962 (Fla. 3d Dist. Ct. App. 1998) (holding that in the discovery proceedings of a malpractice case the hospital was not obliged to produce the doctor’s application for staff privileges or malpractice insurance according to section 766.101(5)); Munroe Reg’l Med. Ctr., Inc. v. Rountree, 721 So. 2d 1220, 1223 (Fla. 5th Dist. Ct. App. 1998) (holding that under section 766.101(5) a doctor was not required to respond to deposition questions pertaining to his interim suspension of staff privileges as his answers could only have been materialized from peer review committee knowledge and information); Palm Beach Gardens Cmty. Hosp., Inc. v. O’Brien, 651 So. 2d 783, 784 (Fla. 4th Dist. Ct. App. 1995) (holding in a malpractice action that a list of complaints regarding the physician’s
\end{itemize}
utes has been all encompassing, hospitals and peer review committees are able to shield information they deem to be private and confidential, regardless of the fact that such information may be pertinent, and many times indispensable, to a fair and just trial.113 Furthermore, on the off chance that a court does not find for protecting the requested information pursuant to Florida Statutes section 766.101 and/or section 395.0191, the public policy argument in favor of doing so has found its way to the top of justifications for nondisclosure.114

B. Amendment 7

Because Florida has always taken such an active role in the peer review process and the legislation that accompanies it,115 it came as no surprise when one of its citizens, in 2004, proposed Amendment 7 on the Florida ballot.116 Amendment 7, also known as the “Patients' Right-to-Know About Adverse Medical Incidents Act,” is intended to authorize patients “access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.”117 However, with
that said, the Florida Legislature also explicitly maintained the position that Amendment 7 was not designed to abolish or alter current peer review laws.\textsuperscript{118}

The enactment of Amendment 7 in Florida triggered a whirlwind of litigation.\textsuperscript{119} In \textit{Florida Hospital Waterman, Inc. v. Buster},\textsuperscript{120} and \textit{Notami Hospital of Florida, Inc. v. Bowen},\textsuperscript{121} Florida courts addressed and responded to the confusion and questions which surrounded this new piece of legislation.\textsuperscript{122} A chief issue encasing Amendment 7 was the inquiry into whether or not it preempted the already established statutory privilege by now allowing the discoverability of peer review information that these statutes have sought to protect.\textsuperscript{123} The response by both courts was uniform in that Amendment 7 did preempt the statutory privilege.\textsuperscript{124}

Reading the provisions of Amendment 7 in \textit{parimateria} so it forms a congruous whole, and construing the provisions broadly and giving them a more liberal interpretation than we would a statute, we come to the conclusion that Amendment 7 preempts the statutory privileges afforded health care providers regarding their self-policing procedures to the extent that such information is obtainable through a formal discovery request made by a patient or patient’s legal-representative during the course of litigation.\textsuperscript{125}

Amendment 7 is extremely explicit about what is and is not discoverable in litigation.\textsuperscript{126} As it stands today, the lingering question seems to be whether or not it can be applied retroactively.\textsuperscript{127} Both \textit{Buster} and \textit{Bowen} reached different conclusions concerning this matter.\textsuperscript{128} \textit{Buster} held that Amendment 7 does not apply retroactively\textsuperscript{129} while \textit{Bowen} held that it should be “prospective in operation” while applying retroactively to existing re-

\begin{itemize}
\item \textsuperscript{118} FLA. STAT. § 381.028(2). On account of the fact that Amendment 7 was not mentioned as an area of concern in the trial or appellate dealings of \textit{Murray} there is no reason to analyze or apply it. \textit{Brandon Reg'l Hosp. v. Murray}, 957 So. 2d 590, 591–92 n.2 (Fla. 2007).
\item \textsuperscript{119} \textit{Amendment 7, supra} note 116, at 1.
\item \textsuperscript{120} 932 So. 2d 344 (Fla. 5th Dist. Ct. App. 2006).
\item \textsuperscript{121} 927 So. 2d 139 (Fla. 1st Dist. Ct. App. 2006).
\item \textsuperscript{122} \textit{See Amendment 7, supra} note 116, at 1; \textit{see also Bowen, 927 So. 2d at 143–44}; \textit{Buster, 932 So. 2d at 348–51, 353–55}.
\item \textsuperscript{123} \textit{Buster, 932 So. 2d at 348}.
\item \textsuperscript{124} \textit{Amendment 7, supra} note 116, at 1; \textit{see also Bowen, 927 So. 2d at 143 n.1}; \textit{Buster, 932 So. 2d at 351}.
\item \textsuperscript{125} \textit{Buster, 932 So. 2d at 350–51}.
\item \textsuperscript{126} FLA. CONST. art. X, § 25; FLA. STAT. § 381.028 (2007).
\item \textsuperscript{127} \textit{Bowen, 927 So. 2d at 144}; \textit{Buster, 932 So. 2d at 353}.
\item \textsuperscript{128} \textit{Amendment 7, supra} note 116, at 2.
\item \textsuperscript{129} \textit{Buster, 932 So. 2d at 354}.
\end{itemize}
Currently, the Supreme Court of Florida has approved a hearing of both cases.

C. Brandon Regional Hospital v. Murray

Presently in Florida, the buffer of statutory protection that has been furnished to its citizens and institutions is slowly starting to crumble. Shying away from the routine and typical court decisions which prevent discovery of peer review information or that pertaining to it, the Supreme Court of Florida, in May 2007, rendered a verdict with an unusual holding. In Murray, the Court held that in discovery proceedings, a person bringing a medical malpractice action is empowered to procure from the hospital the privileges granted to a physician. However, claimants are “not entitled to the” concrete documents which the peer review credentialing committee utilized in aiding the hospital in their decisions to grant or deny such privileges. Therefore, even though the actual peer review documents themselves are still privileged, the ultimate result of what was decided in their meeting, which hospitals use as a guiding source, is discoverable.

In Murray, a medical malpractice suit was initiated against Brandon Regional Hospital (BRH). The Murrays contended that Dr. Wayne S. Blocker, the physician who operated on Mrs. Murray, was inappropriately credentialed to perform her surgery. As a result of his negligence in carrying out the operation, Mrs. Murray was gravely injured. The complications of the lawsuit arose during the discovery process when the Murrays sought to obtain a list of the privileges granted to Dr. Blocker by the hospital. Such privileges were based upon communications which took place.
among the peer review credentials committee. BRH and Dr. Blocker countered the discovery request with a demand for a protective order, pursuant to Florida Statutes sections 395.0191 and 766.101. After denying the motion, the trial court directed BRH to come forth with the list of privileges. Upon BRH’s challenge to this decision, the Second District, although recognizing discord among other district court decisions, confirmed the trial court’s order. The Supreme Court of Florida permitted review of the case as a result of “the Second District’s decision being in express and direct conflict with other district court decisions.”

The core question facing the Court “is whether a list generated by a hospital, which includes a peer review committee recommendation delineating the privileges given to a member of a hospital staff, is protected from discovery under the confidentiality provisions of sections 395.0191 and 766.101, Florida Statutes.” This inquiry merits an explanation from the Supreme Court of Florida as the opinions among the Florida district courts regarding this issue differ, creating a split. The Second District, which governed this case, is notably of the opinion that information resulting from peer review sessions currently in the hands of a hospital, in particular a physician’s privileges, should be discoverable. That notion stands in stark contrast to the holdings emerging from the Third, Fourth, and Fifth Districts.

143. Murray, 957 So. 2d at 591.
144. Id. A protective order is “[a] court order prohibiting or restricting a party from engaging in conduct (esp. a legal procedure such as discovery) that unduly annoys or burdens the opposing party or a third-party witness.” BLACK’S LAW DICTIONARY 1260 (8th ed. 2004).
145. Murray, 957 So. 2d at 591.
146. Id. Although the Supreme Court of Florida granted the production of documents in the discovery process, their rationale was different than that of the Second District. Id. at 595. The Second District’s justification for reaching its decision was based upon the holding in Bayfront Medical Center, Inc. v. Agency for Health Care Admin. Id. at 593. In this case, the court held that while the records used by the peer review committee for the purpose of investigative research were privileged and undiscoverable, the final write up of their findings did not retain that same privilege and was therefore discoverable. Bayfront Med. Ctr., Inc. v. Agency for Healthcare Admin., 741 So. 2d 1226, 1229 (Fla. 2d Dist. Ct. App. 1999). However, it is important to note that this case centered on the Agency for Healthcare Administration (AHCA), which was already granted authority through certain statutes to examine particular records. Murray, 957 So. 2d at 594. The Second District in Murray amplified the reasoning in Bayfront to now permit the discovery of physician privileges in private lawsuits, which were based upon the communications and opinions of those in the peer review committee. Id. at 593.
147. Murray, 957 So. 2d at 591.
148. Id.
149. See id.
150. Id.
which are much more stringent regarding the discoverability of doctors’ privileges.\footnote{151}

In first scrutinizing the rationale behind the decision in Murray, it must be noted that the Court took the time to recognize the importance and history of peer review in Florida.\footnote{152} Before rendering its justification for backing the Second District’s holding, the Court acknowledged its own consistency in finding for broad statutory protection,\footnote{153} citing specifically to its decision of Cruger v. Love (Love II),\footnote{154} which has been referenced by countless other Florida decisions in the past.\footnote{155} In Love II, the Supreme Court of Florida rejected the holding in Jacksonville Medical Center, Inc. v. Akers,\footnote{156} which held that a physician’s application for hospital privileges and those documents accompanying it were discoverable and not privileged.\footnote{157} In recognizing the split, the Supreme Court of Florida referenced three specific district decisions, in contrast to that of the Second, and conceded that as a result of its past holdings, these district courts had followed suit and rendered similar decisions preventing the discovery of peer review materials.\footnote{158} Per se, when the Second District strayed from the precedent Florida had set, it yielded the current clash.

After disagreeing with the Second District’s reasoning,\footnote{159} the Court simply stated that there was “nothing in the legislative scheme for peer review that would prevent a patient from securing such information from a hospital that has granted a physician practice privileges within the hospi-

\footnote{151. Id. at 592; see also infra note 196 and accompanying text. In March of 2006, The Fifth District of Florida rendered a decision in Florida Hospital Waterman, Inc. v. Buster, in which it permitted the plaintiff during discovery to obtain hospital information and documents resulting from the peer review process. In the past, as seen in this article, the Fifth District, along with that of the Third and Fourth Districts, had been extremely steadfast in its decisions to prohibit medical malpractice victims from procuring peer review information during discovery. While this 2006 decision lends itself toward following the holding of the Second District in Brandon Regional Hospital v. Murray, it by no means solidifies its position on the issue. See infra note 194 and accompanying text.}

\footnote{152. Murray, 957 So. 2d at 591–92.}

\footnote{153. Id. at 592.}

\footnote{154. 599 So. 2d 111 (Fla. 1992).}

\footnote{155. Murray, 957 So. 2d at 592.}

\footnote{156. 560 So. 2d 1313 (Fla. 1st Dist. Ct. App. 1990).}

\footnote{157. Murray, 957 So. 2d at 592.}

\footnote{158. Id.}

\footnote{159. Id. at 594; see also supra note 146 and accompanying text. The Supreme Court of Florida did not agree that the rationale in Bayfront Medical Center, Inc. was appropriate and should be expanded to include malpractice litigation. Id. The case at hand deals with parties in search of documents and information generated from peer review, as opposed to the latter which deals with AHCA. Id. AHCA already has statutory permission to search these types of documents. Murray, 957 So. 2d at 594.}
It was irrelevant that the peer review committee played a hand in determining which privileges were to be granted. Furthermore, the Court reasoned that the privileges granted to a physician play an elementary and vital role to any patient making the decision to permit performance of a medical procedure. Therefore, it is a patient's right to be informed about the privileges his or her doctor possesses. Because there is nothing in the Florida Statutes that protects hospital records, even those which may be based upon peer review analysis, the Court was not willing to stretch the statutory protection to do so.

At the close of the trial, Murray's attorney, George A. Vaka, enthusiastically stated, "[i]t just seems to me to be a huge win for patients on an issue that jumps out at me to be so basic and so fundamental." 

**IV. FLORIDA DISTRICT COURT OF APPEALS SPLIT**

*Murray* seems to be an aberration, especially at a time when Florida statutory protection has provided a strong safekeeping on peer review materials. While Florida courts seem to agree that documents, records, and information generated directly from the peer review committee are privileged, the same line of thinking has failed the Second District with regard to a hospital's list of physicians' privileges. As stated previously, the Second District's holding regarding such a discovery request vastly differs from the holdings derived by the Third, Fourth, and Fifth Districts. These districts have stood strong in their almost always recurring decisions not to permit any information related to peer review to be recoverable in discovery. Murray continuously cited to the Supreme Court of Florida's decision of *Love II* for support, where the Court there held that "a physician's application for staff privileges is a record of the committee or board for pur-

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160. *Id.*
161. *Id.* at 594–95.
162. *Id.* at 595.
163. See *id.*
164. *Murray*, 957 So. 2d at 595.
165. Ostrovsky, *supra* note 24. George A. Vaka is currently employed in Tampa at the law firm of Vaka, Larson & Johnson. *Id.*
169. *Id.* at 592.
170. *Id.;* see also *infra* note 197 and accompanying text.
171. *Murray*, 957 So. 2d at 592.
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poses of the statutory privilege." 172 Relying on past decisions such as that, the district courts in their own course of judgment have found that “[d]ocuments created or considered by a hospital peer review or credentialing committee are privileged.” 173 Respectively, a list of hospital privileges granted to a physician “falls within the purview of this privilege as a matter of public policy.” 174 As such, the rationale of these three districts simply does not coincide with that of the Second in Murray. 175

The following analysis illustrates Florida cases which are in direct opposition to the decision the Supreme Court of Florida just rendered.

In Iglesias v. It’s a Living, Inc., 176 a doctor was assaulted and grievously wounded while on the property of the defendants. 177 In an action for damages, the defendants sought in discovery a list of the doctor’s privileges at any hospital he was currently working at or had worked at in the past. 178 The trial court granted the request for such information. 179 The Third District Court of Appeals of Florida reviewed the case and held that such a decision by the trial court “departed from the essential requirements of law in ordering the discovery and that immediate relief [was] appropriate.” 180 The Court’s rationale followed that these privileges were developed with the purpose of advocating outspokenness and openness in peer review communications. 181 Disclosing a doctor’s privileges would destroy the candidacy of peer review and create a “‘chilling effect’” on the public. 182 Because the defendants lacked a “‘showing of exceptional necessity’ or . . . ‘extraordinary circumstances’” they failed to legitimize why it was they needed such information. 183

A second illustration of a doctor’s privileges not being released in discovery was seen in Boca Raton Community Hospital v. Jones. 184 A medical malpractice suit was brought against a practicing physician, Dr. Rankin, in which claimants requested “Dr. Rankin’s applications for staff privileges,

174. Id.
175. Murray, 957 So. 2d at 592–93.
176. 782 So. 2d 963 (Fla. 3d Dist. Ct. App. 2001).
177. Id. at 963.
178. Id.
179. Id. at 964.
180. Id.
181. Iglesias, 782 So. 2d at 964.
182. Id. (quoting Cruger v. Love (Love II), 599 So. 2d 111, 115 (Fla. 1992)).
183. Id. (quoting Dade County Med. Ass’n v. Hlis, 372 So. 2d 117, 121 (Fla. 3d Dist. Ct. App. 1979)).
reports of reviewing committees, and memoranda, correspondence and other documentation indicating that the doctor was given staff privileges at the hospital." Subsequent to denying protective orders, the trial court granted the claimants' demand for the aforementioned information. On appeal, the Fourth District Court of Appeals of Florida reversed, acknowledging the confidentiality of that which was sought. The court held that the information requested is not of a nature that should be disclosed and is accordingly privileged.

In a similar case, Columbia Park Medical Center, Inc. v. Gibbs, the husband of deceased patient, Gibbs, initiated a medical malpractice action against the hospital. Gibbs requested production of the hospital privileges of the two doctors who were responsible for his wife. Claiming that such information was privileged pursuant to Florida Statute section 766.101(5), the hospital refused to turn over the list of privileges. As per usual, the trial court granted production of the privileges. The Fifth District Court of Appeals of Florida reasoned that "committee reports, including documentation that a physician was given staff privileges and delineating the privileges extended, [were] privileged from discovery.

Although the Supreme Court of Florida has already rendered a decision regarding the discovery of a hospital’s list of physician privileges, the rift between the districts is still important. There will most certainly be analogous cases in the future and, depending upon what district they originate in, could impact the final decision of the case.

V. IMPLICATIONS OF THE DISTRICT SPLIT

Murray has left the discoverability of peer review information in Florida in a state of some abashment. Should future courts rely on the holding in Murray and continue to presuppose that Florida peer review statutes do not protect hospital based documents regardless of the fact that they are rooted in

185. Id.
186. Id.
187. Id.
188. See id.
189. 723 So. 2d 294 (Fla. 5th Dist. Ct. App. 1998).
190. Id. at 295.
191. Id.
192. Id.
193. Id.
194. Gibbs, 723 So. 2d at 295–96.
195. Brandon Reg’l Hosp. v. Murray, 957 So. 2d 590, 590 (Fla. 2007).
peer review communications?\footnote{196} Or, do future courts trust in the past decisions of the Third, Fourth, and Fifth District Courts, and on occasion the Supreme Court of Florida, by supporting the broad construction of peer review statutes and the concealment of information in discovery proceedings?\footnote{197} Regardless of whether Florida courts in the future follow the more liberal open door policy for peer review information in discovery or the iron clad non-disclosure tactic, there will be implications and benefits for both.

If future courts opt to continue in the footsteps of Murray, medical malpractice claimants will be thrilled while hospitals and physicians will be distraught. Peer review works because the committee is comprised of experts and specialists in the field of medicine who understand what is required to practice appropriately and safely.\footnote{198} These experts and specialists, usually physicians in the hospital, partake in peer review, many times against their better judgment, as statutory protection guarantees them some mode of security.\footnote{199} With this in mind, if future courts yield to the holding in Murray, and hospital information founded upon peer review decisions is leaked to the public in discovery, participating doctors will most likely entirely stop or seriously curb their involvement in this process.\footnote{200} As it stands, they get paid minimally, and the risks are plentiful.\footnote{201} Without complete protection, there will either be no doctors willing to participate in peer review,\footnote{202} or those who do will inadequately perform and fail to speak out honestly.\footnote{203} Either way, it is a catch-22.

On the upside, patients suffering from medical malpractice will benefit by having a fair and just trial with all the evidence.\footnote{204} Following in the path of Murray will no longer allow peer review boards to hide proof of hospital or physician mistakes and/or carelessness.\footnote{205} Accordingly, injured patients

\footnote{196} See id.

\footnote{197} See Cruger v. Love (Love II), 599 So. 2d 111, 114 (Fla. 1992) (holding that a doctor’s application for staff privileges were protected by Florida Statutes section 766.101(5)); see also Iglesias v. It’s a Living, Inc., 782 So. 2d 963, 964 (Fla. 3d Dist. Ct. App. 2001) (holding that “[d]ocuments created or considered by a hospital peer review or credentialing committee are privileged”); Gibbs, 723 So. 2d at 295 (holding that a doctor’s privileges at a hospital constitute privileged information); Boca Raton Cmty. Hosp. v. Jones, 584 So. 2d 220, 221 (Fla. 4th Dist. Ct. App. 1991) (holding that a doctor’s application for staff privileges and evidence that he was actually given these privileges was confidential and not discoverable).

\footnote{198} Hammack, supra note 57, at 439.

\footnote{199} Scheutzow, supra note 4, at 16–17.

\footnote{200} See Hammack, supra note 57, at 442–43.

\footnote{201} Cate, supra note 48, at 480.

\footnote{202} Id. at 482.

\footnote{203} See Bassler, supra note 6, at 694.

\footnote{204} See Moore et al., supra note 7, at 1183.

\footnote{205} See Morter, supra note 16, at 1115.
will now be able to successfully asseverate their rights, without the discovery process interfering and hindering the growth of their case. Moreover, patients seeking operations will have access to the privileges their physicians possess, which will enable them to make more informed decisions about whether or not to proceed with the particular doctor they are seeing.

At the other end of the spectrum lie the decisions of the Third, Fourth, and Fifth District Courts. Should future courts choose to proceed in their footsteps, hospitals and physicians being sued for malpractice will continue to be greeted with strong statutory protection while those victimized will be left stranded with only bits and pieces of information supporting their claims. In the past, the system of peer review in Florida has generally operated according to this model of thinking. To rehash what has already been stated, solid statutory protection will continue to allow participants in peer review to veraciously speak their mind and formulate decisions in the best interest of the hospital and patients. Limiting their liability in lawsuits, physicians will maintain their active involvement in the process. Additionally, this type of security will permit peer review to continue operating to better the quality of hospital care and the treatment of patients.

Unfortunately, this approach leaves claimants with the short end of the stick. While courts have acknowledged that with strong statutory protection plaintiffs may have a difficult time prosecuting their claim, they nonetheless deem this to be irrelevant and an unconvincing justification for the disclosure of the information sought. As stated by critics, peer review will continue to shield vital information from patients who seek to sue hospitals thereby furthering injustice in today’s judicial system. As such, the self policing tactic which is strongly guarded will continue to further the “conspiracy of silence.”

206. Cate, supra note 48, at 482.
207. Newton II, supra note 9, at 724.
208. Brandon Reg’l Hosp. v. Murray, 957 So. 2d 590, 595 (Fla. 2007).
209. See supra note 197 and accompanying text.
210. See supra note 112 and accompanying text.
211. See Newton II, supra note 9, at 724.
212. Murray, 957 So. 2d at 592.
213. See supra note 113 and accompanying text.
214. See Moore et al., supra note 7, at 1178.
215. See Jorstad, supra note 5, at 693.
216. See supra note 113 and accompanying text.
217. Graham, supra note 3, at 114.
VI. CONCLUSION

There is a very fine line between that which Florida peer review statutes protect and that which they do not. As so clearly seen by the close of this paper, it has been the legislature’s goal right from the outset to provide safe and effective medical care to patients while controlling rising health care costs. Florida peer review statutes incontestably protect records generated from the peer review process and any documents utilized in their considerations and decision-making. However, never does it state that this protection will linger long after the committee has reached their decision and new documents have been created by other medical bodies, even if based upon the committee’s assessments. Murray was simply the first case in which it was acknowledged that the peer review process must end somewhere, and it starts with the privileges a doctor is granted by a hospital. As stated by the Supreme Court of Florida, this information is not of a nature that should be kept confidential as it is fundamental in any patient’s decision to permit surgery. Although there is a split among the district courts, there has been limited rationale provided as to why, after a peer review committee convenes, newly generated documents founded upon some of their information or decisions should remain confidential. Perhaps after this case, physicians will be more cautious in practicing medicine in an area they are not privileged or prepared to do so as this information is now discoverable in civil litigation. Whilst the peer review process is a valuable tool to the healthcare industry, and should only continue to thrive as such, there must be boundaries. With that said, the Florida Statutes as they stand provide excellent protection for doctors participating in peer review, but it must stop there. Presently, only time will tell whether Murray was the first case in a new line of thinking or simply just an isolated decision.