Nova Law Review 31, 1

Nova Law Review*
ARTICLES AND SURVEYS

2006 Changes to the Florida Rules of Professional Conduct
Heather Perry Baxter

Using the Private Attorney General Theory to Protect Florida Charitable Corporations
Angela Gilmore

Engle, State Farm, Florida Law, and Punitive Damages: Was the $145 Billion Punitive Award Truly Excessive?
Harold C. Reeder

2005-2006 Survey of Florida Public Employment Law
John Sanchez

NOTES AND COMMENTS

Florida’s “Unrelated Works” Exception to Workers’ Compensation Immunity
Ross D. Kulberg

Setting the Stage for Creative Lawyering in ERISA Reimbursement Actions
Robert C. Sheres
Articles and Surveys

2006 Changes to the Florida Rules of Professional Conduct........................................................................Heather Perry Baxter 1

Using the Private Attorney General Theory to Protect Florida Charitable Corporations.................................Angela Gilmore 27

Engle, State Farm, Florida Law, and Punitive Damages: Was the $145 Billion Punitive Award Truly Excessive?.....Harold C. Reeder 57


Notes and Comments

Florida’s “Unrelated Works” Exception to Workers’ Compensation Immunity....................................................Ross D. Kulberg 157

Setting the Stage for Creative Lawyering in ERISA Reimbursement Actions..................................................Robert C. Sheres 187
2006 CHANGES TO THE FLORIDA RULES OF PROFESSIONAL CONDUCT

HEATHER PERRY BAXTER*

I. INTRODUCTION ............................................................................... 2
II. A BRIEF HISTORY ........................................................................... 3
III. PROCEDURE ..................................................................................... 3
IV. CHANGES TO THE PREAMBLE, SCOPE, AND TERMINOLOGY
    SECTIONS .................................................................................. 5
    A. General Changes Throughout the Rules ..................................... 5
    B. Changes to the Preamble .......................................................... 6
    C. Changes to the Scope of Rules .................................................. 6
    D. Changes to the Terminology Section ......................................... 7
V. CHANGES TO THE RULES ................................................................. 7
    A. Client-Lawyer Relationship ....................................................... 7
       1. RPC 4-1.1 Competence ....................................................... 7
       2. RPC 4-1.2 Objectives and Scope of Representation ............... 7
       3. RPC 4-1.3 Diligence ............................................................. 8
       4. RPC 4-1.4 Communication ................................................... 9
       5. RPC 4-1.5 Fees and Costs for Legal Services ....................... 9
       6. RPC 4-1.6 Confidentiality of Information ............................ 10
       7. RPC 4-1.7 Conflict of Interest; General Rule ....................... 10
       8. RPC 4-1.8 Conflict of Interest; Prohibited and Other Transactions .................................................. 11
       9. RPC 4-1.9 Conflict of Interest; Former Client ....................... 12
       10. RPC 4-1.10 Imputed Disqualification; General Rule ............ 13
       11. RPC 4-1.11 Successive Government and Private Employment ........................................................................ 14
       12. RPC 4-1.12 Former Judge or Arbitrator ............................... 15
       13. RPC 4-1.13 Organization as Client ....................................... 15
       14. RPC 4-1.16 Declining or Terminating Representation .................. 15
       15. RPC 4-1.17 Sale of Law Practice ......................................... 16
       16. RPC 4-1.18 Duties to Prospective Client ............................. 16
    B. Counselor ................................................................................... 17
       1. RPC 4-2.1 Adviser .................................................................. 17
       2. RPC 4-2.2 Intermediary ......................................................... 17
       3. RPC 4-2.3 Evaluation for Use by Third Persons ... 18

Published by NSUWorks, 2006
1. INTRODUCTION

2006 marks a big year for changes to the Florida Rules of Professional Conduct (RPC). This article will set forth the changes and explain the process of how they evolved. Part II gives a brief history of the Florida Rules of Professional Conduct. Part III explains the procedure for how these changes were implemented. Part IV explains the general changes throughout the rules, as well as the changes to the preamble, scope, and
II. A BRIEF HISTORY

In 1987, the Florida Bar adopted the Rules of Professional Conduct, which are found in Chapter 4 of the Rules Regulating the Florida Bar.1 These rules were patterned after the American Bar Association Model Rules of Professional Conduct (Model Rules).2 Prior to 1987, Florida lawyers were governed by the Code of Professional Responsibility, but the Code lacked guidance in many matters and was unclear in many instances.3 The rules have been amended over the years, but the changes that went into effect in May of 2006 mark a large overhaul. The amendments reflect several years of research and collaboration of many of Florida’s top experts on ethics and are based on major changes that were made to the Model Rules in 2002.4

III. PROCEDURE

In 1997, the American Bar Association (ABA) formed the Ethics Commission 2000.5 The purpose of this organization was to review the Model Rules and to recommend changes.6 The proposed changes were made final at the end of the ABA February 2002 Midyear Meeting.7 The

2. Id.
3. Id.
4. Florida Bar, Special Committee to Review the ABA Model Rules, http://www.floridabar.org (follow “Publications” hyperlink; then follow “Bar Reports” hyperlink; then follow “Special Committee to Review the ABA Model Rules” hyperlink) (last visited Jan. 28, 2007).
6. Id.
7. Id. In 2002, the rules were further amended to encompass changes recommended by the Multi-jurisdictional Practice Commission and the Standing Committee on Ethics and Professional Responsibility. Id. They were also amended in 2003 based on the House of Delegates debate regarding the Task Force on Corporate Responsibility. Id. This article does not address those changes.
Florida Bar then created the Special Committee to Review the ABA Model Rules 2002 ("Committee"). It was charged with analyzing "the changes to the ABA Model Rules of Professional Conduct, comparing them with the existing Rules Regulating The Florida Bar, and considering whether the Florida Bar should adopt the recommended changes." The Committee not only considered the changes adopted by the ABA, but also reviewed the existing Model Rules to determine how they differed from Florida's rules. After an exhaustive review, the Committee submitted its proposals for amendment of the Rules of Professional Conduct ("RPC") to the Florida Bar Board of Governors. The Board approved the proposals, with the exception of minimal changes to rules 4-1.8 and 5-1.1. The changes were then published in the October 15, 2004 edition of The Florida Bar News. On December 1, 2004, after hearing comments, the Florida Bar submitted its Petition to Amend the Rules Regulating the Florida Bar to the Supreme Court of Florida. The Court heard oral arguments on the petition in June 2005. On March 23, 2006, the Supreme Court of Florida issued In re Amendments to the Rules Regulating the Florida Bar, incorporating most of the Bar's amendment suggestions. The new rules became effective on May 22, 2006.

8. Special Committee to Review the ABA Model Rules, supra note 4. This Committee was chaired by Adele I. Stone. Petition app. D at 2, In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d 417 (Fla. 2006) (No. SC04-2246), http://www.floridabar.org (follow "Publications" hyperlink; then follow "Bar Reports" hyperlink; then follow "Special Committee to Review the ABA Model Rules" hyperlink) [hereinafter Appendix D]. Other members were Andrew S. Berman, Randolph Braccialarghe, Timothy P. Chinaris, Mark K. Delegal, Timothy W. Gaskill, Charles P. Pillans, III, The Honorable Ronald J. Rothschild, and D. Culver Smith, III. Id. Elizabeth Clark Tarbert served as counsel to the committee. Id.

9. Special Committee to Review the ABA Model Rules, supra note 4.
10. Appendix D, supra note 8, at 2.
11. In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d 417 (Fla. 2006).
12. Id. at 418.
13. Id.
14. Petition, In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d 417 (Fla. 2006) (No. SC04-2246), http://www.floridabar.org (follow "Publications" hyperlink; then follow "Bar Reports" hyperlink; then follow "Special Committee to Review the ABA Model Rules" hyperlink; then follow "Download the Petition" hyperlink) [hereinafter Petition].
15. Special Committee to Review the ABA Model Rules, supra note 4.
17. 933 So. 2d 417 (Fla. 2006).
18. Id. at 417–18. The court issued a revised opinion on June 29, 2006, changing only scrivener's errors and denying a rehearing. Id. at 417.
19. Id. at 420.
IV. CHANGES TO THE PREAMBLE, SCOPE, AND TERMINOLOGY SECTIONS

A. General Changes Throughout the Rules

Two changes were made that pervade throughout the RPC, both of which deal with consent. First, the rules change the term “consent after consultation” to “informed consent.” The ABA Ethics 2000 Commission suggested this change because it believed it “clarified and strengthened the requirement of communication with clients regarding consent.” The amended rules defined “informed consent” as “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” In its Petition, the Florida Bar stated that it agreed with the ABA that “the lawyer’s duty of communication to the client is more clearly delineated by this definition.

Based on the recommendation of the ABA, the Florida Bar also suggested that consent be “confirmed in writing,” in certain rules. This consent need not be signed by a client, but if oral consent is obtained, the attorney must send a written statement to the client confirming he or she gave consent. The Florida Bar did not adopt this change with regard to as many rules as suggested by the ABA. Rather, it confined the change to RPC 4-1.7, 4-1.11, and 4-1.12.

After reviewing relevant comments and holding oral argument, the Supreme Court of Florida declined to adopt the change to RPC 4-1.7 as set out by the Florida Bar. Instead, the Court modified the new rule to allow consent to be given, alternatively, “by clear statements . . . on the record at a hearing,” rather than the more restrictive requirement that the consent be in writing. This change was prompted by the dissent voiced from public de-
fenders across the state who claimed it would be an onerous request to obtain written consent from all of the clients whose cases may pose a conflict of interest.\textsuperscript{30} Furthermore, the Supreme Court of Florida declined to adopt the Florida Bar's suggestions for RPC 4-3.3—Candor Toward the Tribunal, RPC 4-3.6—Trial Publicity, RPC 4-3.8—Special Responsibilities of a Prosecutor, and RPC 4-4.1—Truthfulness in Statements to Others.\textsuperscript{31}

B. Changes to the Preamble

Many of the changes in the preamble to the Rules of Professional Conduct are made to conform to the changes in the Model Rules, while others reflect the amendments in the substantive rules.\textsuperscript{32} References to a lawyer as an intermediary are deleted, conforming to the deletion of RPC 4-2.2, discussed \textit{infra}.\textsuperscript{33} In its place are references to lawyers as third-party neutrals, consistent with the references found in RPC 4-1.12 and a new rule added this year, RPC 4-2.4, which is discussed \textit{infra}.\textsuperscript{34} The preamble also instructs lawyers to seek improvement in accessing and furthering public knowledge of the legal system.\textsuperscript{35} Finally, the preamble adds further instructions to lawyers on resolving conflicts.\textsuperscript{36}

C. Changes to the Scope of Rules

The scope section adds language notifying lawyers that the comments to the rules may be used to alert them to responsibilities they may have under other laws.\textsuperscript{37} It also makes references to new rule 4-1.18, which deals with a lawyer's duties to prospective clients.\textsuperscript{38} Further, this section clarifies the relationship between the RPC and causes of actions against lawyers, specifically stating that a violation of a rule does not mean a lawyer should automatically be disqualified from a case.\textsuperscript{39} Language is also deleted that appears elsewhere in the rules.\textsuperscript{40} The paragraph stating that it is a lawyer's

\begin{itemize}
\item[30.] Petition, supra note 14, at 15–16.
\item[31.] Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 418. These rules are discussed \textit{infra} in more detail.
\item[32.] Appendix D, supra note 8, at 11.
\item[33.] \textit{See infra} Part V.B.2.
\item[34.] \textit{See infra} Part V.B.4.
\item[35.] Appendix D, supra note 8, at 13.
\item[36.] \textit{Id.} at 14.
\item[37.] \textit{Id.} at 15.
\item[38.] \textit{Id.}
\item[39.] \textit{Id.}
\item[40.] Appendix D, supra note 8, at 15.
\end{itemize}
decision whether or not to disclose confidential information is not subject to reexamination was also deleted.\textsuperscript{41} This deletion was objected to by Florida Bar member Henry P. Trawick,\textsuperscript{42} but the Supreme Court adopted the deletion as recommended by the Florida Bar.\textsuperscript{43}

D. Changes to the Terminology Section

There were several additional terms added to this section that were consistent with changes made throughout the rules.\textsuperscript{44} Specifically, definitions for “confirmed in writing,” “informed consent,” “screened,” “tribunal,” and “writing” were added.\textsuperscript{45} Moreover, the terms “law firm” and “partner” saw some modifications to their definitions.\textsuperscript{46}

V. Changes to the Rules

A. Client-Lawyer Relationship

1. RPC 4-1.1 Competence

No substantive changes are made to this rule, but commentary is added that a lawyer shall “keep abreast of changes in the law and its practice... and comply with all continuing legal education requirements to which the lawyer is subject.”\textsuperscript{47}

2. RPC 4-1.2 Objectives and Scope of Representation

The changes to this rule were made so that they would conform to the \textit{Model Rules}.\textsuperscript{48} One change deals with the power given to a lawyer to take action on behalf of a client if the lawyer has impliedly been given authorization to do so.\textsuperscript{49} The new rule seems to give an attorney the power to accept or reject a settlement without consulting the client, as long as the client has given the attorney authorization at the outset to do so.\textsuperscript{50} Differing from the

\textsuperscript{41} \textit{In re Amends. to the Rules Regulating the Fla. Bar}, 933 So. 2d 417, 423 (Fla. 2006).
\textsuperscript{42} Appendix D, \textit{supra} note 8, at 252.
\textsuperscript{43} \textit{Amends. to the Rules Regulating the Fla. Bar}, 933 So. 2d. at 418.
\textsuperscript{44} \textit{See id.} at 423–24.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.} at 426–27.
\textsuperscript{48} Petition, \textit{supra} note 14, at 12.
\textsuperscript{49} \textit{Amends. to the Rules Regulating the Fla. Bar}, 933 So. 2d at 427.
\textsuperscript{50} \textit{See id.}
Model Rules, the Florida rules only require that a lawyer “reasonably” consult with a client before pursuing an action. The commentary also gives further instructions on the allocation of authority between the client and a lawyer and advises a lawyer that he or she may withdraw if a disagreement develops with his or her client.

The new RPC 4-1.2 completely eliminates subsection (e), which dealt with a lawyer's duties when a client asks for assistance that is not allowed under the RPC. Commentary to RPC 4-1.2 is added informing the reader to refer to RPC 4-1.4(a)(5) when faced with this situation, as the substance of subsection (e) has been moved to that rule. The commentary also expounds on advice regarding how to avoid assisting a client in committing a crime and agreements limiting the scope of representation.

Additionally, RPC 4-1.2 is one of the rules dealing with informed consent, and the language “consents in writing after consultation” is changed to “gives informed consent in writing” in subsection (c).

3. RPC 4-1.3 Diligence

There is no change to the substance of this rule whatsoever. However, language in the comment section is clarified to explain that diligently representing a client does not mean a lawyer has to forego courtesy and respect. For example, a duty to act with promptness does not mean a lawyer should not agree to a postponement if it will not prejudice his or her client. In other words, do not object just for the sake of objecting.

The commentary also adds a discussion on the obligation of the lawyer to prosecute an appeal for a client, stating that such an obligation is dependent upon the scope of representation agreed to between the client and the lawyer.

51. Id.
52. Id. at 428.
53. Id. at 427.
54. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 430.
55. Id. at 429.
56. Id. at 428–429.
57. Id at 427. See also discussion supra Part IV.A.
58. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 430.
59. Id.
60. Id.
61. Id. at 431.
4. RPC 4-1.4 Communication

The changes to this rule place a stronger obligation on the attorney to communicate with his or her client.\textsuperscript{62} The rule is now much more specific on how an attorney is to accomplish this.\textsuperscript{63} For example, in subsection (a)(1), the rule now requires an attorney to "inform the client of any decision or circumstance" that would require informed consent by the client.\textsuperscript{64} The comments to this subsection point specifically to a settlement offer, and explain that an attorney must inform the client of such an offer unless, pursuant to RPC 4-1.2(a), the attorney and client have come to a previous understanding as to what would be an acceptable settlement.\textsuperscript{65} Subsection (a)(2) mandates that an attorney consult with his or her client about the means of accomplishing the goals of the representation.\textsuperscript{66} The comments to this section explain that this duty may require an attorney to contact a client prior to the attorney taking actions on the case, but specifically point out that this communication may not be necessary in situations such as a trial.\textsuperscript{67}

Subsection (a)(3) requires an attorney keep the client informed about the status of a matter, and the comments for this section do not expound on this concept, except to exemplify matters "such as significant developments affecting the timing or the substance of the representation."\textsuperscript{68} Subsection (a)(4) compels an attorney to promptly comply with requests for information from the client, but the comments explain that in the event a prompt response is not possible, the attorney or his or her staff should at least acknowledge receipt of the request and tell the client when a detailed response should be expected.\textsuperscript{69} Subsection (a)(5) places an obligation on the attorney to consult with the client if the attorney believes the client wants him or her to engage in unethical or illegal conduct.\textsuperscript{70}

5. RPC 4-1.5 Fees and Costs for Legal Services

Rule 4-1.5 has consistently varied to a great degree among the Model Rule, the Florida Bar rule, and the Supreme Court rule, which each maintain

\textsuperscript{62} Petition, supra note 14, at 13.
\textsuperscript{63} See Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 431.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 431–32.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 431.
As such, no substantive changes were made to this rule. The amended comments to the rule clarify that although an attorney is prohibited from charging a contingency fee in a domestic relations case generally, contingent fees are acceptable when the attorney is asked to recover post-judgment balances, such as back child support, alimony, etc.

6. RPC 4-1.6 Confidentiality of Information

The beginning of Rule 4-1.6 substitutes “informed consent” for the older “consents after disclosure.” With this exception, not many changes were made to Rule 4-1.6 because, like RPC 4-1.5, this rule differs substantially from the Model Rule. As such, the changes made by the ABA were not applicable to the Florida rule. The commentary adds a paragraph referencing the different rules governing confidentiality of information from prospective clients, former clients, and other conflicts. Additionally, the comments explain that a lawyer may disclose confidential information so he or she can seek advice on ethical violations.

Dissent to this rule was filed by the Sixth Circuit Public Defender, who claimed the language requiring mandatory disclosure of confidential information which prevents “death or substantial bodily harm,” should be deleted as redundant. The Florida Bar disagreed with the dissent, stating the claim was not redundant, and that the comment was not properly brought before the Court because the requirement was already in the rule and was not a change recommended by the Bar.

7. RPC 4-1.7 Conflict of Interest; General Rule

Though it appears the changes to Rule 4-1.7 are momentous, in effect the changes are merely made to conform to and better organize the existing changes of the Model Rules. To begin, the title has been changed to Con-
Conflict of Interest; Current Clients to reflect the specific purpose of the rule.\textsuperscript{82} As already noted, \textit{supra}, the rule now requires a client to give informed consent, which must be “confirmed in writing or clearly stated on the record.”\textsuperscript{83} In its petition, the Florida Bar required consent to be in writing, but after commentary, the Supreme Court of Florida eased the requirement so that informed consent could also be stated merely on the record.\textsuperscript{84}

8. RPC 4-1.8 Conflict of Interest; Prohibited and Other Transactions

Changes are instituted in this rule to strengthen the protection of clients and also to conform to changes in the \textit{Model Rules}.\textsuperscript{85} If a client and attorney enter into a business transaction with each other, subdivision (a)(2) now requires the attorney to inform the client, in writing, of the benefits of seeking independent legal counsel.\textsuperscript{86} Furthermore, subdivision (a)(3) mandates that the written consent from the client must spell out the terms of the transaction and the attorney’s role in the transaction.\textsuperscript{87} Subdivision (c) prevents the attorney from soliciting a substantial gift from a client, which adds to the current rule that an attorney is prohibited from preparing an instrument for a client that would give the lawyer a substantial gift.\textsuperscript{88} Subsection (f) continues to put limits on a lawyer’s ability to accept compensation from a third party,\textsuperscript{89} and subsection (1) now requires a client to give “informed consent.”\textsuperscript{90} In addition, subdivision (g) requires consent to an aggregate settlement to be in writing.\textsuperscript{91} Finally, a new subdivision (k) has been created that attributes all conflicts listed in the rule to all lawyers in the same firm.\textsuperscript{92} This differs from the previous rule in which subdivision (c) was exempted from this imputation.\textsuperscript{93}

Extensive commentary is added to this rule in an effort to provide more guidance to lawyers.\textsuperscript{94} It clarifies that subsection (a) “does not apply to ordi-

\begin{footnotes}
\footnote{82. Id.}
\footnote{83. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 440; see also discussion \textit{supra} Section IV.A.}
\footnote{84. Id.; Petition, \textit{supra} note 14, at 7.}
\footnote{85. Petition, \textit{supra} note 14, at 16.}
\footnote{86. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 440.}
\footnote{87. Id. at 441; Petition, \textit{supra} note 14, at 16.}
\footnote{88. Petition, \textit{supra} note 14, at 16.}
\footnote{89. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 441.}
\footnote{90. Id.}
\footnote{91. Petition, \textit{supra} note 14, at 16.}
\footnote{92. Id.}
\footnote{93. Id.}
\footnote{94. Id.}
\end{footnotes}
nary fee agreements." Further, the commentary explains that subdivision (a)(2) does not apply if a client has obtained independent counsel. It also explains that this rule does not prohibit a lawyer from being appointed as the personal representative of a client’s estate, or another comparable fiduciary position, as long as the appointment meets the requirements of RPC 4-1.7. Lawyers are further cautioned that they "may not subsidize lawsuits or administrative proceedings . . . , including making or guaranteeing loans to their clients." A great deal of guidance is also added regarding third-party compensation and aggregate settlements. Finally, the commentary explains that the new subdivision (k) applies to all lawyers in the same firm.

9. RPC 4-1.9 Conflict of Interest; Former Client

The ABA adopted substantial amendments to this rule, most of which the Florida Bar failed to recommend. Agreeing with the Florida Bar’s recommendations, the Supreme Court of Florida instituted minimal changes to this rule. As noted supra, RPC 4-1.9 is one of the rules that changed the terminology “consent after consultation” to “gives informed consent.” The ABA amendments require this consent to be in writing. The Florida Bar did not recommend this change, because it believes conflicts involving former clients are minimized by the mere fact that they are former clients.

The new rules delete the definition of “generally known” from the rule and add it to the commentary, for consistency purposes. The amendment to the commentary clarifies that the term “generally known” is subject to a “but for” test. Essentially, the information is not generally known if the attorney would not have known the information “but for” the

95. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 442.
96. Id.
97. Id. at 443.
98. Id.
99. See id. at 444.
100. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 444-45.
102. See Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 445-46.
103. Petition, supra note 14, at 18. See also discussion supra Part IV.A.
104. Id.
105. Id.
106. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 445. This terminology refers to information being used to the disadvantage of a client unless it has become “generally known.” Id.
107. Petition, supra note 14, at 18.
108. Id.
109. Id.; Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 446.
The new rules also decline to adopt the ABA's attempt to clarify the term "substantially related," and instead give their own definition in the commentary.

10. RPC 4-1.10 Imputed Disqualification; General Rule

The changes to this rule are some of the most substantial throughout the RPC. To begin, the name has been changed to Imputation of Conflicts of Interest; General Rule. Under the new rule, the conflict of one attorney is no longer imputed to the entire firm if that conflict is based on a "personal interest" of that attorney and the representation of the client would not be affected. Added commentary to the rule exemplifies a situation where an attorney's strong political beliefs are in conflict with the representation of the client. The rationale behind this change is that loyalty and the protection of confidential information is not a concern when the conflict arises from the personal conflict of one lawyer. Therefore, as long as the other lawyers in the firm are not affected by the personal conflict of the individual attorney, they should be able to represent the client.

The new rule also adds subdivision (e), which directs that imputation of conflicts for government lawyers is addressed by RPC 4-1.11. Also added to the commentary is language addressing the conflicts of nonlawyer employees. The commentary explains that the conflict of a nonlawyer employee is not imputed to the entire firm, though such employees should be screened from participation in the matter. Last, the definition of a law firm is deleted from the commentary since that definition is now found in the terminology section.
11. RPC 4-1.11 Successive Government and Private Employment

This rule is now titled, *Special Conflicts of Interest for Former and Current Government Officers and Employees*. The change of title was intended to reflect the content of the rule more accurately. Subdivision (a) now hosts a new proviso that a former government employee, or public officer, is subject to RPC 4-1.9(b)—the rule dictating that an attorney cannot use information learned from a former client to his or her disadvantage, unless that information has become generally known. “Consents after consultation” is changed to “gives its informed consent, confirmed in writing, to the representation.” Also, the language in subdivision (b) is clarified with regard to the screening of disqualified lawyers.

The definition of “confidential government information” has been moved to new subdivision (c) from former subdivision (e). The old subdivision (c) has been renumbered as subdivision (d), and now includes a mandate that government employees are subject to RPC 4-1.7—*Conflict of Interest; Current Clients*—and RPC 4-1.9—*Conflict of Interest; Former Client*. Subdivision (d) also changes the exception to conflicts regarding government employees. The prior rules allowed a current government employee to participate in a matter in which he or she was involved in private practice if there was no one else authorized to act in his or her stead. The new rules require “informed consent” from the proper agency. The comments to this rule have changed, clarifying the changes made. Specifically, the comments explain the relationship between RPC 4-1.9—*Conflict of Interest; Former Clients*—and this rule. They also explain why government lawyers should be treated differently than private lawyers, explain what screening is, and define “‘matter’ as used in the rule.”

123. *Id.* at 448.
127. *Id.*
128. See *id.*; Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 449.
129. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 449.
131. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 449.
132. *Id.*
134. *Id.*
135. *Id.*
12. RPC 4-1.12 Former Judge or Arbitrator

The title to this rule has been changed to encompass other third-party neutrals, such as former mediators. The title now reads, Former Judge or Arbitrator, Mediator or Other Third-Party Neutral. Because more lawyers are serving in the capacity of third-party neutrals, the Florida Bar and the Supreme Court of Florida found it necessary to make it clear that this rule applies to all lawyers who have served in this capacity. The rule also adds the caveat that all parties must give informed consent, which is confirmed in writing, to waive the conflict of interest. The Florida rule also adds commentary that a Bar member who happens to also be a certified mediator must adhere to other rules relating to certified mediators.

13. RPC 4-1.13 Organization as Client

The only change to this rule requires that a lawyer explain the identity of the client if “the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” This is compared to the prior language, which only required an explanation if it was “apparent” to the attorney. The commentary regarding the identity of a government client is amended for clarity purposes, specifically addressing a government entity as a client.

14. RPC 4-1.16 Declining or Terminating Representation

Most of the changes to this rule were made to conform to the Model Rules. One change which is not consistent with the Model Rules, however, is the new requirement for the mandatory withdrawal of an attorney from a case if the client has used the attorney’s services to commit a crime. Prior to this change, an attorney was permitted to withdraw under such circumstances, but the rules did not require it. An attorney is also

136. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 452.
137. Id.
138. Id.
139. Id.
140. Id. at 453.
141. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 453.
142. Id.
143. Id. at 454; see also Petition, supra note 14, at 23.
144. Petition, supra note 14, at 24.
145. Id.
146. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 455.
permitted, but not required, to withdraw if a client insists on taking action “with which [a] lawyer has a fundamental disagreement,” pursuant to subdivision (b)(2). Subdivision (c) now requires a lawyer to obtain court permission for withdrawal when applicable. The comments exemplify situations, such as pending litigation, where counsel may be required to obtain leave of court before withdrawal. Subdivision (d) now adds mention of refunding unused cost advances, similar to unused fees.

15. RPC 4-1.17 Sale of Law Practice

Based on changes to the Model Rules, Florida has modified this rule to allow the sale of part of a law practice, rather than the former requirement that the entire practice be sold. The Florida Rule differs still from the Model Rule, however, in that the ABA requires an attorney to discontinue practicing law in the area of the practice that is sold, while Florida does not.

16. RPC 4-1.18 Duties to Prospective Client

This is an entirely new rule, based on the new Model Rule 1.18, which essentially addresses an attorney’s duty to maintain the confidences of a prospective client. Subdivision (a) defines a prospective client, while subdivision (b) explains that the confidences of a prospective client must be kept, regardless of whether the client retains the attorney. Subdivision (c) prevents an attorney from representing a client whose interests may be adverse to another prospective client, if information gained from the prospective client “could be used to the disadvantage of” the prospective client. The Model Rule boasts the language “could be significantly harmful to,” rather than “could be used to the disadvantage of.” The Florida Bar recommended the change in language because it thought the suggested verbiage

147. Id.
148. Id. at 456.
149. Id.
150. Id.
151. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 457.
152. Petition, supra note 14, at 25.
153. Id.
154. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 459.
155. Id. at 459–60.
more closely conformed to the existing concepts in Florida, and the Supreme Court of Florida agreed.

The Florida Bar and the Supreme Court of Florida did not agree, however, on one aspect of the new ABA Rule. The ABA adopted two exceptions to the ban on representation based on subdivision (c). First, if both the affected client and prospective client give informed consent, which is confirmed in writing, the representation will be allowed. Likewise, if the lawyer who received the information was screened from the process, the firm may continue to represent the client. The Florida Bar found this unacceptable, as the Florida rules do not generally use screening to resolve conflicts, with the exception of government lawyers and judges. The Supreme Court of Florida disagreed and adopted the rule as written by the ABA.

B. Counselor

1. RPC 4-2.1 Adviser

No substantive changes were made to this rule, but the commentary was amended to add a discussion about informing clients of reasonable alternative dispute resolution.

2. RPC 4-2.2 Intermediary

The ABA deleted this rule in its entirety from the Model Rules. Florida chose to follow suit and also deleted the rule. The ABA originally adopted RPC 4-2.2 because the ABA considered the representation of multiple clients to be prohibited. Today, however, it is much more acceptable to represent multiple clients, and the Florida Bar reasoned that RPC 4-1.7 handles issues regarding this type of representation. In an effort to maintain...
tain continuity, the Florida Bar and the Supreme Court of Florida decided to designate the number as "open," rather than renumber the entire section.170

3. RPC 4-2.3 Evaluation for Use by Third Persons

In subdivision (a), the term has been changed to "provide" evaluation, rather than "undertake" evaluation.171 Further, "informed consent" is substituted for the prior "consents after consultation," as discussed in Section IV.A., above.172 The additions to the commentary emphasize that a lawyer shall not make a knowingly false statement in performing an evaluation.173 The commentary refers the reader to RPC 4-4.1, which deals with "Truthfulness in Statements to Others."174

4. RPC 4-2.4 Lawyer Serving as Third-Party Neutral

The ABA adopted an entirely new rule discussing lawyers serving as third-party neutrals, and the Florida Bar recommended the adoption of this rule in its entirety to the Supreme Court of Florida.175 The Court agreed, and new RPC 4-2.4 was born.176 The new rule defines a lawyer as a third-party neutral "when the lawyer assists [two] or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them."177 The rule itself gives such examples as an arbitrator or mediator.178 The rule requires a lawyer serving in this capacity to inform the parties that he or she does not represent them.179 Furthermore, the lawyer has a duty to correct any misunderstanding regarding the lawyer's role.180 Extensive commentary is added to explain these new requirements.181

170. Id. at 27–28.
171. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 463.
172. Id. at 464; see also supra Section IV.A. (discussing the general changes involving consent).
174. Id.
175. Petition, supra note 14, at 28.
176. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 418.
177. Id. at 465.
178. Id.
179. Id.
180. Id.
181. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 465.
C. Advocate

1. RPC 4-3.1 Meritorious Claims and Contentions

This rule has always required an attorney to have a valid basis to bring an action, and the changes to this rule insert the terms "in law and fact" after the word "basis."\textsuperscript{182} The commentary explains a lawyer's obligation to investigate a client's case before arguing the client's case.\textsuperscript{183} The rule also points out that constitutional law may require an attorney defending a criminal client to present a claim that would otherwise be prohibited under this section, but such constitutional matters take precedence over the \textit{Model Rules}.\textsuperscript{184}

2. RPC 4-3.2 Expediting Litigation

No substantive changes were made to this rule, but language was added that a lawyer shall not routinely delay a matter for his or her own convenience.\textsuperscript{185}

3. RPC 4-3.3 Candor Toward the Tribunal

The Florida Bar proposed several changes to this rule, which were rejected by the Supreme Court of Florida.\textsuperscript{186} The Court cited concerns with possible contradictions within the proposed rule, and directed the Florida Bar to study the rule further.\textsuperscript{187}

4. RPC 4-3.6 Trial Publicity

The ABA Model Rule regarding trial publicity varies greatly from the Florida rule.\textsuperscript{188} The Florida Bar recommended changes to the Florida rule to conform to ABA Model Rule 3.6, but the Supreme Court of Florida rejected these changes.\textsuperscript{189}

\begin{itemize}
  \item \textsuperscript{182} Id. at 466.
  \item \textsuperscript{183} See id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id. at 466–67.
  \item \textsuperscript{186} \textit{Amends. to the Rules Regulating the Fla. Bar}, 933 So. 2d at 419.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} \textit{Compare Model Rules of Prof'l Conduct R. 3.6 (2002), with R. Regulating the Fla. Bar R. 4-3.6 (2006)}.
  \item \textsuperscript{189} \textit{Amends. to the Rules Regulating the Fla. Bar}, 933 So. 2d at 419.
\end{itemize}
5. RPC 4-3.7 Lawyer as Witness

There were no substantive changes to this rule. Some terminology is changed, in an effort to conform to the Model Rules, and commentary is added explaining the rationale for the rule.

6. RPC 4-3.8 Special Responsibilities of a Prosecutor

The Florida Bar proposed some extensive changes to this rule, including the implementation of an obligation on the part of the prosecutor to ensure a person accused of a crime has been advised of the right to counsel. The Supreme Court of Florida chose not to adopt any of the changes recommended by the Florida Bar. The Court explained its reasoning for not adopting these changes in detail, and essentially found that the obligations being placed on prosecutors under this section would be more proper under the criminal procedure rules, rather than the RPC.

7. RPC 4-3.9 Advocate in Nonadjudicative Proceedings

This rule deals with the representation of a client before a body such as the legislature or an administrative agency. The rule is expanded here to require an attorney to deal honestly with the tribunal. Diverging from the Model Rules, the Florida rule now allows ex parte contacts with the decision maker. The Florida Bar found such a prohibition was “inconsistent with the legislative and administrative process in government” and “unduly burdensome to practicing attorneys.”

190. See id. at 467.
191. Id.
193. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 419.
194. Id.
195. Id. at 468.
196. Id. The prior rule stated that an attorney “should” deal honestly, and the new rule dictates that an attorney “must” be honest. Id.
197. Petition, supra note 14, at 32.
198. Id.
D. Transactions with Persons Other than Clients

1. RPC 4-4.1 Truthfulness in Statements to Others

There are no substantive changes to this rule, but commentary is added providing guidance on the meaning of misrepresentation. The changes proposed by the Florida Bar conformed generally to the Model Rules, but deviated slightly. Finding no explanation for the deviation, the Supreme Court of Florida chose to adopt the commentary as found in the Model Rule, as opposed to the proposal by the Florida Bar.

2. RPC 4-4.2 Communication with Person Represented by Counsel

The Florida Bar proposed adding a comma to subdivision (a), but the Supreme Court of Florida neither adopted that change nor commented on the matter. The Court did, however, adopt the proposed additions to the commentary. Several additions explain the rationale of the rule and its application. Special considerations for a client that is an organization are also discussed. Additionally, the comments make clear that a violation occurs only if the lawyer has actual knowledge that the person is represented by counsel, and also reference RPC 4-4.3—Dealing with Unrepresented Persons.

---


200. The Florida Bar’s proposal reads:

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud, to disaffirm an opinion, document, affirmation, or the like.

Appendix D, *supra* note 8, at 181–82. Compare ABA Model Rule 4.1 with the rule as amended by the Supreme Court of Florida which reads:

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.

*Amends. to the Rules Regulating the Fla. Bar*, 933 So. 2d at 469–70.

201. *Id.* at 469.


204. *Amends. to the Rules Regulating the Fla. Bar*, 933 So. 2d at 470.

205. *Id.* at 470–71.

206. *Id.* at 471.
3. RPC 4-4.3 Dealing with Unrepresented Persons

In conformity with Model Rule 4.3, the Florida rule moves the "provision that a lawyer shall not give legal advice to an unrepresented person...from the commentary to the body of the rule."\(^{207}\) The Model Rule also adds a provision allowing a lawyer to give legal advice to an unrepresented person, as long as that person's "interests are not in conflict with the [interests of the lawyer's] client."\(^{208}\) The Florida Bar did not recommend adopting that addition, however, "because of the danger that an attorney-client relationship may be created with the unrepresented person pursuant to case law in Florida."\(^{209}\) The commentary is modified to conform to substantive changes in the rule and to add a reference to RPC 4-1.13—Organization as Client.\(^{210}\)

4. RPC 4-4.4 Respect for Rights of Third Persons

Because of the proliferation of e-mail and other electronic forms of communication, the issue of misdelivered documents arises quite frequently.\(^{211}\) The new Model Rule 4.4 added a provision obligating the recipient of such an inadvertent document to notify the sender promptly, and the new Florida rule reflects this requirement.\(^{212}\) The commentary to the Florida rule also provides guidance on how to handle this situation.\(^{213}\) The commentary does not, however, reach the issue of whether such a document is privileged, or whether the recipient must return the document.\(^{214}\)

E. Law Firms and Associations

1. RPC 4-5.1 Responsibilities of a Partner or Supervisory Lawyer

The title of this rule has been changed to, Responsibilities of Partners, Managers, and Supervisory Lawyers.\(^{215}\) The changes to this rule extend the responsibilities of a partner to all lawyers in the firm who have managerial

---

\(^{207}\) Petition, supra note 14, at 34.

\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) Id.

\(^{211}\) Id. at 34–35.

\(^{212}\) Id. at 34–35.

\(^{213}\) Petition, supra note 14, at 34–35.

\(^{214}\) See In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d 417, 472 (Fla. 2006).

\(^{215}\) Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 472.
Language listing the types of partners affected by this rule is deleted as redundant in subdivision (a) and (c)(2), as this list can be found in the commentary. The commentary also clarifies the difference between a lawyer with managerial authority, such as a partner, and a lawyer with direct supervisory authority over another lawyer. Finally, the commentary clarifies that although a partner may be held liable for a lawyer’s conduct, the lawyer’s personal duty to abide by the Rules of Professional Conduct is not altered.

2. RPC 4-5.3 Responsibilities Regarding Nonlawyer Assistants

The term “authorized business entity” is changed to “law firm,” in subdivision (a) of this rule because law firm is defined elsewhere in the rules. The rule also expands the responsibility of assuring the compliance of nonlawyers with the Rules of Professional Conduct to all attorneys with managerial authority comparable to that of a partner. The comments now read that a lawyer “must” give assistants appropriate instruction on ethical considerations, as opposed to the prior rule which only stated a lawyer “should” do so.

3. RPC 4-5.4 Professional Independence of a Lawyer

Following the Model Rules, this rule now allows lawyers to share court-awarded fees with nonprofit, pro bono legal service organizations that either employ or recommend a lawyer in the matter. The ABA Ethics 2000 Commission believed that such a division of fees provided “less of a ‘threat to independent professional judgment’” than the other fee-sharing arrangements still prohibited by the rule. Further, subdivision (e) broadens the prohibition against nonlawyer officers to include nonlawyers who hold posi-

216. Id.
217. See id. at 472–73.
218. Id. at 473.
219. Id.
220. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 474; Petition, supra note 14, at 35.
221. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 474–75.
222. Id. at 475.
223. Petition, supra note 14, at 36.
224. Id.
tions similar to corporate officers. Commentary was also added to reflect these changes.

4. RPC 4-5.6 Restrictions on Right to Practice

This rule is expanded to prohibit a lawyer from not only making a partnership or employment agreement that restricts the rights of lawyers to practice after termination of the relationship, but also a shareholder, operating, or other similar type of agreement that would do the same. The commentary also replaces the term “partners or associates” with “lawyers” to reflect the fact that lawyers do not always work together in such a traditional way.

F. Maintaining the Integrity of the Profession

1. RPC 4-8.1 Bar Admission and Disciplinary Matters

No changes are made to the body of this rule, but the commentary reflects new language requiring the “correction of any prior misstatement” in a bar application or disciplinary proceeding.

2. RPC 4-8.3 Reporting Professional Misconduct

A change in the language of this rule now dictates that a lawyer “who knows that another lawyer has committed a violation of the Model Rules of Professional Conduct” must report that lawyer to the Florida Bar, rather than the prior requirement that a lawyer “have knowledge” of the violation. This change was made to conform to the Model Rules. The rule also now creates an exception to this reporting requirement, which also conforms to the Model Rules, wherein disclosure is not required if the knowledge of the lawyer’s conduct is gained through a lawyer assistance program. This exception is an effort to encourage lawyers to participate in such programs.

225. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 476.
226. Id.
227. Id.
228. Petition, supra note 14, at 37.
229. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 477.
230. Id. (emphasis added).
231. Id.
232. Petition, supra note 14, at 37.
233. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 478.
234. Petition, supra note 14, at 37.
3. 4-8.4 Misconduct

This rule adds a provision prohibiting a lawyer from achieving results by violating the Rules of Professional Conduct. 235 Commentary added to the rule provides guidance when one lawyer is responsible for the misconduct of another lawyer. 236

G. 5-1.1 Rules Regulating Trust Accounts

This rule clarifies the lawyer’s obligation when more than one person has an interest in a trust fund that the lawyer is holding. 237 A provision is also added that provides a “lawyer shall promptly distribute all” undisputed funds. 238 Commentary was further changed to make clear that some duties, such as keeping disputed funds in a trust account, are mandatory. 239

VI. CONCLUSION

Though many of these amendments were cosmetic in nature, there are some that may have a significant effect on practitioners. It is suggested that all Florida practitioners review the new rules as amended, and that all Florida practitioners take particular notice of RPC 4-1.4 240—Communication; RPC 4-1.8 241—Conflict of Interest; Prohibited and Other Transactions; RPC 4-1.10 242—Imputation of Conflicts of Interest; General Rule; RPC 4-1.11 243—Special Conflicts of Interest for Former and Current Government Officers and Employees; RPC 4-1.18 244—Duties to Prospective Client; RPC 4-4.3 245—Dealing with Unrepresented Persons; RPC 4-4.4 246—Respect for Rights of Third Persons; RPC 4-5.1 247—Responsibilities of Partners, Managers, and Supervisory Lawyers; and RPC 4-5.3 248—Responsibilities Regarding Nonlawyer Assistants. As the practice of law

235. Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d. at 478-79.
236. Id. at 479.
237. Id. at 480.
238. Id.
239. See id. at 481.
241. Id. R. 4-1.8.
242. Id. R. 4-1.10.
243. Id. R. 4-1.11.
244. Id. R. 4-1.18.
245. R. REGULATING THE FLA. BAR R. 4-4.3.
246. Id. R. 4-4.4.
247. Id. R. 4-5.1.
248. Id. R. 4-5.3.
changes, so does the regulation of its practitioners. Only time will tell how these changes to the ethics rules will affect the practice of law in the State of Florida.
USING THE PRIVATE ATTORNEY GENERAL THEORY TO PROTECT FLORIDA CHARITABLE CORPORATIONS

ANGELA GILMORE*

I. INTRODUCTION ............................................................................. 28

II. WHAT IS A CHARITABLE CORPORATION? .................................................. 30
   A. Charitable Corporations Are Public Benefit Organizations ........................................... 32
   B. Charitable Corporations Are a Subset of Tax Exempt Organizations ................................. 33
   C. Charitable Corporations Distinguished from Mutual Benefit Corporations .......................... 34

III. ROLE OF DIRECTORS IN NONPROFIT CORPORATIONS ................... 35
   A. Fiduciary Relationship ................................................................................................. 35
   B. Florida Statute Concerning Directors’ Fiduciary Duties .................................................. 36
   C. Florida Case Law Concerning Directors’ Fiduciary Duties .............................................. 37

IV. ENFORCEMENT OF DIRECTORS’ DUTIES ...................................... 38
   A. Florida Not For Profit Corporation Act Provisions Concerning Standing ......................... 39
   B. Statutory Provisions Do Not Adequately Protect All Nonprofit Corporations .................. 41
   C. Shortcomings of Florida’s Approach ............................................................................... 42

V. WHY FLORIDA SHOULD CHANGE THE STANDING PROVISION IN THE NOT FOR PROFIT CORPORATION ACT ........................................ 44
   A. Florida Should Provide Equal Access to Derivative Actions to Public Benefit and Mutual Benefit Nonprofit Corporations .............................................................. 44
   B. Florida Should Protect Charitable Corporations and Charitable Trusts Similarly .................. 45

VI. THE PRIVATE ATTORNEY GENERAL DOCTRINE .............................. 47
   A. What Is the Private Attorney General Doctrine? ............................................................ 47
   B. Potential Plaintiffs Under the Private Attorney General Doctrine ..................................... 48

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I am grateful to Professors Elena Marty-Nelson and Olympia Duhart for their thoughtful and helpful comments, and to Christine Barzola, Carlos Duque, Rene Murillo and especially Stephanie Suarez for research assistance. Finally, I thank Angela Wallace for her support.

Published by NSUWorks, 2006
1. Substantial Donors ................................................................. 49
2. Employees and Volunteers ....................................................... 50
3. Beneficiaries and Potential Beneficiaries ................................. 50

C. Fundamental Principle Underlying Private Attorney General Doctrine ........................................................... 51
D. Remedy Available Under Private Attorney General Doctrine ........................................................................ 52
E. Attorney’s Fees Under the Private Attorney General Doctrine ........................................................................ 53

VII. CONCLUSION ................................................................................ 54

I. INTRODUCTION

A nonprofit corporation can be characterized as either a “public benefit” organization or a “mutual benefit” organization. Public benefit organizations, also referred to as charitable corporations or charities, exist to provide a benefit to society. Mutual benefit organizations, often referred to as membership organizations, exist to provide a benefit to their members. Florida, like many states, uses a “one size fits all” approach to determine who has standing to bring suit against directors of nonprofit corporations for breach of fiduciary duties. That is, for both mutual benefit and public benefit nonprofit corporations, states restrict the parties who have standing to challenge the actions of the directors on behalf of the corporation. Standing is granted

1. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 74 (3d ed. 2006).
2. Id.
3. Id. at 74–75.
5. For example, the Georgia Nonprofit Corporations Code provides in relevant part: A corporation's power to act may be challenged: (1) [i]n a proceeding by a member against the corporation to enjoin the act; (2) [i]n a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or (3) [i]n a proceeding by the Attorney General under Code Section 14-2-1430.

GA. CODE ANN. § 14-3-304(b)(1)-(3) (Supp. 2006). Similarly, the Connecticut Revised Nonstock Corporation Act states in relevant part: 
(b) A corporation's power to act may be challenged: (1) [i]n a proceeding by a member or director against the corporation to enjoin the act; (2) in a proceeding by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation; or (3) in a proceeding by the Attorney General to dissolve the corporation or to enjoin the corporation from the conduct of unauthorized affairs.
(c) In a member's or director's proceeding under subdivision (1) of subsection (b) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable
only to members, directors, and legal representatives of the nonprofit corporation, as well as to the state’s attorney general. 6

In light of the distinctions between the two types of nonprofit corporations, this article proposes that the Florida Legislature include a standing provision in the Florida Not for Profit Corporation Act 7 that ensures that directors of both mutual benefit and public benefit nonprofit corporations, are held accountable to all of the constituencies they serve. This article argues that Florida’s current approach, while adequately protecting the interests of mutual benefit nonprofit corporations, does not achieve for many public benefit nonprofit corporations its desired goal of protecting nonprofit corporations from the harmful acts of directors. Florida’s approach to standing leaves the actions of directors of public benefit nonprofit corporations virtually unchallengeable and unchallengeable. 8

This issue is especially timely given the recent approval of the Uniform Trust Code, 9 by the National Conference of Commissioners on Uniform State Laws, and Florida’s subsequent adoption of it. 10 The stated purpose of the Uniform Trust Code is to “provide [s]tates with precise, comprehensive, and easily accessible guidance on trust law questions.” 11 Because of a settlor’s special interest in a charitable trust, the drafters created section 405(c) of the Uniform Trust Code, which grants standing to a settlor of a charitable trust to sue the trustees for breach of fiduciary duty. 12 Charitable trusts and charitable corporations are both used to accomplish charitable pur-
Thus, given the similarities between the two, it is time for donors, and others with a special interest in a charitable nonprofit corporation, to be treated the same as their counterparts in the charitable trust arena and be given a comparable right to enforce the fiduciary duties of the directors of the corporation.

Part II of this article explains what it means for a corporation to be recognized as a Florida charitable, public benefit, nonprofit corporation. Part III of the article explores the role of directors in Florida nonprofit corporations. Part IV of the article discusses the current state of Florida law regarding who has standing to bring suit for enforcement of the duties directors owe to nonprofit corporations. Part V of the article explains why Florida law must be changed if mutual benefit and public benefit corporations are to be treated similarly with respect to standing. Part VI of the article proposes that the Florida Not for Profit Corporation Act include a private attorney general provision which would allow those with a legitimate stake in the public benefit nonprofit corporation to enforce the duties of the directors. The proposal is based, in part, on the rationale used to grant standing to settlors in the charitable trust area. Finally, Part VII of the article concludes by calling for an amendment to the Florida Not for Profit Corporation Act which recognizes the special interests certain constituencies have in charitable corporations.

II. WHAT IS A CHARITABLE CORPORATION?

A corporation is a charitable corporation if it has been organized as a nonprofit corporation under state law and has complied with the requirements established by the Internal Revenue Code for charitable organizations. Thus, the nonprofit corporate status of a charitable corporation is determined by state law, while the charitable nature of the charitable corporation is established by federal law.

Complicating matters, the terms nonprofit and charitable are sometimes used as if they are interchangeable. Charitable corporations are, however, a subset of nonprofit corporations. All charitable corporations are nonprofit
corporations, but not all nonprofit corporations are charitable.\textsuperscript{17} While a
corporation may be a nonprofit corporation, its purpose need not be charita-
table.\textsuperscript{18} Nonprofit corporations are simply corporations that can be distin-
guished from for-profit corporations, primarily, on the basis of one fact: no
part of a nonprofit corporation's profits may be distributed to owners of the
corporation.\textsuperscript{19} Unlike for-profit corporations, nonprofit corporations must
reinvest any profits in the corporation.\textsuperscript{20}

The Florida Not for Profit Corporation Act is found in chapter 617 of
the Florida Statutes.\textsuperscript{21} Nonprofit corporations can be formed in Florida for
many different purposes. In fact, section 617.0301 of the Florida Statutes
includes a non-exclusive list of twenty-two permissible purposes for non-
profit corporations.\textsuperscript{22} According to the statute, nonprofit corporations may
be organized for "charitable, benevolent, eleemosynary,\textsuperscript{23} educational, his-
torical, civic, patriotic, political, religious, social, fraternal, literary, cultural,
asletic, scientific, agricultural, horticultural, animal husbandry, and profes-
sional, commercial, industrial, or trade association purposes.\textsuperscript{24} The defining
characteristic of a Florida nonprofit corporation, like all nonprofit corpora-
tions, is that it does not distribute any part of its income or profit to members,
directors, or officers.\textsuperscript{25} This characteristic distinguishes a nonprofit corpora-
tion from a for-profit or business corporation that may distribute its profits to
its owners in the form of dividends paid to shareholders.\textsuperscript{26}

Charitable corporations are nonprofit corporations that have applied for
and received recognition from the Internal Revenue Service as having com-
plied with the requirements of section 501(c)(3) of the Internal Revenue
Code.\textsuperscript{27} In order for an organization to qualify for charitable status under
section 501(c)(3), five things must be true: 1) it must take the form of a cor-
poration, community chest, fund, or foundation; 2) it must be organized and

\textsuperscript{17} See id. \\
\textsuperscript{18} Id. \\
\textsuperscript{19} Id. at 2. "Nonprofit organizations are not prohibited from making a profit. The pro-
hibition is against the distribution of any profits to members, officers, or directors of the or-
ganization, or to other private individuals or entities." Id. \\
\textsuperscript{20} See Phelan & Desiderio, supra note 13, at 2. \\
\textsuperscript{22} Id. § 617.0301. \\
\textsuperscript{23} Eleemosynary means "[r]elating or devoted to charity." Black's Law Dictionary
467 (5th ed. 1979). \\
\textsuperscript{24} Fla. Stat. § 617.0301. \\
\textsuperscript{25} Id. § 617.01401(5). \\
\textsuperscript{26} Compare id. § 607.06401(1), with § 617.01401(5). \\
\textsuperscript{27} I.R.C. § 501(c)(3) (2000).
operated primarily for a charitable purpose; 3) the net earnings of the organization may not inure to the benefit of a private person; 4) the organization may not engage in a substantial amount of lobbying activities; and 5) the organization must not be involved in any political campaigns. 29

A. Charitable Corporations Are Public Benefit Organizations

Corporations that satisfy both the requirements of chapter 617 of the Florida Statutes and section 501(c)(3) of the Internal Revenue Code are also referred to as "public benefit" organizations. 30 The corporations are public benefit organizations because they exist to provide a benefit to the public, or to some segment of the public, and not to provide a benefit to their owners, shareholders, members, or benefactors. 31 Historically, the goal of public benefit organizations was to alleviate poverty by feeding the poor, housing the homeless, caring for the elderly, tending to the sick, and engaging in other activities that involved the provision of essential goods and services to those who could not care for themselves. 32 Over time however, the concept of public benefit has expanded to also include other activities that provide a benefit to society. 33 The provision of education, both formal and informal, support of religion, advancement of science, and the elimination of prejudice and discrimination are all ways organizations can provide a benefit to society. 34 Additionally, organizations that promote the arts are considered public benefit organizations. 35 While the activities of these organizations may not be charitable, as the term is traditionally understood, they enrich society in ways that provide a benefit to the public. 36 Thus, museums, symphonies, and theater groups can be operated as charities. 37

28. Organizations that are recognized as having satisfied the requirements of section 501(c)(3) of the Internal Revenue Code are commonly referred to as charitable organizations. See Fishman & Schwarz, supra note 1, at 74. In order to be considered a 501(c)(3) organization, the purpose of the organization must be "religious, charitable, scientific, testing for public safety, literary, . . . education[, . . . foster[ing] national or international amateur sports competition, . . . or the prevention of cruelty to children or animals." I.R.C. § 501(c)(3).

29. See id. Throughout this paper, corporations that have been recognized as section 501(c)(3) organizations will be referred to as charities or charitable organizations.

30. Fishman & Schwarz, supra note 1, at 74.

31. Id. at 75.

32. See generally id. at 87–89 (discussing charitable purposes).

33. See id. at 89.

34. Exemption Requirements, supra note 15.


36. See id.

37. See id.
PRIVATE ATTORNEY GENERAL THEORY

B. Charitable Corporations Are a Subset of Tax Exempt Organizations

Charitable corporations are often referred to as tax exempt organizations because the income of these organizations is exempt from federal income tax. The Internal Revenue Code provides that corporations are subject to an annual income tax. Charitable corporations, however, are exempt from this tax pursuant to section 501(a) of the Internal Revenue Code. In addition to the exemption of the charity's income from federal income taxation, donors to certain charities are generally entitled to deduct the amount of their charitable donations from the income on which they will have to pay federal income tax. This deduction is available to donors to nonprofit organizations that are also recognized as section 501(c)(3) organizations, as well as certain other tax exempt organizations. However, donations to most other types of tax exempt organizations are not deductible from the donor's taxable income.

Furthermore, Florida law provides preferential tax treatment to charitable corporations in the areas of property, sales, use, and income taxes. Property owned by an exempt entity and exclusively used for "educational, literary, scientific, religious, charitable, or governmental purposes" is exempt from Florida's property tax. Florida charities are also exempt from paying state sales and use tax. Finally, the only taxable income earned by a Florida charity is income that is derived from any commercial activity undertaken by the charity that is unrelated to its charitable purpose. Therefore,

39. Id. § 11(a). "A tax is hereby imposed for each taxable year on the taxable income of every corporation." Id.
40. Id. § 501(a). "An organization described in [§ 501(c)(3)] shall be exempt from taxation . . . ." Id.
41. I.R.C. § 170(a)(1). "There shall be allowed as a deduction any charitable contribution . . . ." Id. The Internal Revenue Code limits the amount of the deduction to 50% or less of the donor's taxable income. Id. § 170(b)(1)(A).
42. See id. § 170(c). The code also allows a donor donating to governmental bodies, veterans' organizations, fraternal organizations, and cemetery companies to deduct the contributions from the donor's adjusted gross income. Id.
43. See I.R.C. § 170(a) and (c).
45. Id. § 196.012(1).
46. Id. § 196.192.
47. See id. § 212.08(7)(p). "Also exempt from the tax imposed by this chapter are sales or leases to organizations determined by the Internal Revenue Service to be currently exempt from federal income tax pursuant to s. 501(c)(3) of the Internal Revenue Code . . . ." Id.
48. See Fla. Stat. § 220.13(2)(h). ""Taxable income," in the case of an organization which is exempt from the federal income tax by reason of s. 501(a) of the Internal Revenue Code, means its unrelated business taxable income . . . ." Id.

Published by NSUWorks, 2006
any income generated by the charitable activities of the organization—for example, tuition charged for education—is not subject to Florida income tax.\textsuperscript{49}

The primary reason that charities and their donors are entitled to preferential tax treatment is that they provide a benefit to society.\textsuperscript{50} Charitable corporations are thought to alleviate the burdens of government by providing goods and services to the public that the government and for-profit organizations—two other types of societal institutions that provide goods and services to the public—cannot, or will not, provide in sufficient quantities.\textsuperscript{51} Governments may not be able to provide the goods or services because it would not be efficient for government to do so. In addition, it may not be appropriate for government to provide the goods and services if it would involve entanglement with religion. For-profit organizations may not be interested in providing many of the goods and services provided by charitable corporations because there is no significant profit to be made by doing so.\textsuperscript{52} In exchange for the contributions they make to society—both by lessening the burdens of government and by increasing the quality of life of its citizens—charities and their donors are treated favorably by state law and the Internal Revenue Code.\textsuperscript{53}

C. Charitable Corporations Distinguished from Mutual Benefit Corporations

Charitable corporations must be distinguished from mutual benefit nonprofit corporations. Rather than benefiting the public, mutual benefit corporations exist to provide a benefit to members of the organization.\textsuperscript{54} Like charitable nonprofit corporations, mutual benefit nonprofit corporations are governed by chapter 617 of the Florida Statutes.\textsuperscript{55}

Mutual benefit nonprofit corporations may be recognized as tax exempt organizations for tax purposes as well. Section 501(c) of the Internal Revenue Code delineates organizations, other than charities, whose income is exempt from the federal income tax.\textsuperscript{56} Business leagues, social clubs, labor

\textsuperscript{49} See id.

\textsuperscript{50} See Fishman & Schwarz, supra note 1, at 327–28 (discussing the rationale for charitable tax exemptions).

\textsuperscript{51} See id. at 43–44 (explaining the rationale for the nonprofit sector).

\textsuperscript{52} See id.

\textsuperscript{53} See id. at 327–28.

\textsuperscript{54} Id. at 74.


\textsuperscript{56} I.R.C. § 501(c) (2000).
organizations, and horticultural organizations are just a few of the different types of organizations listed in section 501(c). Homeowners associations and political organizations are also tax exempt organizations pursuant to other sections of the Internal Revenue Code. Donations to mutual benefit tax exempt organizations are not deductible from the donor’s taxable income.

III. ROLE OF DIRECTORS IN NONPROFIT CORPORATIONS

A nonprofit corporation is governed by a board of directors. It is the members of the board of directors who collectively guide the nonprofit corporation’s operations. Perhaps most importantly, directors are charged with knowing the purpose of the nonprofit corporation they serve and with working within the law to achieve and maximize this purpose.

A. Fiduciary Relationship

It is generally recognized that the relationship between the director of a nonprofit corporation and the corporation is a fiduciary one. As a result, directors owe three major fiduciary duties to the charity. The first duty is the duty of obedience.

The duties of the board of directors of a nonprofit organization can be encapsulated in the three Ds: [D]uty of care, duty of loyalty, and duty of obedience. Defined by case law, these are the legal standards against which all actions taken by directors are held. They are collective duties adhering to the entire board and require the active participation of all board members. Accountability can be demonstrated by showing the effective discharge of these duties.
rations must obey the articles of incorporation and the bylaws of the corporation, and remain faithful to the mission and goals of the corporation. 67

The second duty, the duty of loyalty, requires the directors to act in the best interest of the charitable corporation. 68 This duty requires directors to resolve any conflicts of interests with the corporation in favor of the corporation. 69 This duty also requires directors to avoid usurping opportunities that the corporation may wish to obtain. 70

The duty of care is the third duty owed to the corporation by its directors. 71 The duty of care requires directors to devote to the corporation the time needed to actually manage its affairs. 72 It also requires directors to educate themselves about the issues facing the corporation and the consequences of decisions they make on behalf of the corporation. 73 In addition, the duty of care imposes upon directors a responsibility to discover and expose any acts that may inflict harm upon the corporation. 74

B. Florida Statute Concerning Directors' Fiduciary Duties

Florida, like many other states, has codified the duty of care for directors of nonprofit corporations. 75 Section 617.0830 of the Florida Statutes provides:

(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner he or she reasonably believes to be in the best interests of the corporation. 76

67. Id.
68. Id. at 3. See Phelan & Desiderio, supra note 13, at 4–7.
71. Hopkins, Legal Responsibilities, supra note 65, at 3.
72. See id.; Guidebook for Directors of Nonprofit Corporations, supra note 63, at 19.
73. See id.
74. See id.
This section, however, has only been cited a few times by Florida courts ruling on disputes.\textsuperscript{77} Therefore, there is very little guidance available to determine how it will be applied in particular situations.

C. \textit{Florida Case Law Concerning Directors' Fiduciary Duties}

The vast majority of Florida cases involving the duties of directors of nonprofit corporations involve non-charitable nonprofit corporations, specifically condominium and homeowners' associations.\textsuperscript{78} Careful analysis of the relevant cases reveals that Florida courts treat the duties more broadly, as fiduciary duties that involve obedience, loyalty, and care without identifying or labeling them as such.\textsuperscript{79} For example, in \textit{Penthouse North Ass'n v. Lombardi},\textsuperscript{80} the Supreme Court of Florida found that a condominium association could bring an action against its directors when the directors, who also leased property to the nonprofit corporation, included a rent escalation clause in the lease without informing the members of the association.\textsuperscript{81} The Court recognized that directors who "us[e] their position[s] to enrich themselves at the expense of the [nonprofit corporation]" are in breach of their fiduciary duties.\textsuperscript{82} Likewise, in \textit{Taylor v. Wellington Station Condominium Ass'n},\textsuperscript{83} the Court denied a director's motion for summary judgment when members of the nonprofit condominium association alleged that the director "acted solely at the urging of the developer in order to achieve financial gain."\textsuperscript{84} In \textit{Taylor}, the director of the nonprofit corporation was also an officer of the for-profit developer of the condominium.\textsuperscript{85} In addition to allegedly acting in the best interest of the developer, rather than in the best interest of the condominium association, it was argued that the director never attended the condominium association's board meetings.\textsuperscript{86} By denying the

\begin{itemize}
\item \textsuperscript{76} FLA. STAT. § 617.0830(1)(a)-(c).
\item \textsuperscript{77} \textit{See}, e.g., Fox \textit{v. Prof'l Wrecker Operators of Fla., Inc.}, 801 So. 2d 175, 180–81 (Fla. 5th Dist. Ct. App. 2001) (concerning a civil case involving a breach of a fiduciary duty); State \textit{v. Justice}, 624 So. 2d 402, 404 n.8 (Fla. 5th Dist. Ct. App. 1993) (concerning a criminal case involving an alleged theft by a director of a nonprofit corporation).
\item \textsuperscript{78} \textit{See}, e.g., \textit{Penthouse N. Ass'n, Inc. v. Lombardi}, 461 So. 2d 1350, 1351 (Fla. 1984); \textit{Taylor v. Wellington Station Condo. Ass'n Inc.}, 633 So. 2d 43, 44 (Fla. 5th Dist. Ct. App. 1994).
\item \textsuperscript{79} \textit{See generally Penthouse N. Ass'n}, 461 So. 2d at 1350; \textit{Taylor}, 633 So. 2d at 43.
\item \textsuperscript{80} 461 So. 2d 1350 (Fla. 1984).
\item \textsuperscript{81} \textit{Id.} at 1352.
\item \textsuperscript{82} \textit{Id.} at 1351.
\item \textsuperscript{83} 633 So. 2d 43 (Fla. 5th Dist. Ct. App. 1994).
\item \textsuperscript{84} \textit{Id.} at 44.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at 44 n.1.
\end{itemize}
director’s motion for summary judgment, the Court found that the director’s actions and inactions could constitute a breach of fiduciary duties.\footnote{Id. at 44–45.}

Two cases involving charitable nonprofit corporations also discuss generally directors’ fiduciary obligations to their charities.\footnote{See State ex rel. Butterworth v. Anclote Manor Hosp., Inc., 566 So. 2d 296 (Fla. 2d Dist. Ct. App. 1990); Word of Life Ministry, Inc. v. Miller, 778 So. 2d 360 (Fla. 1st Dist. Ct. App. 2001).} In \textit{State ex rel. Butterworth v. Anclote Manor Hospital, Inc.}, \footnote{566 So. 2d 296 (Fla. 2d Dist. Ct. App. 1990).} the court found that directors of a nonprofit corporation had breached their fiduciary duties by selling the nonprofit corporation’s assets—a hospital and two undeveloped parcels of land—for less than fair market value to a for-profit corporation they owned.\footnote{Anclote Manor Hosp., Inc., 566 So. 2d at 297.} While not describing these fiduciary breaches as breaches of the duties of obedience, loyalty, and care, the court recognized that the directors were acting in ways that were inconsistent with the nonprofit corporation’s articles of incorporation.\footnote{Id. at 299. “The attorney general presented sufficient competent evidence to sustain the trial court’s finding that the appellee’s improperly used the corporation’s articles of incorporation when they sold the corporation’s assets . . . .” Id. at 298–99.} Similarly, in \textit{Word of Life Ministry, Inc. v. Miller}, \footnote{778 So. 2d 360 (Fla. 1st Dist. Ct. App. 2001).} the court found that directors of a church were not entitled to summary judgment on a suit brought by the church and members of the congregation for attempting to amend the bylaws of the church, a nonprofit corporation, in such a way that would allow them to dissolve the nonprofit corporation and take control of the church’s assets.\footnote{Id. at 363.} The court found that a cause of action had been stated for a breach of fiduciary duty by the directors and stated that “[a] corporation must act in accordance with its articles of incorporation and duly adopted by-laws.”\footnote{Id. at 366.} In addition, the court in \textit{Word of Life Ministry, Inc.} found that summary judgment was inappropriate when the complaint alleged that the directors had “acted in furtherance of their own personal interests rather than in the Church’s best interests.”\footnote{See FISHMAN & SCHWARZ, supra note 1, at 176.}

\section*{IV. Enforcement of Directors’ Duties}

When directors of a nonprofit corporation have breached their fiduciary duties to the corporation, it is the corporation that is injured.\footnote{Id. at 363.} The injury
results from assets or opportunities that belong to the corporation being misused in a way that interferes with the corporation’s ability to fulfill its mission. The harm may reduce the funds available to the corporation for use in its operations because the directors have spent the money in ways that are not aligned with the corporation’s purpose. The harm may also cause the corporation to miss out on opportunities that are aligned with the corporation’s purpose because the directors have taken the opportunities for themselves. In addition to hurting the corporation financially, the injury may also harm the corporation’s reputation, making it more difficult for the corporation to operate in the community. The corporation can only be protected if there are individuals who are entitled to bring suit against the directors, on behalf of the corporation, for the unlawful acts committed by the directors in the name of the corporation.

A. Florida Not for Profit Corporation Act Provisions Concerning Standing

Florida law grants standing only to a few specific individuals who challenge actions of directors that may constitute breaches of the nonprofit corporation directors’ fiduciary duties. Section 617.0304 of the Florida Statutes provides in relevant part:

(2) A corporation’s power to act may be challenged:

(a) In a proceeding by a member against the corporation to enjoin the act;

97. See id. at 176–79.
98. Id. at 176.
99. Id. at 205–06.
100. See, e.g., David Kidwell, Charity Director Used Funds for Personal Benefit, MIAMI HERALD, Apr. 18, 2004, at A1. Camillus House, a Miami, Florida charity providing housing, meals, medical, and rehabilitation services to the homeless, is an example of how a charity’s reputation can be damaged by the action or inaction of a board of directors. Id. In March 2004, Dale A. Simpson, the former executive director of Camillus House, was forced to resign after he used the assets of the charity to renovate his own homes. Id. According to the Miami Herald, “[b]lind trust and lax oversight” on the part of the board of directors allowed Mr. Simpson to misuse the charity’s funds. Camillus House Scandal Is a Wake-Up Call, MIAMI HERALD, Apr. 20, 2004, at 24A. “The board must be deeply engaged in Camillus’ inner workings if it is to shore up public trust.” Id.
(b) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an incumbent or former officer, employee, or agent of the corporation; or

(c) In a proceeding by the Attorney General, as provided in this act, to dissolve the corporation or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

(3) In a member's proceeding under paragraph (2)(a) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.103

In Florida, only members, directors, or legal representatives of a nonprofit corporation in a derivative suit, and the attorney general, have standing to challenge a nonprofit corporation's power to act on behalf of the corporation.104 In determining how the attorney general will be apprised of possible fiduciary breaches by directors of nonprofit corporations, Florida Statutes section 617.2003—Proceedings to Revoke Articles of Incorporation or Charter or Prevent Its Use—states:

If any member or citizen complains to the Department of Legal Affairs that any corporation organized under this act was organized or is being used as a cover to evade any of the laws against crime, or for purposes inconsistent with those stated in its articles of incorporation or charter, or that an officer or director of a corporation has participated in a sale or transaction that is affected by a conflict of interest or from which he or she derived an improper personal benefit, either directly or indirectly, and shall submit prima facie evidence to sustain such charge, together with sufficient money to cover court costs and expenses, the department shall institute and in due course prosecute to final judgment such legal or equitable proceedings as may be considered advisable either to revoke the articles of incorporation or charter, to prevent its improper use, or to recover on behalf of the corporation or its un-

103. Id. § 617.0304(2)-(3).
104. See id. § 617.2003.
known beneficiaries any profits improperly received by the corporation or its officers or directors.\textsuperscript{105}

This provision codifies the practice which allows citizens of the state to contact the Office of the Attorney General of Florida, also known as the Department of Legal Affairs,\textsuperscript{106} with concerns and questions about nonprofit corporations.\textsuperscript{107}

B. \textit{Statutory Provisions Do Not Adequately Protect All Nonprofit Corporations}

Section 617.2003 of the \textit{Florida Statutes} appears to provide an avenue for private citizens to ensure that directors of nonprofit corporations honor their fiduciary duties.\textsuperscript{108} However, the provision allows the Department of Legal Affairs to exercise its discretion in determining which of the concerns voiced by citizens will be pursued.\textsuperscript{109} As a result, breaches of fiduciary duties by directors may not be challenged if the Department of Legal Affairs declines to exercise its discretionary authority.\textsuperscript{110} This may happen for a number of reasons, including "[s]taffing problems and a relative lack of interest in monitoring nonprofits."\textsuperscript{111} As a result, it has been said that "attorney general oversight [is] more theoretical than deterrent."\textsuperscript{112} Moreover, Florida's Attorney General's office, unlike those in several other states,\textsuperscript{113} has not created a separate charities section or unit to handle and coordinate

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} (emphasis added).
\item \textsuperscript{106} Office of the Attorney General; Department of Legal Affairs, http://www.oppaga.state.fl.us/profiles/1026 (last visited Jan. 28, 2007).
\item \textsuperscript{107} See Florida Attorney General—Role and Function of the Attorney General, http://myfloridalegal.com/overview (follow "Role and Function of the Attorney General" hyperlink) (last visited Jan. 28, 2007). "Many Floridians look to the Office of the Attorney General for guidance with disputes and legal issues. This agency receives hundreds of letters, e-mails, phone calls, and visits each week about crime victims' compensation, divorce proceedings, abuse, possible consumer fraud, and other topics." \textit{Id.}
\item \textsuperscript{108} See \textit{FLA. STAT.} § 617.2003. The first sentence allows for any \textit{citizen} to lodge a complaint. \textit{Id.}
\item \textsuperscript{109} See \textit{id}. "[T]he [D]epartment shall institute and ... prosecute ... proceedings as may be considered ... ." \textit{Id.}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{FISHMAN & SCHWARZ, supra} note 1, at 248.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} See \textit{COUNCIL ON FOUND. & FORUM OF REG'L ASS'NS OF GRANTMAKERS, GOVERNMENT REGULATION OF CHARITIES—AN OVERVIEW 9} (2006), http://www.givingforum.org/cgi-bin/doc_rep/public/file.pl/3666/regpuboverview.pdf (discussing how states like Pennsylvania, California, and Ohio have established charity sections in their attorney general offices).
\end{itemize}
charity oversight work, thereby increasing the likelihood that concerns about fiduciary breaches will not be handled in a timely fashion, if ever.  

C. Shortcomings of Florida’s Approach

Florida’s approach to standing to bring suit against directors of nonprofit corporations for breach of statutory duties does not achieve its desired goals. While adequately protecting the interests of a mutual benefit nonprofit corporation, this approach leaves the actions of directors of public benefit nonprofit corporations virtually untouchable and unchallengeable. When directors of a mutual benefit corporation, such as a country club, homeowners’ association, or labor union, breach their fiduciary duties, those who are most affected by the breach—the members of the corporation—are empowered by the Florida Statutes to bring suit against the directors on the corporation’s behalf. This right, which has been granted to the members, has been analogized to the right of shareholders of a for-profit corporation to bring suit against its directors for breach of fiduciary duties in a derivative action. In Larsen v. Island Developers, Ltd., members of the Fisher Island Club, a nonprofit corporation that operated and maintained the residential condominium community facilities, brought a derivative action against the corporation. Reversing the trial court’s dismissal of the members’ complaint, the court stated that the right of members to bring a derivative action on behalf of a nonprofit corporation comes from the common law. According to the court, it is an equitable remedy that provides “relief from ‘faithless directors and managers.’” Thus, even though the not-for-profit corporation statute, in effect at that time, did not provide for derivative actions against directors of nonprofit corporations, the common law did.

114. See Mary Grace Blasko et al., Standing to Sue in the Charitable Sector, 28 U.S.F. L. Rev. 37, 47–49 (1993).
115. See, e.g., Fox v. Prof’l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180 (Fla. 5th Dist. Ct. App. 2001). Though Florida recognizes standing for members of nonprofit corporations for breach of fiduciary duties, the directors of the nonprofit corporation are essentially immune from civil liability. Id.
116. See id. at 180–82.
118. Fox, 801 So. 2d at 180.
119. 769 So. 2d 1071 (Fla. 3d Dist. Ct. App. 2000).
120. Id. at 1071–72.
121. Id. at 1072.
122. Id. (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949)).
123. Larsen, 769 So. 2d at 1072.
Likewise, in Fox v. Professional Wrecker Operators of Florida, Inc., the court found that members of nonprofit corporations should be treated similarly to members of for-profit corporations with respect to derivative actions "because there is nothing about the remedy, which seeks redress for breach of fiduciary duty, that warrants distinctive treatment based upon corporate purpose."

However, the same is not true when the directors of a public benefit nonprofit corporation breach their fiduciary duties. In this instance, it is not the members of the corporation that are directly affected by a fiduciary breach by directors; rather, it is the donors to the corporation, whose money is being misused, or the employees and volunteers whose workplace has been impacted, who are most directly affected. Unlike the mutual benefit corporation scenario, those who are most affected by the nonprofit corporation's failure to act as intended are not granted the right to challenge the actions of the directors on the corporation's behalf.

Florida's "one size fits all" approach to standing—lumping together both mutual benefit and public benefit organizations—fails to recognize that many public benefit nonprofit corporations do not have members who are empowered to act on behalf of the corporation when directors abuse their position. Charities are unlike country clubs, homeowners associations, or business leagues that are comprised of members who benefit from the nonprofit corporation's activities. Public benefit organizations, by definition, benefit the public or some undefined segment of the public.

In addition, while section 617.0304 of the Florida Statutes grants standing to directors to bring suit on behalf of the corporation when the directors breach their fiduciary duties, it is unlikely that directors will authorize

124. 801 So. 2d 175 (Fla. 5th Dist. Ct. App. 2001).
125. Id. at 180.
126. FLA. STAT. § 617.0304(2)(a). Because the statute only grants standing to a "member" of the corporation, this effectively leaves public benefit nonprofit corporations without members as immune. Id.
128. See FLA. STAT. § 617.0304(2)(a).
129. See id. § 617.0301; Fox, 801 So. 2d at 180.
130. FISHMAN & SCHWARZ, supra note 1, at 76.
131. See BLACK'S LAW DICTIONARY 249 (8th ed. 2004). Charitable organizations are "operated exclusively for . . . community-service purposes [and do] not distribute earnings for private individuals." Id.
132. FISHMAN & SCHWARZ, supra note 1, at 76.
133. FLA. STAT. § 617.0304.
potentially embarrassing litigation to be brought against them.\textsuperscript{134} Thus, unless the Florida statute is changed, those who wish to challenge the acts of charitable corporations in Florida are at the mercy of the Florida Attorney General when seeking recovery, when directors misuse their positions.

V. \section*{Why Florida Should Change the Standing Provision in the Florida Not for Profit Corporation Act}

A. \textit{Florida Should Provide Equal Access to Derivative Actions to Public Benefit and Mutual Benefit Nonprofit Corporations}

Florida courts have stated—in cases involving mutual benefit corporations—that there is no reason to treat nonprofit corporations differently than for-profit corporations, when it comes to derivative actions.\textsuperscript{135} Since the purpose of derivative actions is to permit redress for "rights of action that belong to corporations that have been injured by the acts of the corporations' officers and directors,"\textsuperscript{136} the not-for-profit corporation statute must ensure that it is possible for this to happen when both mutual benefit and public benefit nonprofit corporations have been injured. The statute accomplishes this goal for mutual benefit nonprofit corporations by allowing members of the corporation to bring suit when the directors have breached their fiduciary duties.\textsuperscript{137} The members have a vested interest in the purpose of the nonprofit corporation, and it is appropriate that they can act on behalf of the corporation when the directors act contrary to that purpose.

The statute does not, however, provide the same redress when the corporation is a public benefit nonprofit corporation.\textsuperscript{138} Even though there are individuals with a vested interest in the public benefit corporation's purpose, because there are often no members of the corporation,\textsuperscript{139} there is no one with standing to enforce the rights of the corporation.\textsuperscript{140} The goal of derivative actions, however, is to give those with a legitimate stake in the corpora-

\textsuperscript{134} \textit{See} ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESS AND CLOSELY HELD CORPORATIONS § 8.12 (1996). Professor Hamilton makes the same argument about shareholders and actions against for-profit corporations. \textit{Id.}

\textsuperscript{135} \textit{See supra} text accompanying notes 75–78; \textit{see}, e.g., Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180 (Fla. 5th Dist. Ct. App. 2001); Larsen v. Island Developers, Ltd., 769 So. 2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2000).

\textsuperscript{136} Timko v. Triarsi, 898 So. 2d 89, 90 (Fla. 5th Dist. Ct. App. 2005) (citing Provence v. Palm Beach Taverns, Inc., 676 So. 2d 1022, 1024 (Fla. 4th Dist. Ct. App. 1996)).

\textsuperscript{137} \textit{See} FLA. STAT. § 617.0304 (2006).

\textsuperscript{138} \textit{Id.} § 617.0304 (2)(a).

\textsuperscript{139} FISHMAN & SCHWARZ, \textit{supra} note 1, at 76.

\textsuperscript{140} \textit{See} FLA. STAT. § 617.0304.
tion standing to act on the corporation’s behalf. Courts have held that members have a legitimate stake in mutual benefit corporations. Who has a legitimate stake when the corporation is a public benefit corporation?

B. Florida Should Protect Charitable Corporations and Charitable Trusts

Similarly, charitable organizations are generally organized as either charitable corporations or charitable trusts. Even though charitable corporations are as similar to charitable trusts as they are to for-profit corporations, the organizational structure determines the law that governs the charity. Florida has chosen to apply the principles of corporate law to charitable corporations. Therefore, the Florida Not for Profit Corporation Act, resembles the Florida Business Corporation Act, and not the Florida Trust Code, when determining who has standing to bring suit, when directors of charitable corporations breach their fiduciary duties.

The law concerning standing may have been drafted differently if Florida had chosen to borrow from trust law, instead of corporate law. In Delaware ex rel. Gebelein v. Florida First National Bank of Jacksonville, the First District Court of Appeal of Florida explained standing for enforcement of charitable trusts as follows:

As a general rule, only the Attorney General may enforce a charitable trust. Unlike a private trust, where there are identifiable beneficiaries who are the equitable owners of the trust property, the beneficiaries of a charitable trust are the public at large. Whereas beneficiaries of a private trust have the power to maintain

---

141. Timko, 898 So. 2d at 90–91.
142. See, e.g., Fox v. Prof’l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180 (Fla. 5th Dist. Ct. App. 2001); Larsen v. Island Developers, Ltd., 769 So. 2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2000).
143. See Phelan & Desiderio, supra note 13, at 27–28, 30.
144. See id. at 27–32 (discussing organizational structures of nonprofit organizations).
145. See id. at 1–8.
148. Id. §§ 607.0101–193.
150. See FLA. STAT. § 617.0304.
151. 381 So. 2d 1075 (Fla. 1st Dist. Ct. App. 1979).
a suit to enforce the trust, the public must act through some public official to maintain such a suit.\textsuperscript{152}

The court continued:

However, it has been recognized that an entity other than the Attorney General can be a proper party to bring suit to enforce a charitable trust. Trustees have been permitted to bring suit against co-trustees, and persons or organizations having a special interest in a trust or a special status under a trust instrument are considered to have standing to enforce the trust.\textsuperscript{153}

Under Florida corporate law, the attorney general and trustees are empowered to bring suit against trustees for breach of fiduciary duties.\textsuperscript{154} Moreover, those with a “special interest” in a trust or a “special status” under a trust instrument can bring suit to enforce a charitable trust.\textsuperscript{155} In Gebelein, the court found that the Attorney General of Delaware, as the lawful representative of the citizens of Delaware, had standing to challenge the actions of the trustees of the DuPont Trust.\textsuperscript{156} According to the trust instrument, “the net income of the trust was to be paid... to the Nemours Foundation ‘for the purpose of maintaining “Nemours” as a charitable institution for the care and treatment of crippled children, ... first consideration, in each instance, being given to beneficiaries who are residents of Delaware.’”\textsuperscript{157} The Florida court found that the citizens of Delaware had a special interest in enforcement of the trust because they had a special status not shared with the public at large.\textsuperscript{158}

Additionally, Florida is one of the nineteen states that has enacted the Uniform Trust Code.\textsuperscript{159} Section 736.0405 of the Florida Statutes recognizes the special interest of settlors in ensuring that the assets of the charitable trusts they create are used to fulfill a charitable purpose.\textsuperscript{160} Because there are those with a special interest or a special status, with respect to a charitable corporation, just as there are those with such an interest or status, with re-

\textsuperscript{152} Id. at 1077.
\textsuperscript{154} FLA. STAT. § 617.0304.
\textsuperscript{155} Gebelein, 381 So. 2d at 1077.
\textsuperscript{156} Id. at 1078.
\textsuperscript{157} Id. at 1076.
\textsuperscript{158} Id. at 1078.
\textsuperscript{159} UTCproject.org, supra note 10.
\textsuperscript{160} FLA. STAT. § 736.0405 (2006).
pect to a charitable trust, those corporate individuals should also have standing to enforce the directors' duties.\footnote{161}{See Blasko et al., supra note 114, at 37 (analyzing standing to sue charitable trusts and corporations for mismanagement, fraud, and corruption).}

VI. THE PRIVATE ATTORNEY GENERAL DOCTRINE

In order to fully protect the interests of charitable nonprofit corporations, the Florida Not for Profit Corporation Act should be amended to include a private attorney general provision for public benefit corporations.

A. What Is the Private Attorney General Doctrine?

The private attorney general concept dates back to at least 1943, when the court, in \textit{Associated Industries of New York State, Inc. v. Ickes},\footnote{162}{134 F.2d 694 (2d Cir. 1943).} used the term private attorney general to refer “to plaintiffs empowered by Congress to ‘su[e] to prevent action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest.”’\footnote{163}{Trevor W. Morrison, \textit{Private Attorneys General and the First Amendment}, 103 MICH. L. REV. 589, 590 n.1 (2005) (quoting Ickes, 134 F.2d at 704).} The term has come to encompass much more than the right to sue a public officer.\footnote{164}{See \textit{Wesley Group Home Ministries, Inc. v. City of Hallandale}, 670 So. 2d 1046, 1050 (Fla. 4th Dist. Ct. App. 1996).} For example, Florida recognizes that the private attorney general theory is used when private attorneys bring suit for violation of civil rights.\footnote{165}{Id. at 1046.} In \textit{Wesley Group Home Ministries, Inc. v. City of Hallandale},\footnote{166}{Id. at 1050 (citing \textit{Newman v. Piggie Park Enters., Inc.}, 390 U.S. 400, 402 (1968)).} a case involving the Fair Housing Act, the Florida court stated that “[i]n civil rights laws, Congress uses the private attorney general concept as a vehicle for vindicating social policies of the highest priority.”\footnote{167}{Id. at 1050 (citing \textit{Newman v. Piggie Park Enters., Inc.}, 390 U.S. 400, 402 (1968)).} The common thread that runs through private attorney general actions is that the lawsuit involves more than just redress for a private injury.\footnote{168}{Morrison, supra note 163, at 590. “At its core, however, the term denotes a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own.” Id.} Rather, the private attorney general theory applies when the injury is to the public, or when the acts of the potential defendant run contrary to some important public policy.\footnote{169}{See \textit{id.} at 598.} Such actions also allow for a remedy that protects the public and the public
The private attorney general theory is not appropriate when there is only an injury to a single person because in that instance, it would be appropriate for the injured party to retain an attorney to seek redress for the injury.\footnote{171}

B. Potential Plaintiffs Under the Private Attorney General Doctrine

When directors of public benefit corporations breach their fiduciary duties, it is the corporation that is injured.\footnote{172} In addition, the public is injured because public benefit corporations exist to provide a benefit to the public.\footnote{173} Because public benefit corporations generally do not have members, there are no private individuals who are entitled to bring suit for enforcement of those duties.\footnote{174} A private attorney general provision in the Florida Not for Profit Corporation Act would grant standing to certain private individuals that would enable them to act on behalf of the corporation.\footnote{175} The provision would not grant standing generally to members of the public.\footnote{176} Rather, the provision would recognize that there are those with a legitimate stake or special interest in the corporation who are entitled to act on behalf of the corporation.\footnote{177}

In order to have a legitimate stake or special interest in a public benefit nonprofit corporation that would confer standing, an individual must have an interest or stake in the charity that exceeds any general interest possessed by the public at large.\footnote{178} The individual must have a more intimate relationship with the charity, such that it would be appropriate for that individual to serve as a watchdog over the charity.\footnote{179} Three categories of individuals—substantial donors, key employees and volunteers, and potential beneficiaries—shall be considered in turn.

\footnote{170}{See id.}
\footnote{172}{See Fishman & Schwarz, supra note 1, at 76.}
\footnote{173}{See Phelan & Desiderio, supra note 13, at 2.}
\footnote{174}{Fishman & Schwarz, supra note 1, at 75–76.}
\footnote{175}{See Morrison, supra note 163, at 590.}
\footnote{176}{See id.}
\footnote{177}{See id.}
\footnote{178}{See id. at 622–27.}
\footnote{179}{See id.}
1. Substantial Donors

Section 736.0405 of the new Florida Trust Code explicitly grants, for the first time, standing to enforce a charitable trust to the trust's settlor. The statute continues the common law rule that charitable trusts are enforceable by the state attorney general, as well as others with a special interest in a trust, including co-trustees. The Florida Trust Code defines a settlor as "a person, including a testator, who creates or contributes property to a trust." Thus, in order to protect charitable corporations and charitable trusts similarly, the Florida Not for Profit Corporation Act should also allow those who create or contribute property to a charitable corporation to sue the directors for breach of fiduciary duty. However, in order to ensure that not everyone who makes a contribution to a charity will have standing to sue the charity, a private attorney general provision would only grant standing to "substantial" donors. The provision could define a substantial donor as one who has contributed at least twenty percent of the charity's revenue in the year or years of the action or actions to be challenged. This requirement would protect directors from having to defend themselves in lawsuits brought by those with virtually no interest in the corporation, while recognizing the significant contribution the substantial donor has made to the charitable corporation.

Allowing a substantial donor to have standing to sue directors for breach of fiduciary duties serves several beneficial purposes. First, it serves to alleviate the burden on the attorney general's office of policing the fiduciary duties of all Florida charitable organizations. Substantial donors would likely keep a watchful eye on the continuing operations of their chosen charitable organizations. Granting standing to such concerned individuals or entities would perhaps enable the donors to catch a breach early enough to avert a catastrophic result to the charity.

Second, charitable organizations attempting to seek substantial contributions from prospective donors would benefit from a law granting such
donors standing. The charitable organizations could point to this right in discussions with prospective donors who otherwise might insist on difficult and confining contractual limitations on the use of their donated funds.\footnote{See Iris J. Goodwin, \textit{Donor Standing To Enforce Charitable Gifts: Civil Society vs. Donor Empowerment}, 58 \textit{VAND. L. REV.} 1093, 1143 (2005).}

2. Employees and Volunteers

This portion of the attorney general provision of the statute would also provide a status akin to employees' whistle-blower status and regular volunteers of the charity.\footnote{See 10-259 Lab. & Emp. Law (MB) § 259.04 (2006), http://lexis.com (follow "Matthew Bender" hyperlink; then follow "By Area of Law" hyperlink; then follow "Labor & Employment Law" hyperlink; search "259.04"; then follow "Part IX General Employment Law" hyperlink). Whistle blower status protects "employees who report, or threaten to report, [or object to employer] wrongdoing" from retaliatory job actions. \textit{Id.}} Often, employees and volunteers, those who are involved in the day-to-day operations of the charity, have a front row seat to abuses by directors. The statute could grant a special status to these individuals, so long as they were employees or volunteers at the time of the alleged breaches and witnessed, or otherwise had first-hand knowledge of the directors' breaches of fiduciary duties, giving them standing to sue the directors on behalf of the corporation.\footnote{FLA. STAT. § 112.3187(2) (2006). Florida's Whistle-blower's Act is intended: to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee. \textit{Id.}}

3. Beneficiaries and Potential Beneficiaries

While it is tempting to advocate that beneficiaries and potential beneficiaries be recognized as having standing to bring suit on behalf of the charities from which they benefit against the directors who are misusing the charities, these individuals may constitute a group that is too amorphous and undefined to be manageable. The beneficiaries of a charitable corporation are by definition unidentifiable, and while it may be possible to identify current beneficiaries of a particular charity, current beneficiaries eventually become former beneficiaries.\footnote{Gary, \textit{supra} note 101, at 616; Braver et al., \textit{supra} note 146, at 50.} Students graduate from school, homeless people find homes, hospitals discharge patients, and symphony patrons move to new
cities. However, it is possible that certain beneficiaries have stakes in the corporation that are legitimate enough that they should be granted standing to sue for breach of fiduciary duties by the directors. Therefore, the statute should provide that: 1) Current beneficiaries of a charitable corporation at the time of the alleged breach of fiduciary duty have standing to sue on behalf of the corporation; and 2) when the class of potential beneficiaries is sharply defined, any of those potential beneficiaries has standing to sue on behalf of the corporation. For example, students who are members of a class from which a charitable corporation is to select scholarship recipients would have standing to sue if the directors breach their fiduciary duties.

C. Fundamental Principle Underlying Private Attorney General Doctrine

Determining who should have standing to enforce the fiduciary duties of charitable corporation directors is difficult and bright line rules are always subject to scrutiny. However, the fundamental, conceptual principle is clear: The plaintiff must be distinguishable from members of the general public so that it is appropriate for the individual to act on behalf of the corporation. There must be a nexus between the potential plaintiff’s interest in the charity and the alleged breach of fiduciary duty. The potential plaintiff must have an interest in the charity that is related to the alleged breach of duty. Donors, employees, volunteers, and certain beneficiaries all have interests in the charity that require the directors to act in ways that do not harm the charity. When directors misuse the charity’s assets or opportunities, donors, employees, volunteers, and beneficiaries are affected in ways that are different than any effect that may be felt by general members of the public.

190. See Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 756 (N.Y. 1985). In this case, the Knapp Foundation, a charitable corporation, established to provide assistance to the employees of specified companies and their families, amended its certificate of incorporation to allow it to distribute principal and income of the Foundation to other charitable organizations. Id. at 754. The court, in holding that the employees had standing to challenge the amendment, stated:

The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number.

Id. at 755.

191. See Blasko et al., supra note 114, at 55, 70.

192. Id. at 74

193. Id.

194. See FISHMAN & SCHWARZ, supra note 1, at 75–76.

195. See Blasko et al., supra note 114, at 70–71.
Donors, whose money has been misspent, employees and volunteers, who can no longer perform their jobs effectively, and beneficiaries, who cannot receive the goods or services they need, suffer and are affected by the breach in a way that is related to, but separate from the injury suffered by the charity. Similarly, the potential plaintiff must have an interest in ensuring that the charity fulfills its charitable mission in a way that can be distinguished from the interest of the general public. While public benefit organizations benefit the public generally by lessening the burdens on government, and improving the quality of life for society as a whole, there are those who are more intimately connected with a charity’s charitable purpose. Donors, who have contributed money to further the charitable purpose, employees and volunteers, who give their time to further the charitable purpose, and beneficiaries, who receive the fruits of the charity’s labor, have a greater interest in the charity’s fulfillment of its charitable purpose than members of the public generally.

D. Remedy Available Under Private Attorney General Doctrine

The purpose of the private attorney general theory is to protect the charity—not to compensate any individual for harms they may have received as a result of a breach of fiduciary duty. Thus, the remedies available under the statute will be those designed to restore the charity to the state it was in before the breach. Directors who have acted in ways inconsistent with the fiduciary duties that they owe to the corporation will be required to return to the charity any assets or opportunities taken from the charity. In addition, the charity may be entitled to equitable relief intended to enjoin the directors from acting in ways that will harm the charity. Further, in appropriate instances, the court may even remove directors from the board or in the most egregious situations, dissolve the corporation. There is the risk that a private attorney general provision in the Florida Not for Profit Corporation statute will make it more difficult for charitable corporations to find individuals

196. Id. at 70–72.
197. See Fishman & Schwarz, supra note 1, at 76.
198. See Morrison, supra note 163, at 590. “The remedies sought in such actions tend to be correspondingly broad: rather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions.” Id.
199. See Rubenstein, supra note 171, at 2141.
200. Id.
201. Morrison, supra note 163, at 590.
willing to serve as directors. However, the private attorney general provision will not alter any protections for directors already built into the Not For Profit Corporation Act.

E. Attorney’s Fees Under the Private Attorney General Doctrine

Private attorney general statutes often provide for attorney’s fees for successful litigation. The doctrine has been described as one that allows for the award of attorney’s fees “to a party who vindicates a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance.” The private attorney general statute this article proposes would not generally allow for attorney’s fees. Unlike, for example, the Florida Deceptive and Unfair Trade Practices Act, which allows the prevailing party to recover attorney’s fees, the private attorney general provision in the Not for Profit Corporation Act would only do so in very limited circumstances.

The purpose of allowing private individuals to bring suit for directors’ breaches of fiduciary duty is to protect the charity. That is, directors should be required to disgorge any benefit they received at the expense of the charity and return it to the charity. If the prevailing party were entitled to attorney’s fees from the corporation, as is the case with the attorney’s fees when shareholders prevail in derivative actions, it is possible the charity would end up paying more in attorney’s fees than the charity would recover.

---

203. See id.
204. See id. § 617.0834(1)(b)(1)-(3). The Florida Statute provides for immunity from civil liability for directors who have not acted criminally, derived an improper personal benefit, or who have not acted recklessly, in bad faith, with a malicious purpose, or in a manner demonstrating wanton and willful disregard of human rights, safety, or property. Id.
206. Id.
208. Id.
209. Id. § 501.2105(5).
210. See Gary, supra note 101, at 596.
211. See id.
212. See, e.g., Fla. Stat. § 607.07401(6). The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney’s fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage of the injured shareholders.

Id.
from the breaching directors. Instead, the American Rule\textsuperscript{213} regarding attorney's fees would apply and private attorneys and legal clinics would be encouraged to take up these cases on a pro bono basis. If, however, a director is found to have breached his or her fiduciary duties, and also either: 1) violated the criminal law; 2) received an improper personal benefit; or 3) acted recklessly, in bad faith, with a malicious purpose, or in a manner demonstrating wanton and willful disregard of human rights, safety, or property, that director will be responsible for the prevailing party's attorney's fees.\textsuperscript{214} In addition, a nonprofit corporation will not be permitted to indemnify a director in such a case.\textsuperscript{215}

The private attorney general provision in the Florida Not for Profit Corporation Act is intended for use in only the most serious cases—when none of the directors of the charity is willing to bring suit on behalf of the charity and when the attorney general's office is unwilling to pursue the claim.\textsuperscript{216} By providing for attorney's fees only when the directors have acted particularly egregiously,\textsuperscript{217} the provision will discourage frivolous and vexatious litigation.

VII. CONCLUSION

A private attorney general provision in nonprofit corporation acts that treats public benefit and mutual benefit corporations similarly with regards to standing will ensure that charitable nonprofit corporations provide the public benefits they were created to provide. By providing a mechanism that allows those who are most invested in the corporation to enforce the fiduciary duties the directors owe to the corporation, the private attorney general provision will allow private individuals to assist the attorney general in maintaining a watchful eye over corporations that were granted the privilege of operating in the State of Florida based on the benefits they promised to provide to the public. In addition, the provision will prevent charitable corporations from misusing their corporate charters by encouraging directors to live up to their fiduciary responsibilities. A private attorney general provision that is not a

\textsuperscript{213} Black's Law Dictionary explains the American Rule as providing "that attorney fees are not awardable to the winning party unless statutorily or contractually authorized." BLACK'S LAW DICTIONARY 75 (5th ed. 1979).

\textsuperscript{214} This language is borrowed from the provision of Florida's Not for Profit Corporation Act regarding personal liability of directors of nonprofit corporations. FLA. STAT. § 617.0834(1)(b)(1)-(3).

\textsuperscript{215} This does not change the indemnification provision in the Florida Not for Profit Corporation Act. See id. §§ 617.0831, 607.0850.

\textsuperscript{216} See supra Part VI.D.

\textsuperscript{217} See supra Part VI.E.
"one size fits all" provision will further the state’s interest in protecting its citizens by holding directors of charitable corporations accountable to the corporations they serve.
ENGLE, STATE FARM, FLORIDA LAW, AND PUNITIVE DAMAGES: WAS THE $145 BILLION PUNITIVE AWARD TRULY EXCESSIVE?

HAROLD C. REEDER*

I. STATE FARM AND ITS AFTERMATH .......................................................... 59
II. ENGLE IV AND THE THIRD DISTRICT ...................................................... 69
III. FLORIDA'S HIGHEST COURT IN ENGLE ........................................... 75
IV. STATE FARM'S APPLICABILITY TO ENGLE ......................................... 80
A. The First Guide Post ........................................................................... 82
   1. Most Reprehensibility Factors Appear Present ............... 83
   2. Other Courts Found Most Reprehensibility ...... 84
   3. State Farm Deficiencies Not Present .................. 84
B. The Second Guide Post ....................................................................... 85
   1. Engle Involved Mass Tort Class .......................... 86
   2. This Was Engle's Trial Plan ................................ 87
   3. Florida's Lawsuit Against Big Tobacco .............. 89
   4. Third District's Prior Broin Case ...................... 91
   5. Possible Solution to "Overkill" Problem? .......... 93
   6. Jenkins Shows No Federal Infirmity ................. 95
   7. Class Reps Were Awarded Compensatories ...... 96
   8. State Farm's Impact Seems Questionable .......... 96
   9. Individualized Entitlement to Punitive Damages? 97
   10. Individualized Proof of Punitive Damages? ...... 99
   12. Calculation Could Have Been Deferred .......... 102
C. The Third Guide Post ......................................................................... 103
   1. Punitive Awards in Individual Cases ................ 104
   2. Possible Civil and Criminal Sanctions ............ 108

* Harold C. Reeder received his B.S. from Florida State University and his J.D. from Cleveland-Marshall College of Law, Cleveland State University. He is a member of both the Ohio and Florida Bars. Mr. Reeder practices law in Cleveland, Ohio and has an interest in selected public interest law issues such as tobacco. He is author of The 'Law of Tobacco' Is a Major Contributing Factor That Hampers Effective Resolution to the Country's Tobacco Problem, 6 FLA. COASTAL L. REV. 17 (2004), and Lindsey v. Tacoma-Pierce County Health Department: Cipollone Revisited, Billboards, State Law Tort Damages Actions, Federal Preemption and the Federal Cigarette Labeling and Advertising Act, 24 SEATTLE U. L. REV. 763 (2001), and several other articles on tobacco. Mr. Reeder wishes to acknowledge the invaluable support and encouragement of his wife, Linda L. Bickerstaff, Esq., his greatest inspiration.
In 2000, a Florida jury awarded a history-making $145 billion in punitive damages against the tobacco industry in a class action suit brought on behalf of Florida smokers. The judgment, however, was reversed in its entirety, including the class certification, three years later by Florida’s Third District Court of Appeal in Liggett Group, Inc. v. Engle (Engle IV). This year, the Supreme Court of Florida upheld the Third District’s reversal of the $145 billion punitive damages award although it rejected much of the Third District’s decision in that case.

While Engle IV presented a number of intriguing issues, one is especially noteworthy because of the United States Supreme Court’s ruling in State Farm Mutual Auto Insurance Co. v. Campbell (State Farm I) that was made the month before the Third District rendered its decision. In State Farm I, which ironically involved a $145 million punitive award, the Court reiterated its previous position that excessive punitive damage awards can run afoul of the United States Constitution and provided further guidance for courts to determine when this occurs. In State Farm I, the Court did the latter by elaborating more on the appropriate ratio between any award of punitive damages and that of the compensatory damages.

After the United States Supreme Court rendered its decision in State Farm I, it was unclear how that case would affect Engle IV since there had been no total award of compensatory damages to the class to which the $145 billion punitive award could be compared. However, for both the Third District and the Supreme Court of Florida, that fact alone rendered the punitive

2. 853 So. 2d 434, 440 (Fla. 3d Dist. Ct. App. 2003), app’d in part, quashed in part, rem’d, No. SC03-1856 (Fla. July 6, 2006).
3. Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 2 (Fla. July 6, 2006). Please note that at the time this article was going to print that this opinion by the Supreme Court of Florida was not final due to a rehearing motion which had been filed but not determined.
5. Id. at 417–19.
6. Id. at 424–28.
award violative of *State Farm I*.\(^7\) The two courts further held that the punitive award was unconstitutionally excessive as a matter of law.\(^8\)

Whether the punitive award in *Engle IV* was violative of *State Farm I* and/or unconstitutionally excessive under either federal or Florida law warrants examination.

I. **STATE FARM AND ITS AFTERMATH**

The *State Farm I* case arose out of an automobile accident that occurred in Utah.\(^9\) A state jury in Utah found Curtis Campbell liable for causing a multi-car accident in which one driver died and another was left permanently disabled, awarding damages against him of more than $185,000.\(^10\) Thereafter, Campbell and his wife sued their insurance company—which allegedly had refused to settle and insisted on going to trial—for “bad faith, fraud, and intentional infliction of emotional distress.”\(^11\) Another Utah jury then “awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages.”\(^12\)

After the verdict against the insurance company, the trial court reduced the compensatory award to $1 million and the punitive award to $25 million.\(^13\) The Supreme Court of Utah, however, reinstated the full $145 million punitive award after both parties appealed.\(^14\) The insurance company then appealed to the United States Supreme Court which reversed the judgment of the Supreme Court of Utah and remanded the case back to that court “for further proceedings not inconsistent with [its] opinion.”\(^15\)

The United States Supreme Court’s opinion in *State Farm I* would begin by announcing that the issue in that case concerned “the measure[ment] of punishment, by means of punitive damages [that] a State may impose upon a defendant in a civil case.”\(^16\) The Court noted that while

---

7. *Engle IV*, 853 So. 2d at 451; *Engle VI*, No. SC03-1856, slip op. at 3.
8. *Engle IV*, 853 So. 2d at 458; *Engle VI*, No. SC03-1856, slip op. at 3.
10. Id. at 413.
11. Id. at 414.
12. Id. at 415.
13. Id.
15. Id. at 429.
16. Id. at 412. Punitive or exemplary damages are damages which may be awarded to the plaintiff over and above compensatory damages, where the wrong done to [plaintiff] was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other
"[c]ompensatory damages 'are [only] intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct,' . . . punitive damages serve a broader function [than compensatory damages as] they are aimed at deterrence and retribution." 17 Further, "[w]hile States possess discretion over the imposition of punitive damages," the Court acknowledged, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." 18 The Court explained that "[t]o the extent [a punitive] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." 19

In evaluating whether a punitive award was excessive, the Court in State Farm I noted that it had previously instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 20

The Court stated that the first guide post was "[t]he most important indicium of the reasonableness of a punitive damages award." 21 According to the Court:

Courts should determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him.

BLACK'S LAW DICTIONARY 352 (5th ed. 1979). In this article, "punitive" and "compensatory" are used interchangeably with "punitive damages" and "compensatory damages."

17. State Farm I, 538 U.S. at 416 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)).
18. Id. (citing Cooper Indus., Inc., 532 U.S. at 433).
20. Id. at 418 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).
21. Id. at 419 (quoting Gore, 517 U.S. at 575).
actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 22

With respect to the second guide post, the Court noted that it had “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.” 23 While the Court would “decline again to impose a bright-line ratio which a punitive damages award [could not] exceed,” 24 the Court would make the following observations:

Few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Pacific Mutual Life Insurance Co. v. Haslip,* 25 in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4 to 1 ratio again in *BMW of North America Inc. v. Gore.* 26 The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1. 27

The Court stated that “ratios greater than those [it had] previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” 28 The Court, however, stated that “[t]he converse [was] also true . . . [meaning that] [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

22. *State Farm I,* 538 U.S. at 419 (citing *Gore,* 517 U.S. at 576–77). The Court further stated that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Id.*
23. *Id.* at 424 (citing *Gore,* 517 U.S. at 582).
24. *Id.* at 425.
26. 517 U.S. at 559.
27. *State Farm I,* 538 U.S. at 425 (citations omitted).
28. *Id.* (quoting *Gore,* 517 U.S. at 582).
The Court further emphasized that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 29

In reference to the third guide post, "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases,'" 31 the Court noted that it had "also looked to criminal penalties that [might] be imposed [on the defendant]." 32 The Court interjected, however, that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." 33

Applying the State Farm I guide posts, the Court found that the case was "neither close nor difficult," 34 and that "[i]t was error [for the Supreme Court of Utah] to reinstate the jury's $145 million punitive damages award." 35 While the Court did not disagree that the insurance company had engaged in reprehensible conduct—and that an award of punitive damages was proper—the Court clearly disagreed with the degree of reprehensibility and declared that "a more modest punishment" was warranted. 36 The problem as described by the Court was that the case "was used as a platform to expose, and punish, the perceived deficiencies of [the insurance company's] operations throughout the country," 37 and this resulted in punitive damages being awarded "to punish and deter conduct that bore no relation to the Campbells' harm." 38 The Court also stated that there was "no doubt that there is a presumption [of unconstitutionality] against an award that has a 145 to 1 ratio." 39 The Court noted that the $1 million compensatory award in the case "for a year and a half of emotional distress" was "substantial," and appeared to "already contain [a] punitive element [in it]." 40 The Court further noted that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud,

29.  Id.
30.  Id. at 427 (citing Gore, 517 U.S. at 585).
31.  Id. at 428 (quoting Gore, 517 U.S. at 575).
32.  State Farm I, 538 U.S. at 428 (citing Gore, 517 U.S. at 583; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991)). The Court explained that "[t]he existence of a criminal penalty [has a] bearing on the seriousness with which a State views the wrongful action."  Id.
33.  Id. The Court emphasized that "[p]unitive damages are not a substitute for the criminal process," and "[g]reat care must be taken to avoid the use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed."  Id.
34.  Id. at 418.
35.  State Farm I, 538 U.S. at 418.
36.  Id. at 419.
37.  Id. at 420.
38.  Id. at 422.
39.  Id. at 426.
40.  State Farm I, 538 U.S. at 426.
an amount dwarfed by the $145 million punitive damages award."\textsuperscript{41} The Court termed the Supreme Court of Utah's discussion "about the loss of [the insurance company's] business license, the disgorgement of profits, and possible imprisonment" as "speculat[ion]," and stated that this was an "insufficient [basis] to justify the award."\textsuperscript{42} 

After the Court struck down the $145 million punitive damages award, the Supreme Court of Utah—in a second review—lowered the punitive damages to $9 million.\textsuperscript{43} The Court then declined the opportunity to further review the case despite the defendant's claim that the 9 to 1 ratio was still too high.\textsuperscript{44} 

Immediately after \textit{State Farm I} was rendered, there was some doubt as to its applicability since it was a case involving economic injury, and not personal injury or products liability.\textsuperscript{45} That doubt would not last long; within a month of the decision, the Court vacated a number of other punitive damage awards in state cases and remanded the cases back to the state courts for reconsideration in light of the principles set forth in \textit{State Farm}.\textsuperscript{46} 

One such case involved a plaintiff in an Oregon state court, who was seriously injured by a drug and sued the drug manufacturer as well as the doctor who prescribed it.\textsuperscript{47} The doctor made a cross-claim against the drug manufacturer for negligence and fraud, alleging that the manufacturer "failed to provide adequate information concerning [the drug]."\textsuperscript{48} The jury returned verdicts in favor of both the plaintiff and the doctor against the drug manufacturer, awarding the plaintiff more than $5 million in compensatory damages plus $35 million in punitive damages and the doctor $500,000 in com-

\textsuperscript{41} Id. at 428 (citation omitted).

\textsuperscript{42} Id. The Court again reiterated that the Supreme Court of Utah's "references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct." \textit{Id.}


\textsuperscript{46} \textit{See} Bocci v. Key Pharms., Inc. (\textit{Bocci IV}), 76 P.3d 669, 672 (Or. Ct. App. 2003); \textit{see generally} Romo v. Ford Motor Co. (\textit{Romo I}), 122 Cal. Rptr. 2d 139 (Ct. App. 2002); Sand Hill Energy, Inc. v. Ford Motor Co. (\textit{Sand Hill I}), 83 S.W.3d 483 (Ky. 2002).

\textsuperscript{47} \textit{See} Bocci \textit{IV}, 76 P.3d at 671.

\textsuperscript{48} \textit{Id.}
pensatory damages plus $22.5 million in punitive damages. 49 After the drug manufacturer appealed, the company settled with the plaintiff, but continued to challenge the punitive damages awarded to the doctor. 50 On appeal, the manufacturer claimed that "an award of $22.5 million in punitive damages [was] excessive in relation to the $500,000 that the jury awarded [the doctor] for compensatory damages." 51 After two reviews by an Oregon intermediate appellate court, the $22.5 million punitive damages award was upheld in its entirety. 52 The United States Supreme Court, however, vacated and remanded the case based on State Farm and the state appellate court was required to review the issue for a third time. 53 On the third review, the state appellate court required the doctor to accept a punitive damages award of $3.5 million, a 7 to 1 ratio of punitive to compensatory damages, or face a new trial. 54

Two other state cases where the United States Supreme Court vacated the punitive damages award and ordered that they be reconsidered in light of State Farm involved the automaker Ford Motor Company. 55 In one case, a California jury awarded $290 million in punitive damages against the automaker in a sport-utility vehicle rollover accident that killed three individu-

49. Id.
50. Id. at 672.
51. Id.
52. See Bocci v. Key Pharms., Inc. (Bocci II), 22 P.3d 758 (Or. 2001); Bocci v. Key Pharms., Inc. (Bocci I), 974 P.2d 758 (Or. Ct. App. 1999). In the first appeal, an equally divided appeals court affirmed the judgment in favor of the doctor. See Bocci I, 974 P.2d at 774 (en banc). The Supreme Court of Oregon, however, vacated the decision and remanded the case for reconsideration in light of its findings in Parrott v. Carr Chevrolet, Inc., 17 P.3d 473, 483-84 (Or. 2001), where it had stated that a punitive award is "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution where it is not within the range that a rational juror could award. Bocci II, 22 P.3d at 759. After remand, the appeals court considered Parrott as well as BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), in its second review and again affirmed the punitive award. See Bocci v. Key Pharms., Inc. (Bocci III), 35 P.3d 1106, 1108, 1111 (Or. Ct. App. 2001). According to the appellate court, the drug manufacturer had only "argued that the total punitive damage award of $57 million in favor of [the plaintiff] and [the doctor] was excessive . . . ." Id. at 1108. While the ratio of punitive to compensatory damages would be 45 to 1 if the damages were viewed separately and apart from the damages to the plaintiff, when they are considered collectively, the ratio of the punitive damages award to the compensatory damages award would only be approximately 10 to 1. See id. at 1111 n.3; Bocci IV, 76 P.3d at 675. The appellate court "concluded that, evaluated in their entirety, the punitive damages were not excessive" and the Supreme Court of Oregon would later decline further review. See Bocci IV, 76 P.3d at 672 (citing Bocci III, 35 P.3d at 1111).
54. Bocci IV, 76 P.3d at 676.
als. In the other, the Supreme Court of Kentucky found that the automaker should pay $15 million in punitive damages to the family of a miner killed when a Ford pickup truck slipped into reverse and crushed him, although the jury had actually awarded $20 million in such damages. While the punitive damages award in the California case exceeded the single-digit ratio of punitive to compensatory damages, the United States Supreme Court discarded the already reduced punitive award in the Kentucky case even though there was only a 5 to 1 ratio in that case. After the California case was remanded, the state appellate court "conditionally affirm[ed] the punitive damages portion of the judgment . . . conditioned upon plaintiffs’ acceptance of reduction of the punitive damages portion of the judgment [from $290 million] to $23,723,287," resulting in a reduction of almost 92%. After its case was returned, the Supreme Court of Kentucky vacated the punitive damages award and remanded the case back to the trial court "for a new determination of the amount of punitive damages."

The United States Supreme Court's actions shortly after State Farm quickly made clear that its guidelines on punitive damages were applicable to both personal injury and product liability cases. They also demonstrated that the Supreme Court had placed itself in a position to monitor punitive

58. Romo I, 122 Cal. Rptr. 2d at 146. While the jury in the California case found that the plaintiffs' total compensatory damages were $6,226,793.00, it also found that one of the plaintiffs had been 10% at fault. Id. Consequently, the trial court reduced the compensatory award to $4,935,709.10. Id. Depending upon which of these figures ($6,226,793.00 or $4,935,709.10) is used to calculate the ratio, it is either 47 to 1 or 59 to 1. Id.
60. Sand Hill I, 83 S.W.3d at 497. There was a $3 million compensatory award in that case. Id.
61. Romo v. Ford Motor Co. (Romo III), 6 Cal. Rptr. 3d 793, 797 (Ct. App. 2003). If the plaintiffs declined such acceptance, the punitive damages judgment would be reversed and a new trial would be had on the issue. Id. at 813.
62. Sand Hill Energy, Inc. v. Smith (Sand Hill III), 142 S.W.3d 153, 168 (Ky. 2004). Although the Supreme Court of Kentucky had rejected the automaker's challenge to the jury instructions as they related to punitive damages in its earlier opinion, it now found that those instructions had been insufficient "in light of State Farm." Id. at 155–56 (quoting Ford Motor Co. v. Estate of Smith (Sand Hill II), 538 U.S. at 1028). According to the court, State Farm necessitated instructions that "set[] forth the purpose of punitive damages and provide[d] a safeguard from extraterritorial punishment" and that the trial court's jury instructions had failed to do the latter. Id. at 166.
damages whether they are awarded in federal or state court. Further, as the Kentucky case demonstrates, the Court appears willing to exercise this jurisdiction even where the punitive award does not exceed a single-digit ratio of punitives to compensatories.

Shortly after State Farm, some predicted that the tobacco industry would become a big beneficiary of the Court’s punitive damages ruling. Engle is not the only example in which this is true.

In Henley v. Philip Morris Inc (Henley I), a California jury awarded “$1.5 million in compensatory damages and $50 million in punitive damages” to a smoker who developed lung cancer. The trial judge, however, ordered a new trial on the issue of punitive damages, unless the smoker consented to a reduction of such damages to $25 million. The “[smoker] consented to the reduction.” The cigarette manufacturer, against whom the award had been rendered, appealed claiming that the $25 million punitive award was still unconstitutionally excessive. Initially, the California Court of Appeals for the First District upheld the damage award but the Supreme Court of California ordered its reconsideration in light of State Farm. On remand, the court of appeals found that while the cigarette manufacturer’s conduct in that case “supports a substantial award . . . and warrants some-

---

64. See Romo v. Ford Motor Co. (Romo I), 122 Cal. Rptr. 2d 139, 146 (Ct. App. 2002); see also Sand Hill I, 83 S.W.3d at 496.
65. See Sand Hill I, 83 S.W.3d at 483; see also Sand Hill III, 142 S.W.3d at 153.
66. See, e.g., Lorraine Woellert & Mike France, Tort Reform Has Friends in High Places, Bus. Wk., Apr. 21, 2003, at 78 (“The [tobacco] industry gets hit with the most punitive damages awards, so it could be a big winner.”).
68. 113 Cal. Rptr. 2d 494 (Ct. App. 2001).
69. Id. at 496.
70. Id.
71. Id. This made the total award to plaintiff $26.5 million. See id.
72. See Henley II, 9 Cal. Rptr. 3d at 38.
73. See Henley I, 113 Cal. Rptr. 2d at 509.
74. See Henley II, 9 Cal. Rptr. 3d at 38. This actually was the second time that the Supreme Court of California remanded the case back to the intermediate appellate court. See id.

The first remand occurred when the California appeals court was ordered to reconsider the case in light of two recent cases decided by the Supreme Court of California: Myers v. Philip Morris Inc., 50 P.3d 751 (Cal. 2002), and Naegelie v. R.J. Reynolds Tobacco Co., 50 P.3d 769 (Cal. 2002). See Henley II, 9 Cal. Rptr. 3d at 38. The issue in Myers and Naegelie concerned state “immunity.” See Myers, 50 P.3d at 753; see also Naegelie, 50 P.3d at 771. Apparently, this California statute granted tobacco manufacturers “immunity” from most claims for personal injury but was repealed. See Henley II, 9 Cal. Rptr. 3d at 41. These two cases dealt with the effect of the repeal (to what extent it continues to shield tobacco companies) and the scope of the protection it afforded. See id.
thing approaching the maximum punishment consistent with constitutional principles;”75 the $25 million in punitives could not be sustained in light of the relatively small $1.5 million compensatory.76 Consequently, the court of appeals reduced the punitive award to $9 million, a sum it found “permissible and appropriate on [the] record”77 explaining as follows:

In light of [State Farm] we do not believe the 17 to 1 ratio reflected in the present judgment can withstand scrutiny. As we read that case, a double-digit ratio will be justified rarely, and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages. Indeed, where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is “close to the line.” Nonetheless we believe a higher ratio (6 to 1) is justified here by the extraordinarily reprehensible conduct of which plaintiff was a direct victim . . . [This smoker’s] injuries were not merely economic, but physical, and nothing done by [the cigarette manufacturer] mitigated or ameliorated them in any respect.78

Despite the fact that the jury’s original $50 million punitive award had been reduced by more than four-fifths to $9 million, the cigarette manufacturer later sought further review from the Supreme Court of California, as well as the United States Supreme Court; both declined to disturb the award.79

In another tobacco case, Williams v. Philip Morris Inc. (Williams III),80 an Oregon state court jury awarded the family of a smoker, who died of lung cancer, $821,485.80 in compensatory damages and $79.5 million in punitive damages.81 The trial judge thereafter reduced the compensatory damages to

75. Id. at 70. The California Court of Appeals explained its rationale as follows: The record reflects that defendant touted to children what it knew to be a cumulatively toxic substance, while doing everything it could to prevent them and other addicts and prospective addicts from appreciating the true nature and effects of that product. The result of this conduct was that millions of youngsters, including [this smoker], were persuaded to participate in a habit that was likely to, and did, bring many of them to early illness and death.

76. See id. at 72.

77. See Henley II, 9 Cal. Rptr. 3d at 69.

78. Id. at 73 (citation omitted).

79. See Philip Morris Inc. v. Henley (Henley IV), 544 U.S. 920 (2005); Henley v. Philip Morris USA (Henley III), 97 P.3d 814 (Cal. 2004); Henley v. Philip Morris Inc. (Henley II), 9 Cal. Rptr. 3d 29, 38 (Ct. App. 2004).


81. Id. at 130.
$521,485.80 and the punitive damages award to $32 million. The state appeals court, however, reinstated the full $79.5 million punitive damages award. The United States Supreme Court vacated the judgment of the state appellate court and returned the case back to the appeals court to reconsider in light of the State Farm ruling. Despite the United States Supreme Court’s admonition and its subsequent consideration of State Farm, the appeals court reinstated the total $79.5 million punitive award, specifically finding that the second guide post was met despite an acknowledgement that the punitive award amounted to "a 96 to 1 ratio between the compensatory and punitive damages." In making this determination, the court relied on two United States Supreme Court decisions decided prior to State Farm, which had indicated that it is appropriate to consider the potential harm, as well as the actual harm caused by the defendant’s conduct. The appeals court concluded that while the jury found actual harm to the smoker of $821,485.80 in damages, "[the cigarette manufacturer] inflicted potential harm on the members of the public in Oregon." The Supreme Court of Oregon, which had earlier declined to accept jurisdiction in this case, allowed review this time. While it disagreed with the intermediate appellate court regarding the second guide post and specifically stated that it was not met, Oregon's highest court, nevertheless, affirmed the appellate court's decision upholding the award in its entirety because it was supported by the other two guide posts. The United States Supreme Court granted the Williams cigarette manufacturer's petition for certiorari, and whether that punitive award will survive the nation's high court's third intervention remains to be seen.

82. Id.
83. Id. The family of the smoker apparently only appealed the reduction of the punitive damage award. Williams v. Philip Morris Inc. (Williams I), 48 P.3d 824, 829 (Or. Ct. App. 2002). The decision by the Oregon appeals court was said to "mark[] the first time a jury's award of punitive damages against a tobacco company [had] been upheld in its entirety." Milo Geyelin, Court Reinstates Tobacco Ruling, WALL ST. J., June 6, 2002, at A3.
85. Id. The Oregon appellate court would perform a complete analysis based on the Gore guide posts as refined by State Farm. See Williams III, 92 P.3d at 142-46.
86. Williams III, 92 P.3d at 144.
87. Id.
88. Id.; see BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); see also TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993). The court further stated that even if the punitive award was deemed to exceed a single digit ratio, the "unique facts in [that] case" would justify it. Williams III, 92 P.3d at 145.
89. Williams v. Philip Morris Inc. (Williams IV), 104 P.3d 601, 601 (Or. 2004).
90. Williams v. Philip Morris Inc. (Williams I), 127 P.3d 1165, 1181–82 (Or. 2006).
91. Petition for a Writ of Certiorari at 1, Philip Morris USA v. Williams, No. 05-1256 (Or. Mar. 30, 2006).
II. ENGLE IV AND THE THIRD DISTRICT

Engle was a class action lawsuit brought on behalf of a “class of smokers and their survivors” seeking damages for alleged smoking related injuries.92 The defendants included the “major domestic cigarette companies and two industry organizations” (hereinafter “tobacco defendants”).93 The six named plaintiffs were individuals who were smokers.94 “All six [named plaintiffs] alleged [that] they were unable to stop smoking because they were addicted to nicotine and, as a result, developed medical problems ranging from cancer and heart disease to colds and sore throats.”95

The six named plaintiffs brought the class action for personal injuries against the tobacco defendants seeking damages for injuries caused by smoking.96 In their complaint, they asserted claims of “strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotion distress.”97 “They sought over $100 billion in compensatory damages” as well as over “$100 billion in punitive damages” on behalf of themselves and their class.98 The trial court initially certified a class of smokers and their survivors “as a nationwide class action.”99 On appeal, however, the Third District Court of Appeal “reduced the class to include Florida smokers only.”100 After the case was remanded, the trial court issued its trial plan with respect to the case.101


93. Id. The companies were: Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co. and Lorillard Inc. (collectively, “Lorillard”), and Liggett Group Inc. and Brooke Group Holding Inc. (collectively, “Liggett”). Id. at 441 n.1. The two industry organizations were the Council for Tobacco Research-U.S.A., Inc. and the Tobacco Institute, Inc. Id.

94. Id. at 440.

95. Engle IV, 853 So. 2d at 440.

96. Id.

97. Id. at 441.

98. Id.

99. Id. The class was defined by the trial court as follows: “All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.” Engle IV, 853 So. 2d at 441.

100. Id. (citing R.J. Reynolds Tobacco Co. v. Engle (Engle I), 672 So. 2d 39, 42 (Fla. 3d Dist. Ct. App. 1996)).

101. Id. The trial court issued the trial plan and “refused the [tobacco] defendants’ request to decertify the class,” after which the tobacco “defendants sought review of both orders before the Third District,” but their appeal was dismissed. Francis E. McGovern, Settlement of Mass Torts in a Federal System, 36 Wake Forest L. Rev. 871, 873 (2001) (discussing R.J. Reynolds Tobacco Co. v. Engle (Engle II), 711 So. 2d 553 (Fla. 3d Dist. Ct. App. 1998)).
The trial plan provided for the trial proceedings to be divided into three phases:

Phase 1 consisted of a year-long trial on liability and entitlement to punitive damages with the jury considering common issues relating exclusively to defendants' conduct and the general health effects of smoking. At the conclusion of Phase 1, the jury rendered a verdict for the class on all counts. In Phase 2, the jury determined that the three named plaintiffs were entitled to compensatory damages totaling $12.7 million. The jury also determined in Phase 2 that the entire class was entitled to punitive damages totaling $145 billion. In Phase 3, a new jury was supposed to decide the "individual liability and compensatory damages claims for each class member" after which, "the trial court was to then divide the $145 billion punitive award equally among the successful class members." However, Phase 3 was interrupted because the tobacco defendants appealed after the verdicts in Phase 2.

In the appeal after the Phase 2 verdicts, the Third District reversed the entire judgment as well as the trial court order certifying the class. Although the appellate court had previously approved the class certification,
the court found that the class was improperly certified stating "that the plaintiff's smokers' claims are uniquely individualized and cannot satisfy the 'predominance' and 'superiority' requirements imposed by Florida's class action rules." The Third District made a number of other rulings against the plaintiffs in reference to the damage award, as well as with respect to other aspects of the case:

- The court held that the punitive damage award was barred by the tobacco settlement between the cigarette makers and the states under the doctrine of res judicata.
- Additionally, the court held that the trial court erred "by instructing the jury not to consider the "tobacco settlement between the cigarette manufacturers and the states, as well as the specific agreement between the State of Florida and the cigarette makers "with regard to the issue of punishment and deterrence.""

109. *Id.* at 444 (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998)). The court emphasized that Rule 1.220(d)(1) of the *Florida Rules of Civil Procedure* permits class certification orders to be "altered or amended at any time before entry of a judgment." *Id.* at 442. The court noted that since "[c]lass-certification orders necessarily precede substantial development of the issues and facts . . . a court is required to reassess its class rulings as the case develops." *Id.* Additionally, the Third District would note that "since [its] affirmation of certification in 1996, virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper." *Engle IV,* 853 So. 2d at 443–44 (citations omitted). According to the court, "Phase 2 of the trial conclusively established that individualized issues of liability, affirmative defenses, and damages, outweighed any 'common issues' in this case, and that class representation [was] not superior." *Id.* at 445. Specifically, the court stated that Phase 2 showed that "each claimant will have to prove that his or her illness not only was caused by smoking, but was also proximately caused by defendants' alleged misconduct." *Id.* at 446. The court also stated that this is "evidenced by the fact that affirmative defenses and damages must be litigated individually." *Id.* at 447. The court further pointed to individualized choice-of-law problems. *Id.* at 447–49.

110. *Engle IV,* 853 So. 2d at 467–68. The court would explain its rationale as follows:

The claims for punitive damages in the *Florida v. American Tobacco Co.* case and in this action are based on the same . . . alleged misconduct and the same public interest. The plaintiffs, as private parties, do not have a "right" to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence. Accordingly, as a matter of law, Florida's settlement and release, and the *res judicata* effect of the resulting final judgment, preclude the plaintiffs' punitive damage claims here.

*Id.* at 468 (citations omitted).

111. *Id.* The Third District stated that the tobacco settlement "clearly qualified as evidence relevant to punishment and deterrence" and that "[t]he defendants were entitled to have the jury consider the [tobacco settlements] as potential mitigating factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct." *Id.* at 469. The court found that "[t]he trial court erred in providing the jury with an instruction that removed a disputed issue from the jury's consideration." *Id.* at 470. According to the court, "[t]his error effectively precluded the defendants from presenting
Also, the court found that neither the punitive award nor the compensatory damage award, as it related to one of the tobacco defendants, was supported by the evidence and, according to the court, was "[p]roof of a 'runaway jury.'"\textsuperscript{112}

The court found that "[p]laintiffs' counsel [made] improper race-based appeals [to the jury] for nullification [that] caused irreparable prejudice and require[d] reversal" because such conduct "incited" the "predominantly African-American jury" "to disregard the law because the defendants [were] tobacco companies."\textsuperscript{113}

Moreover, the court referenced other purported misconduct by plaintiffs' counsel, saying that "plaintiffs’ counsel repeatedly made legally improper arguments to the jury regarding the payment of any [punitive] award,"\textsuperscript{114} "referred to matters outside the evidence,"\textsuperscript{115} made derogatory personal remarks about opposing counsel,\textsuperscript{116} and expressed his personal opinion to the jury" about the case,\textsuperscript{117} as well as to some of the defense witnesses.\textsuperscript{118}
The court would indicate, in a footnote, that “none of the three plain-
tiff[s] presented a proper claim within the class action [during Phase 2].”119

In addition to the above, the Third District would further hold that the
$145 billion punitive damage award was unconstitutionally “excessive as a
matter of law”120 and that, in fact, the award had been improper because it
“preclud[ed] the constitutionally required comparison of punitive damages
and compensatory damages.”121

The Third District would specifically state that the $145 billion punitive
award was excessive under both Florida and federal law.122 The court would
cite to Florida law for the proposition “that punitive damages may not be
assessed in an amount which will financially destroy or bankrupt a defen-
dant.”123 The court emphasized that “[t]he [cigarette makers] established that
their combined net worth was no more than $8.3 billion” and that “[t]he $145
billion verdict [was] roughly 18 times . . . [that] net worth.”124 The court also

118. Id. at 464–65. According to the court:

Plaintiffs’ counsel . . . repeatedly expressed his personal opinions about the defen-
dants’ witnesses, making such comments as: “I wanted to punch” one witness; that
another witness “wouldn’t know science if he fell on science;” that he was sure an-
other witness “was ashamed to give this answer, but he gave it. . . . under oath;” and
that as to another witness, “I figured, well, this guy hasn’t been prepped on the sub-
ject [by counsel], so maybe I’ll get an honest answer.”

Id.

119. Engle IV, 853 So. 2d at 453–54 n.23. The appellate court would state that all of the
claims of one of the plaintiffs were barred by the statute of limitations. See id. at 454 n.23.
The trial court had found that while the statute barred most of this plaintiff’s claims, his fraud
claim and its derivative conspiracy claim were not so barred as there was “an exception to the
statute of limitations bar in the case of continuing fraud.” Id. The Third District rejected the
trial court’s position finding that the case relied on by it did not support such an outcome. Id.
With respect to the other two plaintiffs in Phase 2, the appellate court would state that “judg-
ment should have been entered in favor of the defendants as to [them] . . . because their claims
did not accrue until years after the cut-off date for class membership.” Id. The appellate court
would explain as follows: “By its terms, the class definition includes only those smokers who
developed a disease by October 31, 1994. Since [one] was diagnosed in April 1996, and [the
other] was diagnosed in February 1997, they [were] clearly excluded from the class . . . .”
Engle IV, 853 So. 2d at 454 n.23.

120. Id. at 458.
121. Id. at 450.
122. Id. at 456.
123. Id. (citing Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039,
1043 (Fla. 1982); Lipsig v. Ramlawi, 760 So. 2d 170, 188 (Fla. 3d Dist. Ct. App. 2000);
Brooks v. Rios, 707 So. 2d 374, 375 (Fla. 3d Dist. Ct. App. 1998); Hockensmith v. Waxler,
524 So. 2d 714, 715 (Fla. 2d Dist. Ct. App. 1988)). According to the court, it was “acknowl-
edged by even the plaintiffs’ purported experts [in Engle] that the $145 billion punitive
award will extract all value from the defendants and put them out of business.” Engle IV, 853
So. 2d at 456.
124. Id. at 456–57.
emphasized that “[t]here [was] no precedential authority for such an award” and that “[n]o Florida decision endorses even a remotely comparable award,” as “[t]he largest reported [Florida] awards involved only a fraction of a defendant’s net worth.”125 The court would cite to federal law for the proposition that “[f]ederal due process also prohibits ‘excessive’ punitive awards.”126 Specifically citing State Farm, the Third District would exclaim that “[t]his unprecedented punitive damages award is excessive as a matter of law and, thus, does not promote a valid societal interest.”127 The court would even suggest that since “[p]unitive damages are imposed to benefit society’s interests,” the $145 billion award would “frustrate the societal interest in protecting all injured claimants’ rights to at least recover compensatory damages for their smoking related injuries” since “[s]mokers with viable compensable claims will have no remedy if the bankrupting punitive award . . . [were] upheld.”128

The Third District would also state that the punitive damages award in Engle IV put the “‘[c]art [b]efore [the] [h]orse’” where it was made “without the necessary [prerequisite] finding[] of liability and compensatory damages.”129 While the appellate court would acknowledge that determinations of liability were made in Phase 2, it would apparently find them insufficient to justify the class-wide punitive award, since they related to only three individuals.130 According to the court, “[t]he defendants [were] entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages.”131

125. Id. at 457.
128. Id.
129. Id. at 450. The court found that “compensatory damages must be . . . [determined before] punitive damages,” Id. at 451 (citing Ault v. Lohr, 538 So. 2d 454, 457 (Fla. 1989) (Ehrlich, C.J., concurring)). Otherwise, it would be impossible to compare the two to determine if the “punitive damages bear a ‘reasonable’ relationship to the actual harm inflicted on the plaintiff, as required by Florida and federal law.” Id.
130. See Engle IV, 853 So. 2d at 450 n.16. The court explained that “[t]he jury did not determine [that the tobacco] defendants were liable to anyone [in Phase 1],” but only “answered certain general questions about the defendants’ products and conduct.” Id. at 450. The court noted that while these questions related to some of the legal elements, of each legal theory alleged, they did not relate to all of the elements, of each such theory, and that “[e]ssential elements of liability, such as reliance and proximate cause, were never tried in Phase 1.” Id.
131. Id. at 453.
Evidently, any class-wide punitive award rendered—where there was no prior determination of liability and compensatory damages, with respect to the entire class—would be improper for the appeals court.\textsuperscript{132}

\section*{III. Florida's Highest Court in \textit{Engle}}

After the Third District would deny a motion to certify the case to the Supreme Court of Florida, as an issue of great public interest, an attorney, in the law firm that had represented the tobacco defendants in the appeal, would be quoted as saying that “[w]e are confident that there is no basis for a claim of conflict,”\textsuperscript{133} which reportedly was the only other route for the plaintiffs in \textit{Engle} to obtain review by the Supreme Court of Florida.\textsuperscript{134} The Supreme Court of Florida, however, would grant the plaintiffs’ petition for review,\textsuperscript{135} and two years later issue its opinion.\textsuperscript{136}

In a per curiam opinion, the Supreme Court of Florida would indicate that it granted jurisdiction in \textit{Engle VI}, because the Third District “misapplied” its decision in \textit{Young v. Miami Beach Improvement Co.}\textsuperscript{137} The Court would thereafter reject much of the decision by the Third District, but “approve . . . [its] reversal of the $145 billion class action punitive damages award.”\textsuperscript{138}

The Supreme Court of Florida held “that the Third District erred in nullifying its previous affirmance of the trial court’s certification order,”\textsuperscript{139} al-
though it "agree[d] with the Third District that problems with the three-phase trial plan negate the continued viability of th[e] class action."\textsuperscript{140} The Supreme Court of Florida found that \textit{Florida Rule of Civil Procedure} 1.220(d)(1) did not authorize the Third District to simply change its position and reverse its previous ruling, which upheld the trial certification order,\textsuperscript{141} and determined that "under the doctrine of law of the case, the Third District would have been justified in reversing its previous ruling . . . only if it concluded that the prior ruling would have resulted in a clear manifest injustice."\textsuperscript{142} For the Supreme Court of Florida, "no circumstances existed that justified the subsequent . . . reconsideration of the prior Third District decision approving class certification."\textsuperscript{143} The Court, however, found "that continued class action treatment for Phase III of the trial plan [was] not feasible because individualized issues such as legal causation, comparative fault, and damages predominate."\textsuperscript{144} Although the Court noted that there were "no Florida cases address[ing] whether it [was] appropriate under \textit{Florida Rule of Civil Procedure} 1.220(d)(4)(A) to certify class treatment for only limited liability issues,"\textsuperscript{145} it relied on "several decisions by federal appellate courts applying a similar provision in the \textit{Federal Rules of Civil Procedure}"\textsuperscript{146} as "persuasive authority" for it to do so in \textit{Engle VI}.\textsuperscript{147} The end result was that the Court "decertif[i]ed the class, [but] retain[ed] the jury's Phase I findings, other than those on the fraud and intentional infliction of emotion[al] distress claims, which [it stated] involved highly individualized determinations, and

\begin{itemize}
  \item \textsuperscript{140.} \textit{Id.} at 32.
  \item \textsuperscript{141.} \textit{Id.} at 28. According to the Court, the rule only "provide[d] an avenue for reexamining [sic] certification if subsequent discovery shows that circumstances have changed." \textit{Id.}
  \item \textsuperscript{142.} \textit{Engle VI}, No. SC03-1856, slip op. at 29 (citing Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 106 (Fla. 2001)).
  \item \textsuperscript{143.} \textit{Id.} at 30. In fact, the Court found that the Third District's opinion on this issue "was flawed" in two respects. \textit{Id.} One, the Court found that the Third District "ignored the trial court's pretrial ruling that only Florida law would apply when [the Third District] stated that the 'choice-of-law analysis in \textit{Engle VI} would] require examination of numerous significantly different state laws governing the different plaintiffs' claims.'" \textit{Id.} (quoting Liggett Group Inc. v. Engle (\textit{Engle IV}), 853 So. 2d 434, 449 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, \textit{rem'd}, No. SC03-1856 (Fla. July 6, 2006)). Two, the Supreme Court of Florida stated that "none of the cases from other jurisdictions cited by the Third District . . . to justify decertification was in the procedural posture of \textit{Engle VI}.'" \textit{Id.}
  \item \textsuperscript{144.} \textit{Engle VI}, No. SC03-1856, slip op. at 32.
  \item \textsuperscript{145.} \textit{Id.} at 33. The Court noted this rule provides that "[w]hen appropriate . . . a claim or defense may be brought or maintained on behalf of a class concerning particular issues." \textit{Id.} at 32--33 (quoting Fla. R. Civ. P. 1.220(d)(4)(A)).
  \item \textsuperscript{146.} \textit{Id.} at 33. This was Rule 23(c)(4)(A) of the \textit{Federal Rules of Civil Procedure} that states "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues,'" Fed. R. Civ. P. 23(c)(4)(A).
  \item \textsuperscript{147.} \textit{Engle VI}, No. SC03-1856, slip op. at 33.
\end{itemize}
the finding on entitlement to punitive damages question, which [it found to have been] premature." 148

The Supreme Court of Florida also held that “reversal [was] not warranted based on the remarks made by the Engle Class’s Counsel,” finding that “under the totality of the circumstances” such comments did not rise to the level of reversible error. 149 Moreover, the Court found that:

a review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifie[d] the Third District’s overall conclusion that this was a runaway jury inflamed by race because of the arguments directed to the four of the six members of the jury who were African-American. 150

148. Id. at 36. The jury findings were as follows:
(1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or misleading statement of material fact with the intention of misleading smokers; (4)(a) that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment; (5)(a) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) that all of the defendants sold or supplied cigarettes that were defective; (7) that all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not con- form to representations of fact made by the defendants; (8) that all of the defendants were negligent; (9) that all of the defendants engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; and (10) that all of the defendants’ conduct rose to a level that would permit an award of punitive damages.

Id. at 8 n.4. The court would specifically state that findings 1, 2, 3, 4a, 5, 5a, 6 and 8 could stand and that findings 4 and 9 could not. Id. at 4.

149. Id. at 39. The Court noted that Engle’s “counsel ventured very close to the line of reversible error on a number of occasions in his attempt to counteract opposing counsel’s contentions that Tobacco acted lawfully and to communicate his message to the jury that ‘legal doesn’t make it right.’” Engle VI, No. SC03-1856, slip op. at 39. The Court, however, found that the context in which the statements were made was “crucial” in evaluating them and emphasized that they had been spread out over a two-year period. Id. at 41. Further, the Court found that some of the comments that supposedly were improper pleas for jury nullification “were not an attempt to tell the jury to ignore the law” but simply “made in response to Tobacco’s preemption defense: that the warnings on the cigarettes were as provided by law” and Tobacco’s position during the trial that cigarettes were a legal product. Id. at 45.

150. Id. at 46. The Court did state that:
[t]here [was] absolutely no justification for [a] series of remarks [by Engle’s counsel], which appear[ed] to compare the tobacco industry with slavery and, [finding that his references to]
Although the Supreme Court of Florida “agree[d] that the [Third District] properly held that all judgments in favor of [one of the three class representatives] were barred by the applicable statute of limitations,” it disagreed with the Third District on the issue of whether the other two class representatives were properly included within the class as certified by the trial court. Consequently, it “quash[ed] the [Third District’s] reversal of judgment entered in favor of [those two] class representatives . . . [and] or-der[ed] that the judgments be reinstated.”

The Supreme Court of Florida agreed with the Third District that the judgments against the one tobacco defendant had to be reversed because this defendant “‘did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives.” In contrast to the Third District, however, the Supreme Court appeared not to view this as “proof of a ‘runaway jury’” but simply an “inconsistency in the verdict.”

The Supreme Court of Florida held “that the Third District erred in applying the doctrine of res judicata to bar the Engle Class’s punitive damages claim.” Specifically, the court explained that

[c] since the State [of Florida] had no right to pursue [the] type[ ] of private interests [involved in Engle] on behalf of its citizens, the punitive damages claims settled by the State in the [Florida Settlement Agreement between Florida and the tobacco companies], if any, were distinct from the punitive damages sought by the Engle Class.

civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury’s sense of outrage for the injustices visited upon African-Americans in this country.

Id. at 44.

151. Engle VI, No. SC03-1856, slip op. at 50-51. The Third District found that the cutoff date for membership to the class was October 31, 1994 when the trial court originally certified the class. However, the Supreme Court of Florida concluded that the proper date was November 21, 1996 when the trial court recertified the class to include only Florida smokers, pursuant to the Third District’s direction. Id. at 53.

152. Id. at 50.

153. Id. at 51 (quoting Liggett Group, Inc. v. Engle (Engle IV), 853 So. 2d 434, 466 n.46 (Fla. Dist. Ct. App. 2003), app’d in part, quashed in part, rem’d, No. SC03-1856 (Fla. July 6, 2006)).

154. Engle IV, 853 So. 2d at 466.

155. Engle VI, No. SC03-1856, slip op. at 51.

156. Id. at 19.

157. Id. at 17. The Supreme Court of Florida would not address the issue of whether the trial court had erred by instructing the jury not to consider either the Florida Settlement Agreement or the Master Settlement Agreement (between the states and tobacco companies) with regard to the punitive damages issue as the Third District had found. Id. at 3.
Despite its ruling that the Florida Tobacco Settlement did not preclude such award, the Supreme Court of Florida would find three other reasons to discard the $145 billion punitive damages award.\(^{158}\)

First, the court would hold "that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial."\(^{159}\) The court acknowledged that "an award of compensatory damages [was] not a prerequisite to a finding of entitlement to punitive damages"\(^{160}\) since the two types of damages serve different purposes.\(^{161}\) However, the court emphasized that "a finding of liability [was] required before entitlement to punitive damages [could] be determined, and that liability [was] more than a breach of duty."\(^{162}\) The court noted that "[a]lthough [it] appeared to use 'breach of duty' and 'liability' interchangeably in Ault v. Lohr,"\(^{163}\) this really was not the case and that an actual "finding of liability" was necessary before any finding of entitlement to punitive damages.\(^{164}\) The Supreme Court of Florida found that "the Phase I verdict did not constitute a 'finding of liability'" and therefore that it had been "error for the Phase I jury to consider whether Tobacco was liable for punitive damages."\(^{165}\)

Second, the Supreme Court of Florida ruled that "[e]ven if it were not error to determine entitlement to punitive damages in Phase I, it was clear error to allow the jury to go beyond mere entitlement and award class-wide punitive damages when total compensatory damages had not been determined."\(^{166}\) In so ruling, the court acknowledged that it was deviating somewhat from Florida law, explaining as follows:

In the past, we have not discussed whether punitive damages awards must bear some reasonable relation to compensatory damages. For example in Arab Termite & Pest Control of Florida,

---

\(^{158}\) See id. at 2.

\(^{159}\) Engle VI, No. SC03-1856, slip op. at 19–20.

\(^{160}\) Id. at 70.

\(^{161}\) Id. at 20. The Supreme Court of Florida would rely on the following language from the United States Supreme Court in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., to explain the differences:

"The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Id. (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001)).

\(^{162}\) Id. at 21.

\(^{163}\) 538 So. 2d 454 (Fla. 1989).

\(^{164}\) Engle VI, No. SC03-1856, slip op. at 21.

\(^{165}\) Id. at 23.

\(^{166}\) Id.
Inc. v. Jenkins,¹⁶⁷ we stated that punitive damages "are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." However, we now hold, consistent with United States Supreme Court decisions after Ault that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two.¹⁶⁸

Third, the court found "[t]he amount awarded [was] also clearly excessive because it would bankrupt some of the defendants."¹⁶⁹ In this regard, the court appears to rely on Florida law, not federal law in reaching this conclusion.¹⁷⁰ As the court would explain:

We [] conclude that the punitive damages award was clearly excessive under the limitation based on ability to pay established by our precedent because it [was] "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." A comparison of the amounts awarded and the financial worth assigned to each company by the Engle Class’s expert clearly demonstrate[d] that the award would result in an unlawful crippling of the defendant companies.¹⁷¹

IV. STATE FARM’S APPLICABILITY TO ENGLE

As described herein, State Farm has, in a short time frame, had quite an impact on state court judgments awarding punitive damages, including the record one in Engle. This is even more remarkable considering that the United States Supreme Court’s entry into this area has a relatively short history. Prior to 1996, the United States Supreme Court had never invalidated a state court’s punitive damages award as unreasonably large.¹⁷² This was true despite the Court having several opportunities.¹⁷³

¹⁶⁷. 409 So. 2d 1039 (Fla. 1982).
¹⁶⁸. Engle VI, No. SC03-1856, slip op. at 24 (citations omitted).
¹⁶⁹. Id. at 19.
¹⁷⁰. See id.
¹⁷¹. Id. at 27 n.8 (citations omitted) (emphasis added).
¹⁷³. See id.
The Court held that a punitive award was unconstitutionally excessive for the first time in BMW of North America, Inc. v. Gore. In Gore, the Court refused to sustain a $2 million punitive damages award in an Alabama state case where there was only $4,000 in compensatory damages.

It was in Gore where the United States Supreme Court first articulated the three guideposts to identify unconstitutionally excessive punitive damage awards. The Court also "illuminate[d] 'the character of the standard [to] identify [such] unconstitutionally excessive awards' of punitive damages," explaining as follows:

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case . . . . Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Although it was prior to State Farm, at least one federal circuit has opined that "[the] guidepost [sic] should neither be treated as an analytical straitjacket nor deployed in the expectation that they will 'draw a bright line marking the limits of a constitutionally acceptable punitive damages award,' [as o]ther pertinent factors may from time to time enter into the equation."

174. 517 U.S. 559, 584–86 (1996). In Gore, the purchaser of an automobile brought an action against the distributor based on its failure to disclose that the automobile had been repainted after being damaged. Id. at 563–64.

175. Id. at 578, 582. The jury had actually assessed $4 million in punitive damages but the Supreme Court of Alabama would reduce it to $2 million because it "found that the jury improperly computed the amount of punitive damages by multiplying [plaintiff's] compensatory damages by the number of similar [acts] in other jurisdictions," not just Alabama. Id. at 567.

176. See id. at 574–85.


178. Id. (citations omitted).

The fact that Engle was a class action certainly should have been a relevant consideration in determining whether the punitive award was impermissibly excessive. However, not one of the cases cited by either the Third District or the Supreme Court of Florida involved punitive damages in the context of a class action, and those courts seem to largely ignore that distinction. Moreover, since Engle was a mass tort action involving personal injuries, that fact, too, should have entered into any equation in reviewing that punitive award relative to the Gore guide posts. As one legal scholar would observe around the time the Engle verdict was rendered, "[v]irtually no mass tort case . . . ha[d] been tried to a jury."

The Third District would not engage in any analysis of the punitive award utilizing the Supreme Court's guide posts, but simply cited to State Farm for the proposition that the punitive award was excessive as a matter of law. The Supreme Court of Florida would also not engage in such analysis, although it would rely on Gore's second guide post for its conclusion that "compensatory damages must be determined" before any award of punitive damages. As noted, State Farm I mandates that a court evaluate a punitive damages award in light of Gore’s three guide posts. Applying those guide posts to Engle, it is not at all clear that they would prohibit the imposition of the historic punitive damages awarded in that case.

A. The First Guide Post

The United States Supreme Court in State Farm I repeated its statement in Gore that, “the most important indicium of the reasonableness of a puni-

180. According to the Supreme Court of Louisiana in Ford v. Murphy Oil U.S.A., Inc.: [A] class action is a nontraditional litigation procedure permitting a representative with typical claims to . . . stand in judgment for a class of similarly situated persons . . . . The purpose and intent of class action[s] . . . is to adjudicate and obtain res judicata effect on all common issues . . . not only to the representatives . . . but to all others who are “similarly situated.” 703 So. 2d 542, 544 (La. 1997).


184. Engle IV, 853 So. 2d at 456.


The degree of reprehensibility of the defendant’s [mis]conduct. Thereafter, the Court again described the five factors relevant to this guide post. One factor was whether “the harm caused was physical as opposed to economic.” A second was whether “the target . . . had [a] financial vulnerability.” A third was whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.” A fourth was whether “the conduct involved repeated actions or was an isolated incident.” A fifth was whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” There should be little debate about the reprehensibility guide post and the fact that it was met.

1. Most Reprehensibility Factors Appear Present

The Court in State Farm I indicated that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award.” However, arguably almost all of the relevant factors are present in Engle. The named plaintiffs, and their class in Engle, clearly alleged physical, rather than merely economic injury. The conduct of the tobacco defendants in Engle could certainly be said to “evince[] an indifference to or a reckless disregard [for] the health [and] safety of others,” if they knowingly sold the named plaintiffs, and their class, a dangerous product. The situation in Engle definitely was not about an isolated incident. Instead, it dealt with a repeated pattern of conduct on the part of the defendants’ companies—selling cigarettes—that occurred over many years. This is not a situation where the harm caused

187. Id. at 419 (quoting Gore, 517 U.S. at 575).
188. Id.
189. Id. (citing Gore, 517 U.S. at 576).
190. Id. (citing Gore, 517 U.S. at 576).
191. State Farm I, 538 U.S. at 419 (citing Gore, 517 U.S. at 576).
192. Id. (citing Gore, 517 U.S. at 576–77).
193. Id. (citing Gore, 517 U.S. at 576).
194. Id. The Court also stated that “the absence of all of them renders any award suspect.”
196. See State Farm I, 538 U.S. at 419 (citing Gore, 517 U.S. at 576); Engle IV, 853 So. 2d at 440.
197. Id.
198. See Engle IV, 853 So. 2d at 440–41.
199. Id.
200. See id.
could simply be considered a mere accident, and the jury verdict in *Engle* seems to strongly suggest that the tobacco defendants engaged in deceit.\textsuperscript{201}

2. Other Courts Found Most Reprehensibility

Additionally, the courts that have reviewed the awarding of punitive damages in individual tobacco cases have found the reprehensibility guide post met in those cases.\textsuperscript{202} There appears to be no reason why *Engle* should be any different.

3. *State Farm* Deficiencies Not Present

Moreover, the punitive award in *Engle* does not appear to suffer from the same alleged deficiencies, in reference to the first guide post, as the one in *State Farm*.\textsuperscript{203} In *State Farm*, the plaintiffs purportedly "reli[ed] upon dissimilar and out-of-state conduct evidence"\textsuperscript{204} that provided "scant evidence of repeated misconduct of the sort that injured them."\textsuperscript{205} Consequently, according to the United States Supreme Court, this resulted in a punitive damages award "that bore no relation to the [plaintiffs'] harm."\textsuperscript{206} "In *State Farm*, because the [plaintiffs] . . . show[ed] no conduct by [the defendant] similar to that which harmed them, the conduct that harmed them . . .

\textsuperscript{201} See id. at 450. As noted, during Phase 1 of the trial proceedings, the jury would answer questions related to each legal theory alleged, which included claims for fraud and conspiracy to commit fraud. See id. at 441, 450.

\textsuperscript{202} See Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 677 (Ct. App. 2005) ("Utilizing the five factors listed in *State Farm*, all show a high degree of reprehensibility and weigh in favor of the jury’s conclusion that a substantial punitive award was appropriate in this case."); Henley v. Philip Morris Inc. (*Henley I*), 9 Cal. Rptr. 3d 29, 71 (Ct. App. 2004) ("It . . . appears that all five of the subfactors in [State Farm], point to a high degree of reprehensibility.") (emphasis in original); Williams v. Philip Morris Inc. (*Williams III*), 92 P.3d 126, 145 (Or. Ct. App. 2004) ("[I]t is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case."); see also Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1262 (D. Kan. 2002) (federal district judge “find[ing] that all of [the] factors [relating to reprehensibility] point to a conclusion that [the tobacco manufacturer’s] conduct was highly blameworthy and deserving of significant punishment,” in imposing a punitive damage award of $15 million for an injured individual smoker).

\textsuperscript{203} See *State Farm I*, 538 U.S. at 420.

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 423.

\textsuperscript{206} Id. at 422.
[was] the only conduct relevant to the reprehensibility analysis." While the court in State Farm "[did] not suggest there was error in awarding punitive damages [in that case] based upon [the defendant's] conduct toward the [plaintiffs], a more modest punishment,” based solely upon that conduct, was warranted. In Engle, there is absolutely no indication in the opinion of either the Third District Court of Appeal or the Supreme Court of Florida that the plaintiffs in that case improperly used “dissimilar and out-of-state conduct evidence” in securing their punitive damages award. Furthermore, while the United States Supreme Court in State Farm found that the punitive damage award in that case could not “be justified on the grounds that [the defendant] was a recidivist,” the same is certainly not true in Engle.

B. The Second Guide Post

Although the Third District Court of Appeal in Engle was not referring to the second guide post—“the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award”—in particular, it would stress that it was not possible to calculate the ratio between the punitive and compensatory damages in that case at the time the punitive award was rendered. The Supreme Court of Florida would agree and specifically state that the second guide post was “determinative” in regard to the excessiveness issue. The fact that it might not have been possible to calculate the actual ratio between punitive and compensatory damages in Engle at the

207. Id. at 424.
209. Id. at 420; see Liggett Group, Inc. v. Engle (Engle IV), 853 So. 2d 434, 456–58 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006).
211. See Engle IV, 853 So. 2d at 451–58, 468–69. As the United States Supreme Court explained, “a recidivist may be punished more severely than a first offender [because] . . . repeated misconduct is more reprehensible than an individual instance of malfeasance.” BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996).
212. State Farm I, 538 U.S. at 418.
213. See Engle IV, 853 So. 2d at 451. As noted, the Supreme Court in State Farm had stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process,” and, in fact, “an award of more than four times the . . . compensatory damages might be close to the line of constitutional impropriety.” State Farm I, 538 U.S. at 425 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991)).
time the jury returned the $145 billion punitive award may be true.\textsuperscript{215} That fact alone, however, hardly seems a sufficient basis to discard such award for a number of reasons.

1. \textit{Engle} Involved Mass Tort Class

As noted earlier, the fact that \textit{Engle} was a class action was certainly a relevant factor that needed to be taken into consideration.\textsuperscript{216} By definition, "[t]he class action is a representative action in which certain named parties sue or are sued as representatives of a larger group of persons."\textsuperscript{217} In most instances, "non-party members of the class need not be brought personally before the [c]ourt."\textsuperscript{218} Also noted earlier was the fact that \textit{Engle} was not just a class action, it was one in the mass tort context.\textsuperscript{219} The Supreme Court of Florida case, \textit{Ault v. Lohr},\textsuperscript{220} which the court in \textit{Engle} would state requires "a finding of liability . . . before entitlement to punitive damages [could] be determined, and that liability [was] more than a breach of duty,"\textsuperscript{221} was not a class action.\textsuperscript{222} How such liability is to be established in the class suit is unclear. \textit{State Farm} also was not a class action,\textsuperscript{223} and in that case, the United States Supreme Court also did not attempt to suggest how the ratio guide post was to be applied in the context of a class action.\textsuperscript{224} The teachings in both \textit{Ault} and \textit{State Farm} clearly were designed to apply to the traditional one-on-one mode of litigation and not specifically to class actions.\textsuperscript{225} While a class action should not alter the fact that liability must still be found and compensatory damages be determined,\textsuperscript{226} the reality that a class action is involved, as well as the nature of the case, cannot be simply ignored either.

\begin{thebibliography}{99}
\item \textsuperscript{215} See \textit{Engle IV}, 853 So. 2d at 451.
\item \textsuperscript{216} See supra note 180 and accompanying text.
\item \textsuperscript{219} See Jack B. Weinstein, \textit{Ethical Dilemmas in Mass Tort Litigation}, 88 \textit{Nw. U. L. REV.} 469, 539 (1994) (federal district court judge maintaining that "in mass tort cases . . . the traditional one-on-one adversarial model of litigation does not apply [and that while] [i]m us t he rality does hold true scales . . . it is not blind, nor should it be.").
\item \textsuperscript{220} 538 So. 2d 454 (Fla. 1989).
\item \textsuperscript{221} \textit{Engle v. Ligget Group}, Inc. (\textit{Engle VI}), No. SC03-1856, slip. op. at 21 (Fla. July 6, 2006).
\item \textsuperscript{222} See \textit{Ault}, 538 So. 2d at 455.
\item \textsuperscript{224} See \textit{id.} at 424-25
\item \textsuperscript{225} See supra note 219 and accompanying text.
\item \textsuperscript{226} \textit{See Engle VI}, No. SC03-1856, slip. op. at 21.
\end{thebibliography}
This, however, seems to be what occurred in Engle. If Ault requires all of the nonparty members of the class to be brought before the court at one time to establish liability, is this a class action and, further, is this even possible? Similarly, if State Farm requires that the amount of compensatory damages for all nonparty members be determined before punitive damages can be awarded to the class as a whole, will this, in reality, foreclose the possibility of punitive damages from ever being awarded in a class action? Obviously, since the Supreme Court of Florida issued the ruling in Ault, it was in the best position to explain how its holding in that case was to be applied to the class context. 227 The fact that it did not attempt to do so is most troubling. While the Supreme Court of Florida may not have been in the same position to reconcile State Farm as it was with Ault, it is important to understand that its conclusion—that the ratio guide post precluded the punitive award 228—was based not on the fact that it found that the ratio guide post was not met, but simply because the ratio calculation could not be performed at the time the award was rendered. 229 Whether State Farm demands such an outcome in any case (not just a class action) seems far from certain 230 but if it does, then this ratio guide post is far and away the most important guide post, despite the repeated pronouncement by the United States Supreme Court in State Farm that the first guide post, reprehensibility, is the most important. 231

2. This Was Engle’s Trial Plan

The trial plan in Engle specifically was designed to determine the punitive damages before determining the compensatory damages owed to the

227. See Ault v. Lohr, 538 So. 2d 454, 456 (Fla. 1989).
228. State Farm I, 538 U.S. at 426.
229. See supra note 212–13 and accompanying text.
230. As noted earlier, one federal circuit court has stated that the guide posts are not to “be treated as an analytical straitjacket.” See supra note 179 and accompanying text. If the ratios are supposedly not “binding” and only “instructive,” how can the inability to perform the ratio be conclusive that a punitive award must be discarded? See State Farm I, 538 U.S. at 425–26. The courts clearly have not totally discarded punitive damages simply because there were no civil or criminal sanctions to which such awards could be compared in accordance with Gore’s third guide post. See Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 683 (Ct. App. 2005) (upholding punitive award despite finding no “convincing analogous civil or criminal penalties that could be imposed for comparable misconduct”); Williams v. Philip Morris Inc. (Williams III), 92 P.3d 126, 145 (Or. Ct. App. 2004) (upholding punitive award despite finding “that the state of Oregon [did] not provide civil sanctions for [the] defendant’s conduct and that the criminal statutes that plaintiff [had] mentioned were not truly comparable”).
231. State Farm I, 538 U.S. at 419 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).
class as a whole. In the past, trial plans had been approved where punitive damages were determined before compensatory damages. Further, separating out common issues as to all class members for the jury to first determine, as was done during Phase 1 of the trial in Engle, is nothing new. While the Third District would acknowledge that it had approved the class certification, it would emphasize that the trial court had made its trial plan after such approval. Notwithstanding such a disclaimer by the Third District, the trial plan in Engle would seem to have been within the trial court's inherent power under Florida law to control and manage the process of litigation before it. Florida courts have the "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions." Moreover, there does not appear to be any Florida authority that existed prior to Engle's $145 billion punitive award suggesting that punitive

---


233. See, e.g., Watson v. Shell Oil Co., 979 F.2d 1014, 1018, 1023 (5th Cir. 1992) (holding that trial plan in mass-tort class action was not invalid on the ground that the plan called for the jury to determine punitive damage liability and then to determine compensatory damages for the class members); Spencer Williams, Mass Tort Class Actions: Going, Going, Gone? 98 F.R.D. 323, 332–33 (1983) (federal district court judge recommending trial plan in mass tort case very similar to the one adopted by the trial court in Engle).

234. See, e.g., In re Copley Pharm., Inc., 161 F.R.D. 456, 464 (D. Wyo. 1995); see also Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 184, 186 (4th Cir. 1993) (affirming conditional class certification in an asbestos-related property damage case of a nationwide class to determine common issues relating to the characteristics of the asbestos products at issue, the defendants' knowledge of asbestos health hazards, and whether the defendants' conduct justified a punitive damages award).

235. See Engle IV, 853 So. 2d at 441.

236. Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978). See also Moossun v. Orlando Reg'l Health Care, 826 So. 2d 945, 954 (Fla. 2002) (Lewis, J., dissenting). As the Supreme Court of Florida has explained: "Inherent power has to do with the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings." In re Petition of Fla. Bar, 61 So. 2d 646, 647 (Fla. 1952). In addition, the Florida Rules of Civil Procedure, particularly Rules 1.200, 1.220, 1.270, 1.280 and 1.380, contain numerous express grants of authority that supplement a Florida court's inherent power to manage litigation. Further, the Third District in Engle IV cited to the Manual for Complex Litigation, which serves as an important judicial reference for complex litigation in state and federal court. Engle IV, 853 So. 2d at 455 n.24 (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.27 (1995)). The Manual encourages an active role by the judiciary in developing an effective trial plan as well as recognizes "[t]he need for special judicial management of mass torts." MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.13, 22.1 (2004).
damages in a multi-stage class action could only be made after all of the compensatory damages were determined.\footnote{237}

3. Florida's Lawsuit Against Big Tobacco

Although technically the State of Florida's lawsuit against the tobacco companies seeking reimbursement for Medicaid expenditures may not have been a class action, the Supreme Court of Florida's decision in \textit{Agency for Health Care Administration v. Associated Industries of Florida, Inc.},\footnote{238} related-
ing to that lawsuit cannot be ignored. Shortly before Florida brought its suit, the Florida Legislature amended Florida’s Medicaid Third-Party Liability Act, making it easier for the State to file and prove any recoupment claims.\footnote{239 See FLA. STAT. § 409.910(6)(a) n.5 (1995).} Prior to the amendment, Florida was limited to recovering Medicaid expenses using the traditional method of subrogation, meaning that since it would be standing in the shoes of the injured party, it would be subject to any defenses that the defendant would have against the injured party.\footnote{240 See Agency for Health Care Admin., 678 So. 2d at 1244 (discussing the history of the 1994 amendment to the Medicaid Third-Party Liability Act). See also Philip C. Patterson & Jennifer M. Philpott, Note, In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation, 66 BROOK. L. REV. 549, 561 (2000).} The amended legislation created a new cause of action that was independent of any right or claim of a Medicaid recipient.\footnote{241 See FLA. STAT. § 409.910(6)(a) (1995); Agency for Health Care Admin., 678 So. 2d at 1248, 1250.} It was also unusual in that it appeared to allow the State to proceed under any theory of recovery.\footnote{242 See FLA. STAT. § 409.910(6)(a) (1995); Agency for Health Care Admin., 678 So. 2d at 1248, 1250.} The amended legislation also provided the State with certain additional advantages: 1) It allowed the State to bring a lawsuit that is very similar to a class action;\footnote{243 See FLA. STAT. § 409.910(6)(a) (1995). “Common-law theories of recovery shall be liberally construed to accomplish this intent.” Id.} 2) it allowed the State to pursue such action against a third party, or aggregate third parties without identifying each individual member of the class;\footnote{244 Id. § 409.910(9)(a).} 3) it prevented such third parties from asserting defenses such as assumption of risk and comparative fault;\footnote{245 Id. § 409.910(9)(a).} 4) it allowed the State to pursue its claim under both the market share liability theory,\footnote{246 FLA. STAT. § 409.910(9)(b).} as well as the joint and several liability theory;\footnote{247 Id. § 409.910(1) (1995).} 5) it allowed the State to use statistical analysis in proving its case against third parties,\footnote{248 Id. § 409.910(9).} and 6) it allowed the State to sue on claims that had already been extinguished by the passage of time, by abolishing the statute of repose defense in such suits.\footnote{249 Id. § 409.910(12)(h).} The Supreme Court of Florida ruled on a facial challenge to the constitutionality of the Medicaid Third-Party Liability Act in Agency for Health Care Administration, and largely upheld the Act.\footnote{250 See Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239, 1256–57 (Fla. 1996).}
ity, but that the Act only applied to causes of action that accrued after the effective date of the amendments to the Act.\textsuperscript{251} The court also held that the elimination of affirmative defenses under the Act was not facially unconstitutional as a violation of due process,\textsuperscript{252} since new causes of action do not have to offer defendants all of the usual defenses and there is no absolute prohibition against the elimination of all affirmative defenses.\textsuperscript{253} The court further upheld the joinder of claims in order to promote judicial efficiency,\textsuperscript{254} as well as the use of statistical evidence to prove causation.\textsuperscript{255} The court, however, did find that the provision granting the State authority to pursue an action without identifying individual Medicaid recipients must be stricken as encroaching on due process rights.\textsuperscript{256} In addition, the court modified the State’s abolition of the statute of repose such that Florida could not resurrect a claim that was already time barred when the Act was amended.\textsuperscript{257} Furthermore, the court held that the State must use either a theory of market share liability or joint and several liability, but not both.\textsuperscript{258} Clearly, the Supreme Court of Florida would allow the State of Florida a good deal of flexibility in presenting its case against Big Tobacco.\textsuperscript{259}

4. Third District’s Prior \textit{Broin} Case

The Third District’s prior decision in \textit{Broin v. Philip Morris Co.},\textsuperscript{260} established the background for what would occur in \textit{Engle}, although it did not involve an award of punitive damages.\textsuperscript{261} In \textit{Broin}, a class action was brought against tobacco companies, and the class was represented by the same plaintiffs’ counsel as in \textit{Engle IV}.\textsuperscript{262} The class in \textit{Broin}, however, did not consist of smokers, but of nonsmoking flight attendants that were allegedly injured by secondhand smoke.\textsuperscript{263} After the trial court granted the to-

\textsuperscript{251} See id. at 1250.
\textsuperscript{252} Id. at 1251.
\textsuperscript{253} See id.
\textsuperscript{254} See id. at 1255.
\textsuperscript{255} See Agency for Health Care Admin., 678 So. 2d. at 1250.
\textsuperscript{256} Id. at 1254.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at 1255–56.
\textsuperscript{259} See id.
\textsuperscript{260} 641 So. 2d 888 (Fla. 3rd Dist. Ct. App. 1994).
\textsuperscript{261} See id. at 889.
\textsuperscript{262} Compare id. at 889, with Liggett Group Inc. v. Engle (\textit{Engle IV}), 853 So. 2d 434, 440 (Fla. 3d Dist. Ct. App. 2003), app’d in part, quashed in part, rem’d, No. SC03-1856 (Fla. July 6, 2006).
\textsuperscript{263} Broin, 641 So. 2d at 889.
bacco companies' motion to dismiss the class' allegations, the Third District reversed and remanded the case with an order to reinstate them.\(^{264}\) In so doing, the Third District found that the case raised common issues as to all class members and listed the following as examples:

1. How much exposure to secondhand smoke causes disease?
2. Whether and when the tobacco industry knew that exposure to secondhand smoke caused injury?
3. Whether studies conducted by the tobacco industry provide information about the dangers of secondhand smoke?
4. Whether the tobacco industry misrepresented data on secondhand smoking hazards and conspired to distort such information?
5. Whether the tobacco industry has a duty to warn nonsmokers that exposure to passive cigarette smoke could cause serious health problems?\(^{265}\)

The Third District also made certain other key rulings in *Broin*: 1) that “[P]laintiffs’ legal claims need not be completely identical;”\(^{266}\) 2) that “[d]ifferences among the class members as to applicable statutes of limitations [did] not require dismissal of [the] class action;”\(^{267}\) 3) that even though different choice of law provisions might govern, that did not defeat class certification;\(^{268}\) and 4) that “[e]ntitlement to different amounts of damages [was] not fatal to [the] class action.”\(^{269}\) Upon remand, the trial commenced\(^{270}\) and the parties eventually reached a settlement.\(^{271}\) The Supreme

\(^{264}\) Id. at 892.
\(^{265}\) Id. at 890. The Third District noted “that the common issues [were] potentially dispositive of the case. If defendants prevail[ed] on [those] issues, the individual claims [would] be rendered moot.” *Id.*
\(^{266}\) *Id.*
\(^{267}\) *Broin*, 641 So. 2d at 891.
\(^{268}\) Id. at 891 n.2.
\(^{269}\) *Id.* at 891. The court noted that subclasses could be utilized to address many of these items if they presented a problem. *See id.* at 891 n.2.
\(^{270}\) One observer noted that *Broin* “was historic for being the first class action to reach trial against the tobacco industry.” Brian H. Barr, Note, *Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 Fla. St. U. L. Rev. 787, 805 (2001).
\(^{271}\) *Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24, 27 (Fla. 3d. Dist. Ct. App. 1999). Under the settlement agreement the tobacco makers agreed, *inter alia*, to “support Federal legislation that would impose a smoking ban on all international flights . . . and establish a
Court of Florida’s criticism of the Third District’s change in position regarding class certification seems even more justified in light of Broin.272

5. Possible Solution to “Overkill” Problem?

The Supreme Court of Florida has specifically rejected the argument that punitive damages should be barred in mass tort cases to prevent “overkill,” which presumably would result from “multiple punitive damage awards against a single defendant for the same course of conduct.”273 It seems that there is not any reason to take a different position with respect to an award of punitive damages in a class action. In fact, many have endorsed class actions as a solution to the problems resulting from multiple punitive damages awards.274 Some have even gone further and suggested use of a

$300 million settlement fund to endow a foundation to sponsor scientific research for early detection and cure of diseases of flight attendants caused by cigarette smoke.” Id. The individual class members would not be entitled to any monies under the terms of the settlement agreement, but would “retain the right to bring individual claims for compensatory damages [and not punitive damages which were waived] on any theory of liability other than fraud, misrepresentation, or any other willful or intentional conduct.” Id.

272. See Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 31 (Fla. July 6, 2006). “Invalidating the completed class action proceedings on manageability and superiority grounds after a trial has occurred does not accord with common sense or logic.” Id.

273. W.R. Grace & Co. v. Waters, 638 So. 2d 502, 504 (Fla. 1994). The term “overkill” was first used by the Second Circuit in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). According to one California appellate court, “every appellate court in the nation to consider the argument that punitive damages should be barred in mass tort cases to prevent ‘overkill’ has rejected the idea.” Stevens v. Owens-Corning Fiberglas Corp., 57 Cal. Rptr. 2d 525, 541–42 (Ct. App. 1996). Moreover, the Supreme Court of Kentucky observed “the [United States] Supreme Court has been afforded numerous opportunities to address the issue [of duplicative punitive damages in the context of a mass tort] and, to date, has declined to do so.” Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 413 (Ky. 1998). It would be noted that in addition to “overkill”, the term “windfall” describes another problem with adjudicating punitive damage awards in individual suits. Int’l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 59 (1979) (Blackman, J., concurring). It refers to the arbitrariness of such awards, since juries are usually accorded “broad discretion both as to the imposition and amount of such damages.” Id. at 50. It also refers to the situation in which giving punitive awards to early plaintiffs will risk the possibility that later plaintiffs will not be able to obtain compensatory damages from that same defendant. See Dunn v. HOVIC, 1 F.3d 1371, 1394–95 (3d Cir. 1993) (Weis, J., dissenting) (noting that the dispensing of punitive damages has resulted in the “increased . . . likelihood that future claimants will not be able to recover for their injuries”).

274. Both the American Bar Association and the American Law Institute have endorsed class action lawsuits as the best solution to the multiple punitive damages problem. See 2 AMERICAN LAW INSTITUTE, REPORTERS’ STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL...
“mandatory class action” on the issue of punitive damages in mass tort cases.

INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 260-65, 412-39 (1991); AMERICAN BAR ASS’N, REVISED FINAL REPORT AND RECOMMENDATIONS OF THE COMM’N ON MASS TORTS 54–55 (1989). So too have others. See generally Semra Mesulam, Note, Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class, 104 COLUM. L. REV. 1114, 1140–41 (2004) (suggesting that “[t]he punitive damages class is the only mechanism that can, within the constraints of constitutional process, protect the rights and interests of both plaintiffs and defendants”); Howard A. Denemark, Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant, 63 OHIO ST. L.J. 931, 967 (2002) (“The problem [of multiple awards] simply disappears if all plaintiffs are joined into one class action.”); Richard A. Nagareda, Punitive Damage Class Actions and the Baseline of Tort, 36 WAKE FOREST L. REV. 943, 944, 955–57 (2001) (stating that class actions are the best solution to the multiple punitive damages problem); Jonathan Hadley Koenig, Note, Punitive Damage “Overkill” After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution, 36 WM. & MARY L. REV. 751, 782 (1995) (stating that “only comprehensive class action reform promises a significantly more fair and more rational approach to the adjudication of punitive damage claims in mass tort litigation”); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 20–26 (1989) (proposing class actions as the remedy to multiple punitive damages awards); J.K. Ivey, Punitive Damages in Mass Product Liability Cases: Hope for Reform? 6 REV. LITIG. 69, 91 (1987) (stating that “a class determination of punitive awards” in federal courts is viable after Jenkins); Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 KY. L.J. 1, 102 (1985) (noting that “a class action [for punitive damages] lessens the risk of overkill because a single resolution of the punitive damages issue enables the judge and jury to carefully consider the matter and award the total amount necessary to both punish the defendant and deter others”); Note, Class Actions for Punitive Damages, 81 MICH. L. REV. 1787, 1788 (1983) (asserting that a class action is the best way to resolve mass-tort punitive damage claims).

275. See In re Exxon Valdez (Exxon Valdez I), 229 F. 3d 790, 795–96 (9th Cir. 2000). According to the Ninth Circuit, “[m]andatory class actions avoid the unfairness that results when a few plaintiffs—those who win the race to the courthouse—bankrupt a defendant early in the litigation process. They also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct.” Id.; see also Elizabeth J. Cabraser & Thomas M. Sobol, Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims, 74 TUL. L. REV. 2005, 2031 (2000) (“The certification of a mandatory class with respect to punitive damages claims [will] insure[] defendants that the ultimate award . . . will . . . be proportional to the course of conduct at issue . . . [and that it] will be distributed equitably among the affected class.”); Jerry J. Phillips, Multiple Punitive Damage Awards, 39 VILL. L. REV. 433, 446 (1994) (“[O]nly . . . the mandatory class action, provides a vehicle with which to control multiple punitive damage awards.”); Briggs L. Tobin, Comment, The “Limited Generosity” Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts, 38 EMORY L.J. 457, 465 (1989).

A class action approach to the adjudication of mass-tort punitive damage claims both preserves the benefits underlying the doctrine of punitive damages and solves the problems caused by individual adjudication of these claims . . . [but] the class must be a
6. *Jenkins* Shows No Federal Infirmitity

The trial court plan in *Engle* does not appear to suffer from any type of constitutional infirmity under federal law as well. Although *Jenkins v. Raymark Industries, Inc.* was decided prior to *State Farm*, the Fifth Circuit rejected the argument that under either federal or Texas law, punitive damages could not be determined separately from actual damages in a class action. The case involved a class of plaintiffs with asbestos-related claims who brought an action against thirteen different defendants. The Federal Appeals Court refused to accept the defendants' argument that the culpability of their conduct needed to be evaluated relative to each plaintiff, explaining as follows:

The purpose of punitive damages is not to compensate the victim but to create a deterrence to the defendant, and to protect the public interest. The focus is on the defendant's conduct, rather than on the plaintiff's. While no plaintiff may receive an award of punitive damages without proving that he suffered actual damages, the allocation need not be made concurrently with an evaluation of the defendant's conduct. The relative timing of these assessments is not critical.  

---

mandatory class binding upon all members of the class regardless of whether they have joined in the proceeding.  


277. 782 F.2d 468 (5th Cir. 1986).  

278. *Id.* at 474.  

279. *Id.* at 469.  

280. *Id.* at 474 (citations omitted). For the appellate court, the trial court's "plan [was] clearly superior" to re-litigating the same issue over many times. *Id.* at 473.
7. Class Reps Were Awarded Compensatories

Prior to State Farm, federal law also did not appear to prohibit an award of punitive damages in a class action where representative class members were awarded compensatory damages with such punitive damages. The Sixth Circuit made its position clear in Sterling v. Velsicol Chemical Corp.\textsuperscript{281} that, “[a trial] court need not defer its award of punitive damages prior to determining compensatory damages for the entire class . . . [s]o long as the court determines the defendant’s liability and awards representative class members compensatory damages.”\textsuperscript{282} If so, was there a problem in Engle where representative class members were awarded compensatory damages along with the award of punitive damages?

8. State Farm’s Impact Seems Questionable

To suggest that State Farm prohibits a class claim for punitive damages seems most questionable. As noted, State Farm was not a class action nor did the United States Supreme Court even attempt to address how its teachings were to be applied in that context. Further, at least one court has already rejected the argument that State Farm precludes a class claim for punitive damages.\textsuperscript{283} In Dukes v. Wal-Mart Stores, Inc.,\textsuperscript{284} the federal district court rejected such contention explaining as follows:

[Defendant] also argues that [p]laintiffs’ class claim for punitive damages is foreclosed by the Supreme Court’s recent decision in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003). Nothing in State Farm, however, supports this supposition. In State Farm the Court held that a punitive damage award in an individual action improperly punished the defendant for conduct that “bore no relation to the [plaintiff’s] harm.” \textit{Id.} at 422, 123 S.Ct. 1513. Specifically, it found that the jury improperly considered conduct by [the defen-

\begin{itemize}
\item \textsuperscript{281} 855 F.2d 1188 (6th Cir. 1988).
\item \textsuperscript{282} \textit{Id.} at 1217.
\item \textsuperscript{283} Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal. 2004). \textit{Dukes} involved the largest employment discrimination class action in American history, consisting of at least 1.5 million women in the putative class. Linda S. Mullenix, Complex Litigation: To (b)(2) or not to (b)(2)?, \textit{Nat’l L.J.}, July 26, 2004, at 12.
\item \textsuperscript{284} 222 F.R.D. 137 (N.D. Cal. 2004).
\end{itemize}
dant] that occurred in other states and did not directly affect the plaintiff. Id. at 422–23, 123 S.Ct. 1513. As such, it underscored the basic proposition that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Id. at 423, 123 S.Ct. 1513. Such a principle is not, as [defendant] suggests, incompatible with the recovery of punitive damages in a class action.

First, courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class. Second, as [plaintiffs] propose here, courts can limit recovery of any punitive damages to those class members who actually recover an award of [damages], and thus can demonstrate that they were in fact personally harmed by the defendant's conduct. Finally, courts also can ensure that any punitive damage award is allocated among the . . . class in reasonable proportion to individual [damages] awards. Accordingly, this Court is satisfied that procedures exist that permit [plaintiffs] punitive damage claim to be managed in a manner fully consistent with the principles of State Farm.285

9. Individualized Entitlement to Punitive Damages?

In Engle IV, the Third District's pronouncement that "[t]he defendants [were] entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member [was] entitled to receive punitive damages" is most questionable.286 Although the Supreme Court of Florida would not specifically state this, some undoubtedly will say that its action in discarding the punitive award suggests as such. This might

285. Id. at 172. But cf. In re Simon II Litig. (Simon II), 407 F.3d 125, 138 (2d Cir. 2005). Simon II suggests that State Farm demands:
   In certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages,... [a class] certification order... [must] ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms. Id. According to one litigant, State Farm may have "unintentionally strengthened the prospects for class certification of issues relating to punitive damages" since the guide posts "focus primarily on defendants' conduct and self-consciously strive to systematize the determination of punitive damages in all courts and cases." Elizabeth J. Cabraser, The Class Action Counterreformation, 57 STAN. L. REV. 1475, 1507 (2005).


https://nsuworks.nova.edu/nlr/vol31/iss1/1
be a legitimate argument if referring to compensatory damages. However, does it apply to punitive damages? As the Fifth Circuit in *Jenkins* had stated, punitive damages are not meant to compensate the victim; they are designed to vindicate the public interest. Awarding punitive damages to private citizens is justified as a necessary incentive to accomplish the goals of punishing a defendant who has engaged in outrageous conduct, and deterring that defendant—as well as others—from engaging in such misconduct in the future. The fact that courts have recognized the legitimacy of certifying a class solely for punitive—and not compensatory—damages is

---

287. See Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319–21 (5th Cir. 1998) (rejecting district court’s trial plan as inconsistent with state law because it did not entail an individual inquiry into each member’s actual damages).

288. Again, wouldn’t this defeat one of the primary benefits of bringing a class action, if the Third District is correct and individual determinations were required? See Maenner v. St. Paul Fire & Marine Ins. Co., 127 F.R.D. 488, 491 (W.D. Mich. 1989) (“Defendants’ proposal . . . that all issues of liability and damages be tried together . . . would effectively defeat the class-action treatment of this case.”).

289. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986). This is true under Florida law as well since the “[award of] punitive damages is for the public benefit or collective good . . . [and] will reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole.” *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999) (citing *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986)); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358–59 (11th Cir. 1996)); see also *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982). Punitive damages are to be determined “entirely aside from the measure of compensation for the injured plaintiff.” *Id.*

290. See *State Farm Mut. Auto. Ins. Co. v. Campbell* (*State Farm I*), 538 U.S. 408, 416 (2003). “Compensatory damages are ‘intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct’” while “punitive damages serve a broader function . . . aimed at deterrence and retribution.” *Id.* (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). Punitive damages “are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); *Engle IV*, 853 So. 2d at 468 (“The plaintiffs, as private parties, do not have a ‘right’ to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence.”).

clearly reflective of the fact that such individual determinations are not considered to be required with respect to them.\(^{292}\)

10. Individualized Proof of Punitive Damages?

Tenth, it is also clear that courts have approved various methods of determining compensatory damages on the basis of class-wide, as opposed to individualized, proof of damages.\(^{293}\) In so doing, the courts rejected the de-
fendants’ argument that they have a right to an individual determination of such damages.\(^{294}\) The Third District’s holding in *Engle IV*, that the tobacco defendants had a right to an individualized determination with respect to punitive damages, is therefore questionable from this perspective as well.\(^{295}\) Further, should a wrongdoer be able to avoid punitive damages simply because the harm it caused may have been difficult to prove or value? This is clearly not the case with respect to compensatory damages.\(^{296}\) Under Florida law, any “difficulty in proving [compensatory] damages or uncertainty as to [their] amount will not prevent recovery”\(^{297}\) “where it is clear that substantial damages were suffered and there is a reasonable basis in evidence for the amount awarded.”\(^{298}\) Other jurisdictions have come to similar conclusions.\(^{299}\) One rationale is that a wrongdoer is not able to escape liability sim-

the tobacco companies was, in essence, a class action, and both the Florida Legislature and the Supreme Court of Florida approved of the use of statistical evidence being used in that case. See Fla. Stat. § 409.910(9)(b) (1995) (section omitted pursuant to Fla. HB 3077, § 1 (1997)); see Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239, 1256 (Fla. 1996).

294. See Long v. Trans World Airlines, Inc., 761 F. Supp. 1320, 1325 (N.D. Ill. 1991) (“[T]o the extent defendant argues in this case that . . . it has an absolute right to individualized determinations of damages, its contention must be rejected as contrary to the case law and to the policies governing class actions.”); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D. N.Y. 1971) (“[T]he court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages.”).

295. See Liggett Group, Inc. v. Engle (*Engle IV*), 853 So. 2d 434, 453 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006) (“The defendants are entitled to a jury determination, on an individualized basis.”). Further, would it be constitutionally impermissible to use some method to determine the ratio of compensatories to punitive in a class action based on other than individual proof of such damages?


297. Schimpf, 691 So. 2d at 580.

298. Adams, 352 So. 2d at 78.

299. See Bigelow, 327 U.S. at 264; BE&K Constr. Co., 156 F.3d at 770; Sir Speedy, Inc., 957 F.2d at 1038; Broan Mfg. Co., 923 F.2d at 1240; Hoffer Oil Corp., 34 F.2d at 592; Long-Lewis, Inc., 551 So. 2d at 1027; Romer, 449 A.2d at 1100; DeSombre, 118 N.W.2d at 873; Weinglass, 155 A. at 440; Uhrich Millwork, Ltd., 261 P. at 562.
ply because the harm caused is difficult to prove or value. Could that logic have any application to a punitive damage award? Should a wrongdoer be able to avoid a punitive damage award simply because the harm it may have caused was so great that it either was impossible to determine or might take years to ascertain?

11. What Is Really Proper Analysis?

As one federal district court observed, “the proper analysis is not always simply a comparison of punitive damages to the amount of compensatory damages actually awarded by the jury.” In *Gore*, the United States Supreme Court reiterated that “the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.” Furthermore, the Supreme Court of California, in *Simon v. San Paolo U.S. Holding Co.*, suggested that the *Gore* inquiry still holds true, even after *State Farm I*. California’s highest court explained that in *State Farm I* “the [United States Supreme] [C]ourt referred to the relationship between punitive damages and both ‘the amount of harm’ and ‘the general damages recovered,’ impliedly recognizing that these two are not always identical.” The Supreme Court of California also noted that in “discussing

---

300. *See Bigelow*, 327 U.S. at 264–65; Thompson v. Haynes, 305 F.3d 1369, 1380 (Fed. Cir. 2002); *Be&K Constr. Co.*, 156 F.3d at 770; Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir. 1986).


302. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (emphasis omitted)). In *TXO*, the jury awarded the plaintiff $19,000 in compensatory damages for slander of title, plus $10 million in punitive damages, roughly 526 times the compensatory damages award. 509 U.S. at 446. Nonetheless, and despite its suggestion just two years earlier in *Pacific Mutual Life Insurance Co. v. Haslip* that a 4 to 1 ratio was close to the line, the United States Supreme Court affirmed the award, holding that the punitive damages were not so “grossly excessive” as to be beyond the power of the State to allow.” *Id.* at 462; *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991). While the Court acknowledged the “dramatic disparity between the [punitive] damages,” it concluded that “in light of the amount of money potentially at stake, the bad faith of [the defendant], the fact that the scheme employed . . . was part of a larger pattern of fraud, trickery, and deceit, and [the defendant’s] wealth,” the punitive damages award did not violate due process. *TXO Prod. Corp.*, 509 U.S. at 462.

303. 113 P.3d 63 (Cal. 2005).

304. *Id.* at 71 (discussing State Farm Mut. Auto. Ins. Co. v. Campbell (*State Farm I*), 538 U.S. 408 (2003)).

305. *Id.* (citing *State Farm I*, 538 U.S. at 426).
the second [Gore] ‘guide post,' the [nation’s] high [C]ourt [in State Farm I] spoke repeatedly of a proportionality between punitive damages and the harm or ‘potential harm’ suffered by the plaintiff.’

According to the Supreme Court of California, “United States Supreme Court precedents [including State Farm I] appear to contemplate, in some circumstances, the use of measures of harm beyond the compensatory damages.” As a result, “federal and state courts have, in a variety of factual contexts, considered uncompensated or potential harm as part of the predicate for a punitive damages award.”

The Supreme Court of California makes a convincing argument that, upon closer analysis, is actually supported by State Farm I, as well as other Supreme Court precedents. In evaluating the excessiveness of a punitive award, the amount of the compensatory damages awarded may not always be indicative of the harm caused; therefore, should courts consider the potential harm as well?

12. Calculation Could Have Been Deferred

Finally, and probably most important, it is clear that a calculation of punitive damages could have been taken after all the compensatory damages

306. Id. (citing State Farm I, 538 U.S. at 418, 424).
307. Id.
308. San Paolo U.S. Holding Co., 113 P.3d at 71; see Gensler, supra note 292, at 342–43. Gensler contends that “State Farm, like the previous decisions, does not specifically identify what figure is to be the denominator in the ratio calculation[s],” while theorizing that it was still possible that the denominator could be “the total harm the defendant caused or intended to cause, or the defendant’s total gain from a course of misconduct.” Id. (emphasis omitted) (footnote omitted). Furthermore, Catherine M. Sharkey, in a relevant article on punitive damages, argued that even though State Farm I states that:

“[A] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages” . . . [and] in discussing the relationship “between harm, or potential harm, to the plaintiff and the punitive damages award,” the [United States Supreme] Court seems to contemplate explicitly the use of “harm to the people of Utah,” at least in cases where such an “adverse effect on the State’s general population” could be shown.


310. See In re Exxon Valdez (Exxon Valdez II), 296 F. Supp. 2d 1071, 1076 (D. Alaska 2004). The court opined “that State Farm [I], while bringing the [Gore] guideposts into sharper focus, does not change the analysis.” Id.
were determined. In fact, after the Phase 2 verdicts, a case involving a sick smoker was allowed to proceed to trial in accordance with the Engle trial plan, after which the jury awarded the smoker $37.5 million in compensatory damages. Although this case was thought to be a possible preview of suits to come, it apparently was the only one. Such individual tobacco cases, however, clearly have been allowed to proceed. Further, is not the ruling by the Supreme Court of Florida in Engle VI in reality allowing such individual tobacco cases to proceed, but simply without the bonus of the punitive damages award already determined?

C. The Third Guide Post

The third guide post is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable

311. See, e.g., Gordon Fairclough, Reynolds Ordered to Pay $15 Million—Scale of Punitive Award Heightens Threat Lawsuits Pose to Tobacco Industry, WALL ST. J., June 24, 2002, at A6 [hereinafter Fairclough, Reynolds Ordered to Pay].

312. See Jay Weaver, Jury Awards Smoker $37.5 Million, MIAMI HERALD, June 12, 2002, at 1A.

313. Fairclough, Reynolds Ordered to Pay, supra note 311.

314. See R.J. Reynolds Tobacco Co. v. Engle (Engle I), 672 So. 2d 39, 42 (Fla. 3d Dist. Ct. App. 1996). This clearly seems to be what the Third District contemplated in its original opinion in Engle I, modifying the order certifying a nationwide class to "manageable proportions" by restricting the class to Florida smokers. Id. In its opinion, the Third District recognized that while "certain individual issues [would] have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class [would] clearly predominate over the individual issues." Id. at 41. Incidentally, Broin v. Philip Morris Co. appears to support such an outcome, although it did not involve punitive damages and was a settlement as opposed to a verdict. 641 So. 2d 888 (Fla. 3d Dist. Ct. App. 1994). As noted, while the individual class members in that case were not entitled to any money under the terms of the settlement agreement, they did, however, have the right to bring individual claims. See Philip Morris Inc. v. French, 897 So. 2d 480, 483–84 (Fla. 3d Dist. Ct. App. 2004). A number of class members appear to have instituted their own suits following the settlement in Broin. Id. ("Following the [Broin] settlement, over 3,000 flight attendants brought individual suits against the tobacco defendants for the claims retained by the agreement.").

315. Moreover, if there was true concern that the $145 billion punitive award would "frustrate the societal interest in protecting all injured claimants' rights to at least recover compensatory damages," as claimed by the Third District in Liggett Group Inc. v. Engle (Engle IV), payment of the punitive damage award could have been stayed until the compensatory damages were determined and satisfied. 853 So. 2d 434, 458 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006); see Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. 1993) (noting that trial courts in asbestos litigation had deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages [were] paid").
The real purpose of this guide post is to determine whether or not the defendant has "fair notice" that the wrongful conduct entailed the resulting punitive award. Prior to the historical award in *Engle* it could be argued that the tobacco defendants in that case had "fair notice" from several different avenues.

1. Punitive Awards in Individual Cases

In *Gore*, it was significant to the United States Supreme Court that at the time the dispute arose between the plaintiff and the defendant, "there [did] not appear to have been any judicial decision in Alabama or elsewhere indicating that [the defendant's conduct] might give rise to such severe punishment." The same is not true for *Engle*. While, prior to the *Engle* verdict, there were no comparable punitive awards in a class action composed of injured smokers as in that case, there were, however, punitive awards in comparable individual civil suits.

In 1998, a Florida jury awarded $450,000 in punitive damages to the family of a deceased smoker who had died of a smoking-related injury. In 1999, a California jury awarded $50 million in punitive damages to an injured smoker—although the award would eventually be reduced to $9 mil-

---

317. *See id. at 417; Gore*, 517 U.S. at 587.
319. *See Lee v. Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (noting that "it is appropriate for [the court] to examine punitive damage awards in similar cases" in reference to *Gore*'s third guide post); *see also St. John v. Coisman*, 799 So. 2d 1110, 1115 (Fla. 5th Dist. Ct. App. 2001) (stating that "[a]s the United States Supreme Court noted in *Gore*, this last factor is a broad one, which takes into account many circumstances, including fair notice to the defendant that he can expect to be hit with a punitive damage[s] award similar to the one actually imposed"). Unlike civil penalties or criminal sanctions, other punitive awards would appear more valuable because they should provide ""fair notice not only of the conduct that will subject [the defendant] to punishment, but also of the severity of the penalty that a State may impose."" *State Farm I*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).
320. Vivian Wakefield, *Verdict Is Heard Worldwide: Tobacco Penalty Boosts Cigarette Foes*, FLA. TIMES-UNION, June 12, 1998, at B1. It would be noted that since the family had been awarded $500,000 in compensatory damages, bringing the total verdict to $950,000, the case clearly satisfied *State Farm I* in terms of the ratio between punitive and compensatory damages, since it was less than 1 to 1. *See id.*
321. Henley v. Philip Morris Inc. (*Henley I*), 113 Cal. Rptr. 2d 494, 496 (Ct. App. 2001). This was the *Henley* case discussed earlier.
lion because of *State Farm I*. Later, in 1999, an Oregon jury would award $79.5 million in punitive damages to the family of another smoker who had died of a smoking-related injury. In 2000, prior to the *Engle* punitive award, another California jury would award $20 million in punitive damages to a sick smoker, although the verdict would be reversed on other grounds.

Prior to the punitive award in *Engle*, punitive awards of $450,000, $50 million, $79.5 million, and $20 million had been rendered against

---

322. See supra notes 68–78 and accompanying text.
323. This was the *Williams* case discussed earlier. See supra notes 80–91 and accompanying text. Although the Supreme Court of Oregon has upheld the $79.5 million punitive award, even in light of *State Farm I*, as noted, the United States Supreme Court accepted jurisdiction to review this issue, see *Philip Morris USA v. Williams*, No. 05-1256 (Or. Mar. 30, 2006), and it remains to be seen if the entire punitive award will be allowed to stand. Since the compensatory damages in *Williams III* were only $521,485.80, which was stated to be a ratio of punitive damages to compensatory damages of 96 to 1, see 92 P.3d at 130, 144, the United States Supreme Court may still yet find that the $79.5 million punitive award is “unconstitutionally excessive.” *Cf. Williams v. Philip Morris Inc.* (*Williams V*), 127 P.3d 1165, 1182 (Or. 2006). Assuming, arguendo, that a minimum ratio of 1 to 1, and a maximum ratio of 10 to 1, and that the $521,485.80 in compensatory damages that were ultimately awarded in that case had to be used, a court could find that an appropriate punitive award would fall somewhere between $500,000 and $5 million.

325. Whiteley, 11 Cal. Rptr. 3d at 864; *Smoker Cancer Award Returned for Retrial*, WALL ST. J., Apr. 8, 2004 at 1. In *Whiteley*, plaintiffs, husband and wife, filed suit against two cigarette manufacturers after the wife was diagnosed with lung cancer, alleging claims based on various theories of fraud. 11 Cal. Rptr. 3d at 812, 819. After a jury would award the plaintiffs about $1.7 million in compensatory damages, and $20 million in punitive damages, *id.* at 819–20, the two cigarette manufacturers would appeal claiming, inter alia, that they could not “be liable for fraud, negligent design, or other such product liability claims based on conduct occurring from January 1, 1988 to January 1, 1998” because of a former state immunity statute *California Civil Code* § 1714.45. *Id.* at 812–13. The appellate court would agree with the cigarette manufacturers that the immunity statute provided them complete immunity for the ten-year period and find that the trial court erred in refusing to instruct the jury that it could not base liability upon any of their conduct occurring within such period. *Id.* at 812–13. Consequently, the appellate court would reverse the judgment in favor of plaintiffs and remand the case to the trial court for further proceedings in accordance with its opinion. *Id.* at 864. The court mentioned that while it found it unnecessary to address the manufacturers’ challenge to the punitive damages award, it noted that the trial court would “doubtless be guided by” the United States Supreme Court’s decision in *State Farm I*. *Whiteley*, 11 Cal. Rptr. 3d at 864. This seems to suggest that the appeals court believed that *State Farm I* would have required the $20 million punitive damages award, which was approximately twelve times the $1.7 million compensatory damages award, to be reduced. Again, assuming a minimum ratio of 1 to 1 and a maximum ratio of 10 to 1, the punitive award would fall somewhere between $1.7 million to $10.7 million.

326. Wakefield, supra note 320.
the cigarette makers. Could these awards have provided "fair notice" to the tobacco defendants in Engle that their conduct could subject them to punitive damages? And, if so, did such punitive awards provide them "fair notice" as to the severity of such an award? The former would certainly seem the case even though the $450,000 award was the only award rendered in Florida, the $50 million award was reduced to $9 million, the $79.5 million award may still yet be reduced, and the $20 million award has been com-

329. Whiteley, 11 Cal. Rptr. 3d at 820.
331. There does not appear to be any reason why verdicts against cigarette manufacturers in jurisdictions outside of Florida are not relevant for this purpose. Nonetheless, it should be noted that at the time Engle was filed, Florida had a statutory presumption of excessiveness of any punitive damage awards exceeding three times the amount of compensatory damages in cases based on negligence, strict liability, products liability, and breach of warranty. See Fla. Stat. § 768.73(1)(a)-(b) (1997) (amended 1999) (although the wording of the statute has since changed, this version was applicable to Engle); Engle IV, 853 So. 2d at 434. The statutory presumption, however, did not apply to class action suits, and therefore was not an issue in Engle IV. § 768.73(1)(a) (1997) (amended 1999). Nevertheless, if Engle is to be compared to individual suits where punitive damages were awarded, this statutory presumption must be taken into account. The presumption, however, was hardly conclusive and could be overcome if the claimant demonstrated, by clear and convincing evidence, that the specific circumstances justify the award. § 768.73(1)(b) (1997) (amended 1999). A case illustrating the statutory presumption of excessiveness being overcome by a claimant is Owens-Corning Fiberglas Corp. v. Ballard, a decision rendered by the Supreme Court of Florida one year before the Engle verdict. 749 So. 2d 483, 483–84 (Fla. 1999). In Ballard, Florida's highest court upheld a $31 million punitive damages award to a claimant in an asbestos case even though it was almost eighteen times the $1.8 million compensatory damages award. Id. at 484–85, 488–89. The court found that the presumption of excessiveness was overcome by clear and convincing evidence that the asbestos manufacturer's conduct was egregious, and exhibited a flagrant disregard for the safety of persons exposed to asbestos products. Id. at 483, 488–89. This raises another question: Could the verdict in Engle be compared with punitive damage awards in asbestos cases? There is a much longer line of decisions awarding punitive damages in asbestos cases than in tobacco litigation. See generally GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW, ch. 20 (1993) (explaining the history of punitive damages in asbestos litigation). It is apparently claimed by some that the "disease processes" in asbestos and tobacco cases are similar, although the warning and liability issues might be different. See Carrie Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 CORNELL L. REV. 1159, 1181 n.92 (1995). Further, it has been stated that "the asbestos industry [has] engaged in a pattern of deception remarkably similar to that of the tobacco industry." Arthur B. LaFrance, Tobacco Litigation: Smoke, Mirrors and Public Policy, 26 AM. J.L. & MED. 187, 194 (2000).
pletely overturned. The latter would also appear true if one undertook simple arithmetic. Taking the Engle plaintiffs' apparent initial estimate of a class size of 300,000, this would amount to $483,000 per class member based on that $145 billion punitive award. Further, if the plaintiffs' subsequent estimate of a class size of 700,000 is more accurate, this figure would be less than half that amount, or approximately $207,000 per class member. Based on comparable smoking-related verdicts in individual suits, the cigarette makers appear to have no basis to complain about any disparity with respect to the punitive award in Engle.

333. It would seem that the amount of any other punitive damages awarded against a cigarette manufacturer, or an award with which the cigarette manufacturer was threatened, would be relevant in this regard.

334. Engle IV, 853 So. 2d at 443.

335. Id.

336. Although punitive awards are still being challenged in most of the cases, awards rendered after the one in Engle also do not help the cigarette makers' case in regard to any disparity. One punitive award that has survived such a challenge, however, occurred in 2001, the year following Engle IV. See Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 645–46 (Ct. App. 2005), cert. denied, 126 S. Ct. 1567, 1567 (2006). In Boeken v. Philip Morris Inc., a California jury awarded a sick smoker over $5.5 million in general damages and $3 billion in punitives, although the punitive award was reduced first to $100 million, and later to $50 million. Id. The $50 million punitive award, which exceeded the 4 to 1 ratio but was less than 10 to 1, stood after the United States Supreme Court declined to intervene. There were a number of other punitive awards against the cigarette makers following the one in Engle and Boeken. In 2002, an Oregon jury ordered a cigarette maker to pay $150 million in punitives in the case of a smoker who died of a smoking-related injury. Estate of Schwarz v. Philip Morris Inc., 135 P.3d 409, 414 (Or. Ct. App. 2006). Ultimately, the state court of appeals vacated the judgment for punitive damages and remanded for a new trial on the amount of those damages, basing its decision on the trial court's failure to give jury instructions which limited the jury's consideration of out-of-state evidence in apparent violation of the order of State Farm. See generally id. at 427–33. In another case in 2002, a federal district court judge imposed a $15 million punitive award in favor of an injured smoker. See Fairclough, Reynolds Ordered to Pay, supra note 311. In a third case in 2002, a California jury awarded a record $28 billion in punitive damages to an injured smoker, although the award would later be reduced to $28 million. See Philip Morris Hit with Record $28 Billion Punitive Award, LAW. WKLY. U.S., Oct. 14, 2002, at 2; see also Woman with Cancer to Accept Smaller Award, but Appeal, WALL ST. J., Dec. 26, 2002, at A4. In 2003, an Arkansas federal jury rendered a verdict awarding $15 million in punitive damages to the family of a smoker who died of a smoking-related injury, although the award was later nullified by the trial judge. See Linda Satter, Jury: Smoker's Kin Due $19 Million, ARK. DEMOCRAT GAZETTE, May 24, 2003, at 1A; see also Tobacco Brief—Brown & Williamson Tobacco Co.: Judge Eliminates $15 Million in Punitive Damages in Case, WALL ST. J., July 7, 2003, at C11. Also, in 2003, a New York jury awarded the widow of a deceased smoker $8 million in punitive damages. See William Glaberson, $8 Million Award to Widow Punishes Tobacco Company, N.Y. TIMES, Jan. 10, 2004, at B1. Although there appears to have been no cases awarding punitive damages against cigarette manufacturers in 2004, another New York jury ordered a cigarette manufacturer to pay $17.1 million in punitive damages to a sick smoker in 2005. See Bob Van Voris, Jury
2. Possible Civil and Criminal Sanctions

A related question is whether the tobacco defendants' conduct in Engle could have subjected them to any civil sanctions or even possibly criminal punishment. It is important to mention that courts have recognized that there are "common law tort duties that do not lend themselves to a comparison with statutory penalties." Further, as noted earlier, at least theoretically, under Florida law, punitive damages are supposed to apply to wrongdoing not coverable by criminal law. In St. John v. Coisman, a Florida appellate court found that "[t]here [was] no comparable criminal or civil statute which punishes false arrest in Florida." In Williams III, discussed earlier, the Oregon Appellate Court found "that [the State of] Oregon [did] not provide civil sanctions for [the cigarette manufacturer's] conduct and that the criminal statutes [referenced by the] plaintiff . . . were not truly comparable." Whether the tobacco defendants in Engle had "fair notice," by way of possibly civil and/or criminal sanctions, is not easily answered. It would be noted, however, that the Third District would state that Engle involved "the same alleged misconduct" as in the case brought by the State of Florida against the tobacco companies. In that case, State v. American

Awards $18.8 Million to an Individual Smoker, MIAMI HERALD, Mar. 30, 2005, at 3C. Although it remains to be seen if, and how much, the cigarette makers pay in terms of punitive damages in these cases, Engle's less than a half a million dollars per claimant in punitive damages (assuming a class of 300,000 or more) may wind up being a bargain compared to these cases.

338. See infra notes 396-97.
339. 799 So. 2d 1110 (Fla. 5th Dist. Ct. App. 2001).
340. Id. at 1115.
341. See supra notes 80-91 and accompanying text.
343. See generally Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856 (Fla. July 6, 2006).
Tobacco Co., Florida brought suit against the tobacco companies seeking recovery of Medicaid expenditures it had made on behalf of smokers.

If the Third District is correct that the two cases involved "the same alleged misconduct," then Florida’s tobacco lawsuit might be relevant to this inquiry.

Florida’s Medicaid Third-Party Liability Act formed the cornerstone of Florida’s litigation against the tobacco makers. However, other statutory provisions were utilized as well. Florida asserted that the cigarette manufacturers violated the Florida Deceptive and Unfair Trade Practices Act, the Florida Drug and Cosmetic Act, a statute prohibiting the sale of cigarettes to minors, two Florida misleading advertising statutes, a Florida...
Florida nuisance statute,\(^{356}\) and the Florida Racketeer Influenced and Corrupt Organization Act (RICO).\(^{357}\)

While the Medicaid Third-Party Liability Act normally limits Florida to recovery of the monies it paid for medical assistance to Medicaid recipients, it appears to permit a sanction in the form of treble damages "[i]n cases of suspected criminal violations or fraudulent activity,"\(^{358}\) and Florida would seek such a sanction in its suit against the tobacco makers.\(^{359}\) A party who willfully violates Florida’s unfair and deceptive trade practices statute, known as Florida’s “Little FTC Act,”\(^{360}\) may be subject to a civil penalty of up to “$10,000 for each such violation.”\(^{361}\) Similarly, a violation of the Florida Drug and Cosmetic Act can subject a party to a fine of up to “$5,000 per violation per day.”\(^{362}\) One is considered criminally liable under the statute prohibiting the sale of cigarettes to minors.\(^{363}\) Further, a violation of Florida’s misleading advertising statute can lead to a criminal prosecution,\(^{364}\) or a civil action in which punitive damages are specifically authorized.\(^{365}\) A public nuisance charge is a crime under Florida law.\(^{366}\) Additionally, a violation

\(^{356}\) FLA. STAT. § 823.01; Third Amended Complaint, supra note 347, ¶ 186.

\(^{357}\) FLA. STAT. § 895.01 (1995); Third Amended Complaint, supra note 347, ¶¶ 190–237.


\(^{359}\) Third Amended Complaint, supra note 347, ¶ 177.


\(^{361}\) FLA. STAT. § 501.2075. Such party may also be liable for attorney fees as well. Id. Florida sought both the civil penalty and attorney fees under the Florida Deceptive and Unfair Trade Practices Act in its action against the tobacco companies. See Third Amended Complaint, supra note 347, ¶ 188.

\(^{362}\) FLA. STAT. § 499.066(3). Injunctive relief is also possible for violations of this Act. Id. § 499.066(2).

\(^{363}\) Id. § 569.101.

\(^{364}\) Id. § 817.06(2).

\(^{365}\) Id. § 817.41(1), (6). The statute provides in pertinent part as follows:

(1) It shall be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.

(6) Any person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney’s fees, and may be awarded punitive damages in addition to actual damages proven. This provision is in addition to any other remedies prescribed by law.

FLA. STAT. § 817.41(1), (6). Florida courts have specifically recognized that this provision "is penal in character . . . [and] the type of penalty statute the violation of which affords civil relief." Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So. 2d 1367, 1369 n.3 (Fla. 4th Dist. Ct. App. 1981) (citing Rosenberg v. Ryder Leasing, Inc., 168 So. 2d 678, 679 (Fla. 3d Dist. Ct. App. 1964)).

\(^{366}\) FLA. STAT. § 823.01.
of the Florida RICO Act is a serious criminal offense. Punishment could entail criminal sanctions, including imprisonment, and either: a) a fine of up to $10,000; or b) in lieu of such fine where the offender derives pecuniary value or "cause[s] personal injury or property damage or other loss, . . . a fine [of up to three] times the gross value gained or [three] times the gross loss caused, whichever is the greater, [may be imposed], plus court costs and the costs of investigation and prosecution, reasonably incurred." In addition to, or in place of the above, possible civil remedies include: 1) divesting the offender of any interest in the enterprise; 2) imposing restrictions upon the offender’s activities; 3) dissolving or reorganizing the organization; 4) suspending or revoking a license or permit granted to the enterprise by a state agency; 5) forfeiting or revoking the charter of a Florida corporation or a foreign corporation organized to do business within the state; and/or 6) being subject to an action by the state for three times the actual damages the state sustained as a result of the RICO violation. If the claims asserted by the State of Florida in its lawsuit against the tobacco makers are any indication, then there were both civil and criminal sanctions to which the tobacco defendants in Engle could have been subject. Further, while the United States Supreme Court in State Farm I 367. Id. § 895.04. 368. See id. § 775.082. 369. See id. § 775.083(1)(b). 370. Id. § 895.04(2). 371. FLA. STAT. § 895.05(1)(a)-(e). 372. Id. § 895.05(7). Florida would seek triple damages under this provision. See Third Amended Complaint, supra note 347, ¶¶ 217, 231, and 237. This provision also allowed Florida to recover attorneys' fees—trial and appellate—and court costs, but not punitive damages. See FLA. STAT. § 895.05(7). 373. Is the Federal Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (2000), another possible sanction in which the tobacco defendants in Engle could have been subject? The Federal RICO imposes criminal and civil liability on any person who: 1) invests income from a pattern of racketeering activity in an enterprise; 2) acquires through a pattern of racketeering activity an interest in an enterprise; 3) conducts an enterprise's affairs through a pattern of racketeering activity; or 4) conspires to do any of these things. 18 U.S.C. § 1962(a)-(d). In 1999, one year before the Engle punitive award would be rendered, the United States brought suit against the tobacco companies and their research organizations "claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors," basing its claim for damages and equitable relief on three federal statutes, including the Federal RICO statute. United States v. Philip Morris Inc. (Philip Morris I), 396 F.3d 1190, 1192 (D.C. Cir. 2005). While the district court dismissed claims based on the other statutes, it allowed the government’s RICO claim to stand. Id. Later, the district court ruled that the cigarette companies violated racketeering laws by deceiving the public about the dangers of smoking, and although it did not impose any monetary penalties, it imposed other remedial measures. See United States v. Philip Morris Inc. (Philip Morris II), No. 99-2496, slip op. at 1650–51 (D.D.C. Aug. 17, 2006).
found that any claim about possible loss of business, disgorgement of profits, and imprisonment were merely speculative in that case, can the same be said with respect to the tobacco companies that were sued by the State of Florida? Was the threat speculative or real?

3. Florida’s Lawsuit Against Big Tobacco

Speaking of Florida’s tobacco lawsuit raises another interesting question relative to Gore’s third guide post: Did that lawsuit itself provide the tobacco defendants in Engle with “fair notice” that their conduct could entail a substantial punitive award? After the state’s case was brought, the tobacco companies agreed, among other things, to pay Florida more than $11.3 billion. The Third District was probably correct in observing that Engle and Florida’s lawsuit against the cigarette makers involved the same “allegations of misconduct.” However, the Florida Appellate Court appears to have been wrong in trying to suggest that the claims for punitive damages were the same in both cases. In this regard, it is important to understand that section 768.72 of the Florida Statutes “requires a plaintiff to provide the

375. See State v. Am. Tobacco Co., 707 So. 2d 851, 853 (Fla. 4th Dist. Ct. App. 1998). As shown, under the Florida statutes asserted by the state against the tobacco companies, said companies could have been subject to substantial fines, imprisonment, and loss of any business licenses within the state. See supra pp. 52–55. Further, in its lawsuit, Florida clearly sought “disgorgement of any profits earned on the sale of the [tobacco] companies’ products in Florida.” Am. Tobacco Co., 707 So. 2d at 853. Florida appears to recognize the disgorgement theory of damages. See, e.g., Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc., 889 So. 2d 180, 196 & n.15 (Fla. 2d Dist. Ct. App. 2004) (stating that “the remedy of disgorgement was appropriate under the facts of this case”). Whether Florida would be entitled to such remedy under the Florida RICO Act, however, might be questionable. See Philip Morris I, 396 F.3d at 1199 (rejecting the United States’ claim that disgorgement is within the equitable jurisdiction provided for under the Federal RICO Act).
379. See id. at 468 (stating “[t]he claims for punitive damages in the Florida v. American Tobacco Co. case and in this [Engle] action are based on the same alleged facts. The punitive-damage claims in both cases addressed the same alleged misconduct and the same public interest.”).
[trial] court with a reasonable evidentiary basis for punitive damages before the [trial] court may allow a claim for punitive damages to be included in a plaintiff's complaint." As the Supreme Court of Florida noted in Engle VI regarding the state's tobacco lawsuit: "[Florida's] only claim for punitive damages arose from the alleged violation of [the] Florida statutory provision prohibiting misleading advertising. None of the other statutory provisions alleged to be violated by the [tobacco companies] . . . allowed the recovery of punitive damages." The trial court in State v. American Tobacco Co. apparently found that Florida's Medicaid Third-Party Liability Act provided only a factual basis for recovery of Medicaid costs, not punitive damages. It did, however, permit a claim for punitive damages to be asserted under Florida Statutes section 817.41, the misleading advertising statute, since this statute specifically authorized awards of such damages for violations of its terms.

380. Globe Newspaper Co. v. King, 658 So. 2d 518, 520 (Fla. 1995). Section 768.72 of the Florida Statutes provides in pertinent part as follows:

In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

FLA. STAT. § 768.72 (2006). The Supreme Court of Florida has construed this provision "to create a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages." Globe Newspaper Co., 658 So. 2d at 519; see also Wilson v. Edenfield, 968 F. Supp. 681, 683-84 (M.D. Fla. 1997).

381. See Engle v. Liggett Group Inc. (Engle VI), No. SC03-1856, slip op. at 17, n.7 (Fla. July 6, 2006).

382. See Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance, 25 FLA. ST. U. L. REV. 737, 757 (1998) [hereinafter Transcript]. One of the attorneys representing Florida in its lawsuit against the tobacco companies later explained, "[Florida was] limited in [its] punitives to fraud under Chapter 817. The judge had stricken all of [Florida's] other theories of punitives, believing that [it was] limited to the Medicaid [a]ct." Id. As noted previously, the Medicaid Third-Party Liability Act specifically authorizes the imposition of treble damages in certain instances. See supra note 358 and accompanying text. It is also clear that the Florida RICO Act, which was probably Florida's second most important claim against the tobacco companies, did not authorize punitive damages where triple damages were being sought under it, as Florida would seek in that case. See FLA. STAT. § 895.04 (2006); Third Amended Complaint, supra note 347, ¶ 217, 231, 237.

383. FLA. STAT. § 817.41(6) (2006). Section 817.41(6) plainly authorizes awards of punitive damages for violations of its terms. Id. For a reading of this provision, see supra note 365. As one Florida appellate court explained, this section "creates an entitlement to punitive damages." Kraft Gen. Foods, Inc. v. Rosenblum, 635 So. 2d 106, 109 (Fla. 4th Dist. Ct. App. 1994). The fact that Florida was limited with respect to punitive damages is clearly reflected by its Third Amended Complaint. See Third Amended Complaint, supra note 347, ¶ 185. Florida's only request for punitive damages related to alleged violations of section 817. Id.
Punitive damages did not play as big a role in Florida’s case against the cigarette makers as one might believe. The threat of such damages was limited solely to Florida proving a violation of its false advertising statute. The $11 billion that the tobacco companies agreed to pay under the Florida Settlement Agreement would therefore appear to be more properly viewed as compensatory—reimbursement to Florida for the cost it incurred through Medicaid for injured smokers—as opposed to punitive in nature. If this is correct, the $11 billion figure could have been a barometer of the compensatory damages to which the plaintiffs and their class in Engle might have been entitled. However, the Engle plaintiffs and their class were not as constrained as Florida was in its lawsuit. Florida was restricted to seeking recovery for those Medicaid costs that had occurred after July 1, 1994, the effective date of the amendment to the Medicaid Third-Party Liability Act. In addition, the trial court had apparently ruled that Florida “could not recover future damages under” this Act. Obviously, Medicaid payments account for only a fraction of the total medical care costs attributable to smoking, and the plaintiffs and their class in Engle would not be limited to Medicaid incurred expenditures. Further, the plaintiffs and their class in Engle would be entitled to seek compensatory damages consisting of more than hospital and medical expenses. They would be entitled to seek dam-

Florida, however, did purport to preserve its right to assert punitive damages under section 768.72. See id. ¶ 10.
384. See id. ¶ 185.
386. This is true even if the then present day value of the award was said to only be $6 billion. See Transcript, supra note 382, at 757.
387. See Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239, 1256 (Fla. 1996) (ruling that the State of Florida could properly bring an action under the Act’s statutory authority, but that the Act only applied to causes of action that accrued after July 1, 1994, the effective date of the 1994 amendments).
388. Transcript, supra note 382, at 756. One of Florida’s attorneys explained that this limited Florida’s damages under Medicaid to $1.2 billion and meant that the state would have to return to court every couple of years to seek damages against the tobacco companies. Id. In its lawsuit, however, Florida would agree to give up its right to bring those future lawsuits. Id. at 757 (attorney making clear that the Settlement Agreement “settles those future claims that we were going to have to come back time and time again to get”); see Settlement Agreement, supra note 377, at 11–12. To the extent that the monies payable under the Settlement Agreement exceeded the amount then due Florida, it would appear that it primarily represents damages in the form of reimbursement for future Medicaid and other health-related expenses, and not punitive damages. Id. at 10.
389. According to Florida’s Governor, the state was “spending over $400 million a year for smoking-related, tobacco-related injuries to [its] Medicaid recipients.” See Transcript, supra note 382, at 738.
390. See FLA. STD. JURY INSTR. (CIV.) 6.2(a)-(f).
ages for items such as pain and suffering, mental anguish, lost earnings, and loss of consortium.\textsuperscript{391}

The tobacco defendants in \textit{Engle} had to know from Florida's lawsuit against them and from the subsequent Florida Tobacco Settlement that they had exposure to a sizeable compensatory award.\textsuperscript{392} Further, even though no actual award of punitive damages was made in \textit{State v. American Tobacco, Co.},\textsuperscript{393} an argument could certainly be made that Florida's lawsuit against the tobacco makers also provided them with fair notice that their conduct might support a large punitive award such as would be rendered in \textit{Engle} as well.\textsuperscript{394}

\section*{V. Florida Law on Punitive Damages}

Under Florida law, "punitive damages are recoverable in all actions for damages based on [tortious acts] which involve the ingredients of malice, moral turpitude, or wanton and outrageous [conduct]."\textsuperscript{395} To support a claim for punitive damages under Florida law, the plaintiff must allege and prove conduct by the defendant of "a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."\textsuperscript{396}

\begin{flushright}
391. \textit{Id.}
392. Could the same thing not be said about the lawsuits brought by all of the states against the tobacco companies that were filed between 1994 and 1998 which resulted in an unprecedented multibillion-dollar settlement prior to the \textit{Engle I} verdict? For a listing of the state cases brought against the tobacco makers, see Tobacco Lawsuit Summary Chart, http://www.library.ucsf.edu/tobacco/litigation/summary.html (last visited Nov. 1, 2006).
393. 707 So. 2d 851 (Fla. 4th Dist. Ct. App. 1998).
396. Carraway v. Revell, 116 So. 2d 16, 20 n.12 (Fla. 1959) (quoting Cannon v. State, 107 So. 360, 363 (Fla. 1926)).
\end{flushright}
Florida law also recognizes that punitive damages serve the dual role of deterrence and retribution.\(^{397}\) Further, Florida law envisions that “[p]unitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs.”\(^{398}\) In fact, the Supreme Court of Florida has stated that punitive damages are “the most satisfactory way to correct evil-doing in areas not covered by the criminal law.”\(^{399}\)

It is clear under Florida law that it is within the jury’s discretion whether or not to award punitive damages and to determine the amount that should be awarded.\(^{400}\) Traditionally, punitive damages “are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.”\(^{401}\) In determining the amount of punitive damages, the defendant’s wealth has also historically been an important consideration under Florida law.\(^{402}\)

It has been noted that Florida courts are usually hesitant about disturbing punitive damages verdicts returned by juries.\(^{403}\) Further, it appears that under Florida law, neither party has any recourse to a jury verdict regarding punitive damages, unless such party can prove either fraud or an improperly influenced jury.\(^{404}\) As discussed earlier, the Third District Court of Appeal in

---

397. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982).
398. Id. at 1042.
400. Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978).
401. Arab Termite & Pest Control, 409 So. 2d at 1043.
402. Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985). In this regard, the Supreme Court of Florida has stated that “the greater the defendant’s wealth, the greater it [sic] must be, the punitive damages assessed in order to get his attention regardless of the amount of [actual] damages awarded to the plaintiff.” Id. (quoting Farish v. Bankers Multiple Line Ins. Co., 425 So. 2d 12, 18 (Fla. 4th Dist. Ct. App. 1982)); see also Rinaldi, 314 So. 2d at 763.
403. Lassitter v. Int’l Union of Operating Eng’rs, 349 So. 2d 622, 627 (Fla. 1976). The Supreme Court of Florida has explained as follows:

Although the verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake. In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like.

Id.
Engle IV appears to have determined that the jury had been improperly influenced.\(^{405}\)

To specifically determine whether a punitive damage award is excessive under Florida law, courts consider the relationship between the amount awarded and the degree of misconduct involved, as well as the defendant's ability to pay the judgment.\(^{406}\) It clearly appears that it was on this second item—the defendant's ability to pay the judgment—that both the Third District and the Supreme Court of Florida based their conclusions on the fact that the $145 billion punitive damage award in Engle was excessive under Florida law.\(^{407}\) Certain observations, however, can be made with respect to their apparent determination in that regard.

First, the trial court in Engle evidently felt that the tobacco defendants could avoid financial ruin by simply raising cigarette prices, since this is how the cigarette makers financed the payments under the tobacco settlement.\(^{408}\) Could there have been any merit to the trial court's position?

Second, while the combined net worth of all of the tobacco defendants in Engle was supposedly only $8.3 billion, the net worth of just one of these same defendants in the Williams case, discussed earlier, was said to be “over $17 billion,” more than double the purported combined figure in Engle.\(^{409}\) Is there any merit to claims by plaintiffs that defendants sometimes purposely decrease their net worth in order to avoid a high punitive award?\(^{410}\)

Third, the Third District's determination that the tobacco defendants did not have the ability to pay the judgment appears to have been primarily based on the fact that the sum awarded was “roughly 18 times” their purported combined net worth.\(^{411}\) However, as the Supreme Court of New Jersey has noted, evidence of “ability to pay . . . does not necessarily equate with net

\(^{405}\) See Liggett Group Inc. v. Engle (Engle IV), 853 So. 2d 434, 467–68 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006).

\(^{406}\) Arab Termite & Pest Control, 409 So. 2d at 1043; see also Louisville & Nashville R.R. Co. v. Hickman, 445 So. 2d 1023, 1028 (Fla. 1st Dist. Ct. App. 1983).

\(^{407}\) See Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 3, 25 (Fla. July 6, 2006); Engle IV, 853 So. 2d at 458.


\(^{409}\) Williams v. Philip Morris Inc. (Williams III), 92 P.3d 126, 145 (Or. Ct. App. 2004); see Engle IV, 853 So. 2d at 456–57.


\(^{411}\) See Engle IV, 853 So. 2d at 457.
worth,” because “[d]epending on the facts of a case, a defendant’s income might be a better indicator of the ability to pay.”

Fourth, there is no suggestion that the jury in *Engle* was improperly instructed regarding the issue of the tobacco defendants’ ability to pay a punitive award and/or that such award could not bankrupt them. Assuming that the jury was properly instructed in this regard, under Florida law, the jury is presumed to have followed the instructions given to them, “[a]bsent a finding to the contrary.”

Fifth, while evidence of the Florida and Master Settlement Agreements might have been admissible in *Engle* for the purpose of avoiding or mitigating punitive damages because they may have been relevant to the tobacco defendants’ ability to pay, was the trial court’s apparent instruction to the jury not to consider such evidence a reversible error as found by the Third District? This would not seem to be a sufficient basis for reversing an award of punitive damages under Florida law since this evidence (which is merely mitigation evidence) appears to relate to a matter that is collateral to the main issue.

Sixth, while not definitively stating that wealth may not be considered, *State Farm* has called into question the role of wealth in the punitive damages calculation. Assuming, *arguendo*, that a defendant’s wealth is not always an appropriate consideration to enhance the amount of punitive dam-

---

413. *See* Jury Instructions Phase II B: Punitive Damages, No. 94-8273 CA 22, at 6 (11th Cir. 2000), available at http://www.altria.com/download/pdf/media_engle_jury_instructions.pdf (delineating the financial factors that the jury could use as guidelines in determining the effect a punitive award may have) [hereinafter Engle Jury Instructions]; *see generally Engle IV*, 853 So. 2d at 456–58 (noting that the court blamed the size of the award on juror passion and prejudice).
414. *See* Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 942 (Fla. 2000); *see also* Engle Jury Instructions, *supra* note 413, at 11 (instructing the jury that “[i]t is only a defendant’s current ability to pay a punitive damage award that is relevant, and not whether a defendant can pay using a pay out or an installment plan,” despite the Third District’s later finding that plaintiffs’ counsel made improper comments regarding installment payments); Wransky v. Dalfo, 801 So. 2d 239, 243 (Fla. 4th Dist. Ct. App. 2001) (reversing case for failure to give jury instructions “that punitive damages should not be allowed to destroy or bankrupt a defendant”).
416. *Id.*; *Engle v. Liggett Group, Inc. (Engle VI)*, No. SC03-1856, slip op. at 2 (Fla. July 6, 2006). In its opinion, the Supreme Court of Florida did not address this specific ruling by the Third District. *Id.*
ages, should this argument cut both ways where a defendant’s wealth, or lack thereof, is not always an appropriate consideration to avoid an otherwise proper punitive damages award. In other words, should the possibility of bankruptcy always be an absolute bar to an award of punitive damages? 4 19

As shown above, there are a number of questions raised relating to the conclusion by the Third District and Supreme Court of Florida that the Engle punitive damages award was impermissibly excessive, even under Florida law.

VI. CONCLUSION

To argue, as the Third District did, that mass torts, such as those found in Engle, are not proper for a class action is one thing. 4 20 To suggest, however, that the punitive award in that case was unconstitutionally excessive is wholly another.

As demonstrated herein, an argument could certainly be made that the jury’s punitive award in Engle was not violative of the Gore guide posts as the United States Supreme Court refined them in State Farm, and that the award, therefore, was not unconstitutionally excessive under federal law. The conduct of the tobacco defendants in Engle could certainly be said to be reprehensible. As noted, most of the factors identified by the United States Supreme Court, pertaining to the degree of reprehensibility of a defendant’s conduct, appear to have been present in Engle. 4 21 Further, the appellate courts that have reviewed the awarding of punitive damages in the individual tobacco cases have not found the first guide post to be an issue. 4 22 While the second guide post has impacted punitive damages awards since State Farm, reprehensibility is nevertheless supposed to be the most important guide post in determining a punitive damages award’s reasonableness. 4 23 There also may have been an acceptable ratio of punitives to compensatories to satisfy the second guide post, but neither the Supreme Court of Florida nor the Third District was willing to wait and see. 4 24 As suggested herein, the contention

419. Welch v. Epstein, 536 S.E.2d 408, 424 (S.C. Ct. App. 2000) (rejecting the proposition “that the law on punitive damages [in South Carolina] has evolved to the point of erecting an irrevocabile financial barrier to the imposition of punitive damages if harsh financial realities emanate from the award”) (emphasis added).
420. See Engle IV, 853 So. 2d at 470.
421. See supra notes 194–201 and accompanying text.
422. See supra note 202.
423. See State Farm I, 538 U.S. at 419.
424. As noted, the trial plan called for the jury to determine punitives first and then compensatories for the class, which federal courts have found presents no constitutional infirmity. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986). The Third District
that it is not possible to complete the ratio guide post at the time the jury returned the $145 billion punitive award does not by itself appear to provide a basis to invalidate such an award. This was a multi-phase class action where the compensatory damages to each member of the class had not yet been determined. Steps should have been taken to ensure that recovery of punitive damages was limited to only those class members who established liability. The analysis under the ratio guide post could have either been estimated based on individual damages awards, deferred until all of the compensatory damages were determined, or some combination thereof. Whether Gore's second guide post was met or not is simply not clear. Further, it could certainly be argued that the tobacco defendants in that case had fair notice that their conduct might not only subject them to punishment, but to severe punishment because of the punitive awards against them in the cases prior to Engle and in the unprecedented litigation brought against them by Florida as well as other states. Assuming, arguendo, that one believes the cigarette makers were guilty of misconduct, as the jury in Engle apparently did, the fact that a record setting punitive damages award was rendered in that case really should have surprised no one, especially the cigarette makers.

Moreover, even if Florida law does not allow an award which would force a defendant to file for bankruptcy, should this always be the case? Florida law also says that punitive damages “are to be measured by the enormity of the offense,” and that it is within the jury’s discretion as to the amount of any punitive damages. The jury in Engle exercised its discretion and rendered an award of $145 billion in punitive damages to injured

simply did not allow Phase 3 in Engle to be completed. Further, what if the proper analysis is not always simply a comparison of punitives to compensatories, but a comparison of the punitives to the amount of harm, which may include harm that is uncompensated as well as potential harm? See supra notes 301–316 and accompanying text. From this perspective, is it possible to view the Engle punitive award as a proxy for the thousands of Floridians, dead and living, whose lives and health have been or may be inmutably scarred by tobacco?

425. See supra notes 317–36 and accompanying text.
427. Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982). In Engle VI, the Supreme Court of Florida seems to be suggesting that post State Farm jurisprudence no longer permits this. See Engle v. Ligget Group, Inc. (Engle VI), No. SC03-1856, slip op. at 24 (Fla. July 6, 2006). But see Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (observing shortly after State Farm, that “[t]he standard principle of penal theory that ‘the punishment should fit the crime’ in the sense of being proportional to the wrongfulness of the defendant’s action” is still applicable to punitive damages).
428. Arab Termite & Pest Control, 409 So. 2d at 1041 (citing Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978)).
Florida smokers and their survivors. While the *Engle* verdict may have been unprecedented and, by far, the largest ever in U.S. history, it was no ordinary case. It was a mass-tort class action with an estimated class size of between 300,000 and 700,000 plaintiffs that actually went to verdict. The Supreme Court of Florida quite properly did not adopt the Third District’s conclusion that the punitive award in *Engle* was indicative of an improperly influenced jury, as this jury verdict may very well have been merely reflective of the magnitude of the offense committed in that case.

Tobacco use was and continues to remain the country’s greatest health hazard. It undoubtedly was and continues to be a major issue in Florida, as in every other state. Even if the imposition of the $145 billion punitive

429. *Engle IV*, 853 So. 2d at 441.
431. *Engle IV*, 853 So. 2d at 442–43. As noted earlier, no mass-tort case had apparently gone to trial prior to *Engle*. See Mullenix, Lessons from Abroad, supra note 183, at 20.
434. See MELISSA ALBUQUERQUE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., TOBACCO CONTROL STATE HIGHLIGHTS 2002: IMPACT AND OPPORTUNITY 7 (2002), http://www.cdc.gov/tobacco/statehi/pdf_2002/02FrontMatter.pdf. Tobacco use is said to be “the single most preventable cause of death and disease . . . in the United States.” Id. Approximately 400,000 deaths each year are attributable to smoking. See id. To put this in perspective, “[o]ne in every five deaths in this country is attributable to smoking.” Id. at 3. To put this in another perspective, tobacco is said to “kill[] more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.” Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44398 (Aug. 28, 1996) (codified in scattered parts of 21 C.F.R.).
435. At the time the *Engle* case was brought, Florida officials estimated that that “[e]very day in Florida, 35 people die from a smoking-related illness.” Linda Kleindienst & John Kennedy, *Law Declares Medicaid War on Tobacco*, ORLANDO SENT., May 27, 1994, at C1. It had been estimated that in 1992 alone that it had cost taxpayers $289 million to treat approximately 39,000 Florida Medicaid patients for smoking-related illnesses. Id. For 300,000 to 700,000 of such persons, this would amount to $2 billion to $5 billion, assuming that the health care costs were incurred at the same rate. See id.
436. Of course, tobacco use is an issue all over the world. In fact, it is being projected that tobacco will kill a billion people this century, which is ten times more than the one hundred
award would have the ruinous consequences alleged by the cigarette makers, would it really touch upon due process concerns, or would it simply be self-inflicted and well-deserved punishment that was overdue—assuming that they were responsible for the misconduct claimed?

VII. EPILOGUE

The Third District in Engle would comment that “[c]lass certification in mass-tort actions such as [in that case] ha[d] been historically disfavored by courts throughout the nation.” This is true. The underlying rationale is that “[w]hen personal-injury and death claims are involved, a strong feeling prevails that everyone enmeshed in the dispute should have his [or her] own day in court and be represented by a lawyer of his [or her] choice.” The problem with this rationale as it relates to tobacco is that cigarette manufacturers have been largely shielded from suits brought by individual smokers. This has occurred, in large part, because the courts have improperly construed the very law that was designed to deal with the health problem associated with smoking, the Federal Cigarette Labeling and Advertising Act (FCLAA), to provide cigarette manufacturers special protection from state law tort claims under the guise of “preemption.” This is unfortunate because state law tort claims serve the important functions of regulation and compensation. By precluding state law tort claims from being asserted against cigarette manufacturers, this has given them protection not accorded to others and has prevented any regulation of their behavior, such as forcing them to make cigarettes that are less hazardous. It has also denied those injured by their product the right to even seek compensation based solely on this federal Act that was never intended to be used in such fashion. Fur-

—millions that it is said to have killed in the twentieth century. See Andrew Bridges, Curbing Tobacco Best Step to Cut Cancer, MIAMI HERALD, July 11, 2006, at 11A.


439. Engle IV, 853 So. 2d at 470.


442. See id.

443. See id.

ther, one should not be misled by the few recent verdicts—record breaking in fact—in favor of plaintiffs in individual suits, as the smokers in those cases started smoking prior to 1969, when the FCLAA supposedly began preempting state law tort claims against cigarette manufacturers. That one fact appears to have been crucial to these plaintiffs being able to get to a jury. As the population continues to grow older, this "loophole" is closing fast. It "will not be of any assistance to [anyone] who began smoking after 1969."

The preemption fiasco is just one aspect, albeit a very important one, of a larger problem, which is the "Law of Tobacco." "The Law of Tobacco concerns ensuring the continued vitality of the tobacco industry by protecting it, [not only] from liability suits, [but] other types of 'nuisances' such as advertising restrictions or FDA regulation." The Third District's opinion in Engle IV would appear to be another good illustration of the "Law of Tobacco" in operation, where the appellate court reversed itself on the issue of class certification and then made every possible ruling that it could in favor of the tobacco defendants in that case. In stark contrast, the Supreme Court of Florida showed great courage in Engle VI by first simply accepting jurisdiction to review the case and then issuing a decision that did not bow to the "Law of Tobacco." As indicated by the premise of this article, the only issue one might take with an otherwise well-written and well-reasoned opinion by the Supreme Court of Florida in Engle was its ruling, unanimous no less, that the punitive award in that case was unconstitutionally excessive.

Engle may signal the end to future smokers' class suits. Even class suits that are not specifically brought to recover damages for the health prob

446. Id. at 52.  
447. Id. at 53.  
448. Id.  
449. Id. at 21.  
452. Id. at 1, 53.  
453. See id.  
454. It would be interesting to see if the courts would reevaluate their stance on smokers' class suits if the preemption problem did not exist. With a flood of lawsuits, possibly as never seen before, a class action might be viewed more favorably.
lems associated with smoking are being rejected by the courts. With possibly having an end to any real threat from either individual suits or class actions, the future of Big Tobacco certainly looks bright. The question is: at what cost—specifically, for how long and to what extent is this going to prolong the health hazard associated with tobacco?

Reversal of the $145 billion punitive award was probably viewed as a great victory for Big Tobacco. But was it really? Despite the discarding of the mammoth punitive award, the cigarette manufacturers appear to have two definite reasons not to be pleased with Florida’s highest court, and they both stem from the fact that the court did not completely dismantle the class. One is obvious from the opinion while the other is not. Clearly, the tobacco defendants could not be happy with the fact that class members will be allowed to bring their own suit with the benefit of many of the findings by the jury in Engel. This is going to encourage many to assert claims against the tobacco defendants who otherwise would not. This may also result in the tobacco defendants paying significantly more than the almost $7 million (in compensatory damages alone) that they currently are to pay to two of the class representatives. The other reason, which cannot be gleamed from the Supreme Court of Florida’s opinion, involves the fact that when the tobacco

455. Last December, the Supreme Court of Illinois completely overturned a judgment of $10.1 billion in a class action that claimed consumer fraud over “light” cigarettes. Price v. Philip Morris, Inc., 848 N.E.2d 1, 50 (Ill. 2005). The Illinois high court reversed the judgment, which was $7.1 billion in compensatory damages and $3 billion in punitives, on the ground that the FCLAA preempted claims against cigarette manufacturers under Illinois consumer law. Id. at 50–51. See also Marrone v. Philip Morris USA, Inc., 850 N.E.2d 31 (Ohio 2006) (reversing the certification of a limited class of cigarette purchasers from a six county area in a consumer action brought over the way “light” cigarettes were marketed). But see Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying a class of current and former smokers in a RICO action alleging that cigarette manufacturers induced them to buy “light” cigarettes by falsely representing that they would experience reduced health risks from lower amounts of tar and nicotine).

456. This is true despite the fact that the smoking rate in this country is said to be continuing to decline. See Marc Kaufman, Smoking in United States Declines Sharply: Cigarette Sales at a 54-Year Low, WASH. POST, Mar. 9, 2006, at A1.

457. See Engel VI, No. SC03-1856, slip op. at 53.

458. Apparently, lawsuits have already been filed in response to the ruling by the Supreme Court of Florida. See Christina Cheddar Berk, Cigarette Makers Ask for Review, WALL ST. J., Aug. 9, 2006, at D3.

459. As noted earlier, following the verdict in Engel, one class member in a separate proceeding received a judgment of $37.5 million in compensatory damages. If this verdict is upheld, it shows how the damages against the cigarette makers could easily accumulate. Further, it would seem that all of the class members (including the three already with compensatory awards) would be permitted to seek punitive damages if the tobacco defendants are found liable in their individual suits. See Weaver, supra note 312.
defendants initially appealed from the $145 billion punitive verdict, they apparently agreed that, in lieu of posting the full appeal bond, they would “forfeit” $709 million which would be paid to the class no matter which side won. Of course, after the Third District reversed the case in its entirety, including the class certification, it would be suggested that, since there was no class to pay, this money would possibly be returned to the tobacco defendants. The decision by the Supreme Court of Florida has, therefore, made it harder for the tobacco defendants to make the case that they are entitled to this money back. For the tobacco defendants, there is still clearly a lot at stake in Engle.

It will be most interesting to observe what happens in Engle from this point forward. As this article was going to press, a motion for rehearing filed by the tobacco defendants had still not been ruled upon by the Supreme Court of Florida so the opinion in Engle VI was not yet final. Will the Supreme Court of Florida stand by its ruling in Engle V? Despite an obviously careful and thoughtful opinion, there is still time for the “Law of Tobacco” to interject itself before that Court. Further, even if Florida’s Highest Court holds firm, the tobacco defendants are likely to seek review from the United States Supreme Court. Although from the surface, there does not appear to be any basis for federal jurisdiction in Engle, with the “Law of Tobacco” involved, one should not bet against the cigarette makers.

---

461. See id.
462. Some, of course, had said the same thing about the other recent famous case that the United States Supreme Court took from Florida, Bush v. Gore. 531 U.S. 98 (2000).
2005–2006 Survey of Florida Public Employment Law

John Sanchez*

I. Introduction ......................................................................................................................... 128

II. Hiring Teachers, Privatization, Background Checks, Nepotism, Illegal Immigrants, and Ethics ........................................ 128
   A. Legal Issues over Hiring and Retaining Teachers ......................................................... 128
   B. Privatization and Competitive Bidding Issues ............................................................. 130
   C. Background Checks on Employees .............................................................................. 132
   D. Nepotism: Legal Issues over Hiring Relatives ............................................................. 133
   E. Strengthening Employer Sanctions over Hiring Undocumented Workers ...................... 134
   F. Ethics and Conflicts of Interest .................................................................................. 136

III. Terms of Employment .................................................................................................... 139
   A. Hours and Wages .......................................................................................................... 139
      1. Fair Labor Standards Act Issues ................................................................................ 139
      2. Off-Duty Pay for Police Officers .............................................................................. 140
      3. Teachers’ Pay ........................................................................................................... 141
      4. Military Pay .............................................................................................................. 142
      5. Missed Work Pay Due to Hurricanes ....................................................................... 143
      6. The Wage Gap Between Men and Women ............................................................... 143
      7. Living Wage Laws .................................................................................................... 144
   B. Health Benefits ............................................................................................................ 145
   C. Guns at the Workplace .................................................................................................. 146
   D. Workers’ Compensation ............................................................................................. 147
   E. Unemployment Compensation ..................................................................................... 147
   F. Public Pensions ........................................................................................................... 148

IV. Discipline, Retaliation, and Discrimination ..................................................................... 148
   A. Discipline ..................................................................................................................... 148
   B. Retaliation, Whistle-Blowing, and the First Amendment ............................................ 148
   C. Employment Claims .................................................................................................... 150

V. Employment Discrimination ............................................................................................ 151
   A. Generally ...................................................................................................................... 151

* J.D. 1977 University of California (Berkeley); L.L.M. 1984 Georgetown University; Professor of Law, Nova Southeastern University, Shepard Broad Law Center since 1988.
I. INTRODUCTION

This survey article examines a wide range of legal issues involving public employment in Florida during 2005–06. It begins with a discussion of the law governing the hiring stage of public employment. Part II examines the legal issues over: 1) hiring and retaining teachers; 2) privatization and competitive bidding; 3) background checks on employees; 4) nepotism; 5) the hiring of undocumented workers; and 6) ethics and conflicts of interest usually involving public officials.

Part III canvasses the law governing the terms of public employment. For instance, this section weighs emerging developments in the Fair Labor Standards Act governing minimum wage and overtime pay. This section also notes the growing trend among Florida cities and counties to adopt so-called living wage statutes that bring salaries in line with the cost of living. In addition, this section addresses other legal issues including: 1) the off-duty pay for police officers; 2) teachers' pay; 3) military pay; 4) missed work due to hurricanes; 5) the wage gap between men and women; and 6) living wage laws. Apart from hours and wages, Part III surveys recent developments not only involving health benefits and guns at the workplace, but also workers' compensation, unemployment compensation, and public pensions. Part IV examines case law governing: 1) discipline; 2) retaliation; 3) whistle-blowing; and 4) the First Amendment. Finally, Part V addresses employment discrimination.

II. HIRING TEACHERS, PRIVATIZATION, BACKGROUND CHECKS, NEPOTISM, ILLEGAL IMMIGRANTS, AND ETHICS

A. Legal Issues over Hiring and Retaining Teachers

Under Florida law, public school teachers must earn six continuing-education credits every five years to maintain their teaching licenses. According to the Miami Herald, thirty Miami-Dade teachers were faced with

1. Marc Caputo, Bill Could Shield Teachers, MIAMI HERALD, Mar. 10, 2006, at 9B.
being fired in 2006 for fraudulently obtaining continuing-education credits.  

In response, two Miami legislators proposed a measure aimed at making it "tougher for the state to revoke or suspend an instructor's license obtained fraudulently." According to the proposed legislation, the state must prove that the teachers knew they were taking part in a fraud.

According to the Miami Herald, "[a] study of five school districts found that union seniority rules" commonly require schools to hire unfit teachers. According to a report cited by the Miami Herald, "many teachers transfer because they had done poorly at their previous schools." Even so, the teachers with such transfers often had sufficient seniority to be able to transfer to any school with an opening. The report proposed that teacher hiring decisions be "based on the mutual consent of the teacher and receiving school."

According to a hearing before the Florida Board of Education, the state will need 30,000 more public school teachers in 2006. The expected vacancies stem from state law mandating smaller classes. The state board will try to boost teachers' salaries in its effort to draw more teachers to Florida.

According to the Monroe County School District Superintendent, the "problem is not finding new qualified teachers. It's keeping them." Troops to Teachers, a government program that assists veterans in becoming teachers, recruited 241 former soldiers in Florida between the years of 2001–02 and 2004–05 school years.

---

2. Id.
3. Id.
4. Id.
5. Unfit Teachers Forced on Schools, Study Says, MIAMI HERALD, Nov. 17, 2005, at 10A.
6. Id.
7. Id.
10. Id.
11. Id.
13. Peter Bailey et al., Reveille Call on First Day of School, MIAMI HERALD, Aug. 15, 2006, at 8A.
B. Privatization and Competitive Bidding Issues

Privatization, the conversion of governmental agencies into private entities, continues to be a high-profile issue in Florida. For example, Dania Beach city officials considered privatizing its employment of lifeguards as a cost-saving measure like Hallandale Beach did two years earlier. Under the plan, lifeguards employed by the city would be replaced by those who work for a private company. While use of private lifeguards is common at pools and water parks, critics claim the ocean, with its hazards, requires public lifeguards. In the face of heavy criticism from some residents, local unions, and lifeguards, a Texas company rescinded its plans to supply private lifeguards for Dania Beach. Finally, the city decided to keep public lifeguards on the beach, but outsourced those at pools.

Proponents of privatization often tout efficiency and cost-cutting in support of this policy. For example, a private company that began operating Florida's troubled personnel system in 2002 promised to streamline, centralize, and computerize the state's human-resources system. In 2006, however, a legislative audit found that the outsourcing contract, Florida's largest, was rife with problems. Besides hiring a worker who was later imprisoned for identity theft, two whistle-blowers claimed the company illegally sent public employees' private information "to India for processing." A state senator has proposed legislation that would give the lawmaking body more control over outsourcing contracts despite objections lodged by then-Governor Jeb Bush.

In the education context and at the college level, outsourcing to part-time contract workers means that only 53.8% of teachers nationwide are full-

15. Diana Moskovitz, City May Privatize Lifeguards, MIAMI HERALD, Sept. 12, 2005, at 1B.
16. Id.
17. Diana Moskovitz, 150 Oppose Privatizing Lifeguards, MIAMI HERALD, Sept. 14, 2005, at 1B.
19. Diana Moskovitz, City Saves Lifeguards at Beach, Not Pools, MIAMI HERALD, Sept. 22, 2005, at 3B.
21. Id.
22. Id.
23. Id.
time faculty, as compared to 77.9% in 1970.\textsuperscript{24} While outsourcing teaching positions saves money, a growing army of adjunct professors are left earning low wages, receiving no benefits, and having no job security.\textsuperscript{25} According to the \textit{Miami Herald}, most adjuncts earn between $1800 and $2500 per class at public colleges and universities and usually teach lower-level core courses.\textsuperscript{26} Since part-time teachers are usually in a hurry to leave campus for another assignment elsewhere, there is little time to advise students or to write recommendations needed by students for jobs or graduate school.\textsuperscript{27} While reliance on adjunct professors is beneficial when the motive is to expose students to teachers with real life experience, such reliance is detrimental when driven solely by the need to plug budget holes.\textsuperscript{28}

Consistent with the practice of public entities, Miami-Dade County contracting rules require competitive bidding.\textsuperscript{29} However, these rules have been circumvented by the Miami-Dade Solid Waste Department, because it awarded work to a company that outsourced part of the job to former waste department employees, all without soliciting competitive bids.\textsuperscript{30} A report by the county inspector general found “vague billing records, inadequate documentation, and lack of written authorization before the company initiated work.”\textsuperscript{31} The report recommended ending the no-bid contracting.\textsuperscript{32}

A May 23, 2005 memo by the Federal Office of Management and Budget makes clear that in assessing which types of jobs are inherently governmental and thus not subject to outsourcing, federal agencies should look at employees performing the functions and decide whether all of the workers are performing inherently governmental work.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{24} Noah Bierman, \textit{Colleges Turn to Part-Time Teachers as Enrollment Swells, Cash Shrinks}, \textit{Miami Herald}, Aug. 21, 2005, at 1A.
\item \textsuperscript{25} Id. at 12A.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} See id.
\item \textsuperscript{29} Miami-Dade, Fla., Code pt. 1, art. 4, § 4.03(D), \textit{available at} http://www.municode.com/resources/gateway.asp?pid=10620&sid=9 (last visited Dec. 26, 2006).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\end{itemize}
C. Background Checks on Employees

While 85% of all employers conduct no investigation of prospective employees, in Florida, public agencies must undertake a background check of anyone who works or volunteers at parks, playgrounds, child care centers, or other venues where children meet. Moreover, a 1996 Florida law requires fingerprinting and extensive background screening of all public school employees. While background checks by employers have been challenged on constitutional grounds, such cases are rarely successful.

Since 2004, all volunteers at Miami-Dade County public schools must submit to background screening by the Federal Bureau of Investigation (FBI) and Florida Department of Law Enforcement. Only volunteers who have one-on-one contact with students without teacher supervision must be fingerprinted. In Broward County, volunteers are checked against Florida's database for sexual offenders and predators and face a county criminal back-

35. See Peter Bailey & Hannah Sampson, Schools Increase Scrutiny of Volunteers, MIAMI HERALD, Aug. 21, 2005, at 1B.
36. See FLA. STAT. § 231.02 (1995), amended by FLA. STAT. § 231.02(2)(b) (Supp. 1996) (stating that “all other personnel currently employed by any district school system . . . shall submit a complete set of fingerprints”); see also Bailey & Sampson, supra note 35 (discussing the ramifications of the fingerprinting law).
ground check. However, exceptions are made on a case-by-case basis for volunteers who had minor incidents in the past.

Unforeseen consequences have emerged since the Jessica Lunsford Act took effect on September 1, 2005, “requiring fingerprinting and background checks for contractors, vendors, sports referees, and others [with business on] school property.” For example, six National Football League (NFL) Europe teams abandoned Florida high schools they used for preseason training camps on account of the new law. Similarly, builders are shying away from school projects because of the new law, raising construction costs in the process. Reluctant contractors claim some Hispanic workers refuse on cultural grounds to submit to fingerprinting. In addition, employers must pay the eighty-two dollar fee to fingerprint each worker. The problem has been compounded by some schools that insist on ruling out people who have committed minor crimes from school premises. While most employers do not mind the background checks, many find the fingerprinting overly burdensome.

D. Nepotism: Legal Issues over Hiring Relatives

Florida prohibits employment discrimination on grounds of marital status, but also somewhat confusingly has an “anti-nepotism” law. See FLA. STAT. § 760.01(2) (2006). Nepotism still flourishes “primarily because of the growth of family-owned businesses and companies that view the practice as an opportunity to build loyalty, trust, and responsibility among their work forces.” Hanah Cho, Nepotism Occurs Despite Negative Perceptions, MIAMI HERALD, July 16, 2006, at 4E.
eral courts have addressed the question of whether the "marital status" statute undercuts the "anti-nepotism" law.\textsuperscript{51}

In 2000, the Supreme Court of Florida narrowly interpreted the state's ban on marital status discrimination by ruling that Florida shall not recognize a marital discrimination claim premised on a company's response to the action of one's spouse.\textsuperscript{52} The Court made clear that the common usage of the term "marital status" refers to whether an individual is "married, single, divorced, widowed, or separated;" it does not cover retaliation against an employee for the actions of that employee's spouse.\textsuperscript{53}

In 2005, the state-funded Early Learning Coalition of Miami-Dade/Monroe allegedly employed or did business with relatives or friends of six coalition staff members.\textsuperscript{54} The Coalition received money from the state "to oversee preschool and school readiness efforts in Miami-Dade and Monroe counties."\textsuperscript{55} Results of a state inspector general's investigation are pending.\textsuperscript{56}

E. Strengthening Employer Sanctions over Hiring Undocumented Workers

Under the Immigration Reform and Control Act of 1986,\textsuperscript{57} it is unlawful for employers to hire undocumented illegal aliens.\textsuperscript{58} The employer owes a duty to verify an alien's work status by examining documents to see if it "reasonably appears on its face to be genuine." At times, employers receive notice from the Social Security Administration that an employee's social security information does not match data on record. Until now, employers suffered no penalty if they failed to investigate. But under new rules proposed by the Department of Homeland Security, employers would be required to investigate after notification of discrepancies or face potential

\textsuperscript{52} Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1155 (Fla. 2000).
\textsuperscript{53} Id.
\textsuperscript{54} Carol Marbin Miller, Nepotism Probe Target Points to Agency Successes, MIAMI HERALD, Oct. 15, 2005, at 6B.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{59} Id. § 1324a(b)(1)(A).
\textsuperscript{61} See id. at 34,281–82.
Employers who attempted to clear up discrepancies would be protected from court action. A second regulation allows employers to maintain employment records in electronic form, saving employers who have thousands of employees or a high turnover the cost and storage space that paper records require.

President Bush hoped to make "an overhaul of the nation's immigration laws" his signature domestic initiative of 2006. However, differences among President Bush, the House, and the Senate, meant that the long odds for passage of the Bill in 2006 grew even longer. The House Bill would make it a felony to live in the United States illegally and rejects any chance for undocumented aliens to win legal status. The Senate Bill seeks to strengthen border control, while at the same time giving illegal immigrants a chance to become citizens after paying a fine. President Bush's approach calls for stronger enforcement, while providing avenues to legalize the illegal work force and to carve a potential path to citizenship.

The Eleventh Circuit Court of Appeals, in Williams v. Mohawk Industries Inc., ruled that claims by employees that their employer hired illegal workers as part of a conspiracy to hold down wages and lower workers' compensation claims were valid under the Racketeer Influenced and Corrupt Organizations (RICO) Act and state law.

While there are twenty-one million immigrants and only seven million unemployed Americans, "the majority of immigrants [have not] 'taken' jobs; they must be doing jobs that would not have existed had the immigrants not been here." However, economists disagree over whether immigrants hurt...
the economic prospects of the Americans they compete with, but the consensus of most is that, overall, immigration is good for the country.\textsuperscript{73}

Some Florida cities have proposed their own controversial laws on undocumented immigrants.\textsuperscript{74} For example, Palm Bay in Brevard County and Avon Park in Highlands County are weighing fines for businesses that hire workers without legal residency status.\textsuperscript{75} These measures would also bar city contracts from businesses employing undocumented immigrants.\textsuperscript{76} Critics claim that such ordinances will violate civil rights laws and may be preempted by federal immigration law.\textsuperscript{77} Avon Park had to reconsider its position, because such a ban might have blocked the construction of a Wal-Mart.\textsuperscript{78} Under such ban, Wal-Mart would be in violation for hiring illegal immigrants.\textsuperscript{79} As a result, Avon Park’s proposed immigration ordinance failed on July 24, 2006, by a 3-2 vote by the City Council.\textsuperscript{80}

F. Ethics and Conflicts of Interest

Many states have enacted so-called “codes of governmental ethics” that set standards of conduct not only for public employees, but also for persons such as lobbyists who interact with government officials and employees.\textsuperscript{81} Florida requires that violations of its code of ethics be proven by clear and convincing evidence of wrongdoing.\textsuperscript{82} Under a new law enacted in 2005, Florida legislators may no longer take gifts or meals from lobbyists.\textsuperscript{83} However, according to the \textit{Miami Herald}, many state lawmakers continue to raise money for their political organizations from corporations and lobbyists that have an interest in what the legislature undertakes.\textsuperscript{84} Despite a 2004 rule change that forced all legislators to register any political committees with whom they have an affiliation, some observers speculate that these political organizations amount to a huge loophole for lawmakers to dodge the new

\begin{thebibliography}{9}
\bibitem{73} Id.
\bibitem{74} Cities Propose Laws on Migrants, \textit{MIAMI HERALD}, July 10, 2006, at 5B.
\bibitem{75} Id.
\bibitem{76} Id.
\bibitem{77} Id.
\bibitem{78} Aid Ban Imperils Wal-Mart, \textit{MIAMI HERALD}, July 14, 2006, at 8B.
\bibitem{79} See id.
\bibitem{80} Casey Woods, Immigration Opens Big Split in Small Town, \textit{MIAMI HERALD}, Aug. 9, 2006, at 1A.
\bibitem{81} Erika Bolstad, County Weighs Lobbyist Rules, \textit{MIAMI HERALD}, Jan. 7, 2006, at 1B.
\bibitem{82} Latham v. Fla. Comm'n on Ethics, 694 So. 2d 3d, 83, 84 (Fla. 1st Dist. Ct. App. 1997).
\bibitem{83} See \textit{FLA. STAT.} § 112.3148(7)(j) (2006).
\bibitem{84} Gary Fineout, Cash Flows Despite New Ban on Gifts, \textit{MIAMI HERALD}, Dec. 19, 2005, at 1B.
\end{thebibliography}
In 2006, a group of lobbyists asked a Leon County judge to enjoin one of the nation's toughest restrictions on gifts from lobbyists to legislators. Florida's ban, effective January 1, 2006, angered many lobbyists who were also obliged to reveal how much they get paid. The lobbyists have challenged the new law as "deeply flawed across the board procedurally and it also violates First Amendment and equal protection rights guaranteed by the [United States] Constitution."

On a local level, Broward County commissioners are considering whether to enact their own "ethics rules that [would] bar them from accepting any gifts or meals from lobbyists," mirroring restrictions passed by legislators statewide. "Currently, county commissioners can accept gifts worth less than $100 from lobbyists without reporting them" to the Florida Commission on Ethics. Since 2001, lobbyists that conduct business with the Broward County Commission are required to register and reveal yearly any fees for securing a contract for a client.

Joining the ethics bandwagon in 2005, Florida's Attorney General called for the elimination of the revolving door at "state-run entities where former employees [leave and form] companies only to return seeking contracts from their former employer." Currently, state "law requires state employees to wait two years before doing business with their former agency." Under the new law, violations would be investigated by the Florida Commission on Ethics, with restitution and fines up to $10,000. Soon after, Citizens Property Insurance (Citizens) executives told the Florida House Committee it was about to impose ethics rules along the lines of those proposed by Florida's Attorney General. In 2005, conflict of interest
claims emerged when former Citizens executives hatched a plan to form a private insurance firm that would seek business from Citizens.\footnote{96. Id.}

The Florida Legislature is considering a measure that will outlaw the ethically-dubious practice of “double dipping” whereby state legislators receive a salary as a state legislator and draw pay from another job that is state-funded.\footnote{97. Gary Fineout, ‘Double Dipping’ by Legislators Is Under Attack, MIAMI HERALD, Mar. 15, 2006, at 7B [hereinafter Fineout, Double Dipping].} The bill, for example, will prohibit state lawmakers from working for public schools, a city, or a county.\footnote{98. Id.} In addition, the bill makes it a conflict of interest for a lobbyist to serve on the Florida Commission on Ethics.\footnote{99. Id.} However, if enacted, the law will not apply to any current lawmakers or take effect until January 2016.\footnote{100. Id.}

The ban on the practice of “double dipping” is similar, but not identical, to laws that regulate the practice of dual office holding.\footnote{101. Id. Compare Fineout, Double Dipping, supra note 97, with City of Orlando v. State Dep’t of Ins., 528 So. 2d 468, 469 (Fla. 1st Dist. Ct. App. 1988).} On occasion, the ban on dual office holding is lifted where the second office is merely conceived as an added duty of the first office.\footnote{102. See City of Orlando, 528 So. 2d at 469.} For example, a Florida court ruled that a city commissioner was not barred outright from holding office as a pension trustee if pension administration is a regular duty shared with the office of commissioner.\footnote{103. Id.}

Beyond the statutory concept of dual office holding is the common law doctrine of incompatibility of office.\footnote{104. Gryzik v. State, 380 So. 2d 1102, 1104 (Fla. 1st Dist. Ct. App. 1980).} Incompatibility of office is deemed to arise where one office falls under the control of the other, thereby enabling the office holder to favor one position over the other.\footnote{105. Id.} Faced with this conflict, the office holder is forced to yield one of the positions if holding both might disserve the public interest.\footnote{106. Id.} The potential for conflict rather than actual conflict triggers the ban.\footnote{107. Id.} Under Florida’s Constitution, neither serving as notary public nor holding a commission with the National Guard of state militia triggers divestiture.\footnote{108. See FLA. CONST. art. II, § 5(a).}
III. TERMS OF EMPLOYMENT

A. Hours and Wages

1. Fair Labor Standards Act Issues

The national minimum wage has been frozen at $5.15 an hour since September 1997, "marking the second longest [term] that the [country] has had a stagnant minimum wage since" the enactment of the Fair Labor Standards Act (FLSA) in 1938. States are free to raise the minimum wage within their own borders. "In 2004, Florida voters [overwhelmingly] approved a constitutional amendment that set the state minimum wage at $6.15 an hour and . . . [scheduled] annual adjustments for inflation." On January 1, 2006, the Florida Legislature adjusted the minimum wage to $6.40 an hour. According to the Miami Herald, about "400,000 of Florida's 8.5 million workers earn . . . minimum wage." In the past year, the Department of Labor issued several opinion letters dealing with calculating overtime pay:

- One letter offered aid in assessing overtime when an employee performs both exempt and nonexempt tasks. As a rule, employers owe overtime for all hours worked if the primary duty is nonexempt work.
- One letter made clear that changes to the law governing the executive exemption from overtime pay rules, affected by the 2004 revisions in the FLSA regulations, are clarifications and not substantive changes.

110. See Klein, supra note 109.
111. Id.
112. Id.
113. Id.
115. See id.
One letter clarified that a graduate degree requirement for social workers satisfies the learned professional exemption from overtime, while a general college degree for caseworkers did not.\textsuperscript{117} One letter explained that although an employer is typically required to pay the average aggregate wage when a firefighter works two jobs at different pay levels, employers who can show that the pay scheme is not aimed at selling workers short or evading the FLSA may pay for overtime based on two distinct wages.\textsuperscript{118}

In 2005, the United States Supreme Court ruled that, under FLSA, time spent walking between the area where workers put on and take off (don and doff) protective gear, that is "integral and indispensable"\textsuperscript{119} to the "principal [activity]"\textsuperscript{120} plus time spent waiting to doff, is compensable.\textsuperscript{121} By contrast, time devoted to waiting to put on the first article of gear, that signals the beginning of a non-stop workday, is excluded from the scope of the FLSA under section 4(a)(2) of the Portal-to-Portal Act.\textsuperscript{122}

A Tampa federal court ruled, in \textit{Bogacki v. Buccaneers Ltd. Partnership},\textsuperscript{123} that a worker who files a retaliation claim under the FLSA may recover emotional distress damages alongside lost wages, liquidated damages, costs, and attorneys' fees.\textsuperscript{124}

2. Off-Duty Pay for Police Officers

The Miami-Dade Police Benevolent Association (PBA) conducts an off-duty work program aimed at providing police officers as added security for private businesses.\textsuperscript{125} However, according to a report by the Inspector General, the head of the PBA received over $100,000, since 2003, for patrolling the union office.\textsuperscript{126} According to the report, this is "a 'flagrant abuse' of

\textsuperscript{117} Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep't of Labor, FLSA2005-50 (Nov. 4, 2005).
\textsuperscript{118} Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep't of Labor, FLSA2005-1NA (Feb. 14, 2005).
\textsuperscript{119} IBP, Inc. v. Alvarez, No. 03-1238, slip op. at 7 (U.S. Nov. 8, 2005) (quoting \textit{Steiner v. Mitchell}, 350 U.S. 247, 256 (1956)).
\textsuperscript{120} \textit{Id.} (quoting \textit{Steiner}, 350 U.S. at 256).
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 19.
\textsuperscript{123} 370 F. Supp. 2d 1201 (M.D. Fla. 2005).
\textsuperscript{124} \textit{Id.} at 1201, 1206.
\textsuperscript{125} Scott Hiaasen, \textit{Union Boss' Off-Duty Pay Under Fire}, \textit{Miami Herald}, May 31, 2006, at 1A.
\textsuperscript{126} \textit{Id.}
an off-duty work program,” which was designed to be “self-sustaining, with businesses, not taxpayers, bearing all the costs.”

3. Teachers’ Pay

About 900 Florida International University (FIU) faculty had been working without a labor contract since 2003. However, in 2006, FIU’s faculty signed a three-year landmark contract that will aid the fast-growing public school in recruiting better faculty. The contract, which guarantees each faculty member a minimum pay hike and the right to arbitrate grievances before an internal panel, is the first contract for the FIU faculty since Florida eliminated its Board of Regents.

In 2006, hundreds of South Florida teachers mounted a silent protest by wearing blue shirts in part to express their anger over a state plan to tie teacher salaries to student test scores. In 2005, Miami-Dade public school teachers agreed to a one-year contract that included almost $53 million in salary increases. Under the new contract, a school teacher’s starting salary would increase from $33,275 to $34,200. As a result of the new contract, the average salary of Miami-Dade teachers would rise to $48,307, about $8,000 more than the state average and almost $3,000 above the national average salary for all teachers.

South Florida’s high cost of housing has often deterred new teachers from working in the area. A starting salary of $35,000 makes it very difficult for new teachers to afford to buy even a one-bedroom condo. To address this problem, the Broward School Board entertained proposals by a real estate developer to reserve 50 apartment units in a redevelopment area for

127. Id.
128. Noah Bierman, FIU Faculty Approves New 3-Year Contract, MIAMI HERALD, Feb. 16, 2006, at 1B.
129. Id.
130. Id.
131. Mary Ellen Klas, Teachers Dress in Blue to Protest, MIAMI HERALD, Apr. 26, 2006, at 8B.
132. Matthew I. Pinzur, Early Deal Hikes Dade Teachers’ Pay, MIAMI HERALD, July 30, 2005 at 1B.
133. Id.
134. Id.
135. Steve Harrison, Homing in on a Headache, MIAMI HERALD, Aug. 24, 2005, at 3B.
136. Id.
teachers by selling the units to the teachers below market value. Under the plan, "the School Board [would offer] teachers a $20,000 loan, refundable if they teach for five years." Moreover, the School Board is weighing whether to lobby the state legislature to grant an additional homestead exemption for teachers. "[T]he Miami-Dade County School Board recently approved a program" to provide discounts to teachers for public transit as an employee benefit.

4. Military Pay

Under federal law, employers are only required to keep the same or similar job and pay and benefit packages for any workers called to active duty. A bill introduced in the Florida Legislature in 2005 will assist state National Guard and Reserve soldiers who lose wages when they are called up for active duty.

The Broward County Sheriff’s Office exceeds federal standards, maintaining jobs for reservists by paying them “half of the difference between what the military pays them and what [the employer] ordinarily pays them.” State-wide, “Florida has more than $1.8 million available in matching grants” for any employer who supplements pay to workers “called to active federal military duty.”

In Coffman v. Chugach Support Services, the Eleventh Circuit Court of Appeals ruled that under the Uniformed Services Employment and Reemployment Rights Act (USERRA), an employer is not a successor in interest to another employer absent a merger or transfer of assets between the two entities.

137. Id.
138. Id.
139. Id.
140. Niala Boodhoo, Housing Aid is a Recruitment Tool, MIAMI HERALD, Aug. 13, 2006, at 20A.
142. See Phil Long, State Eyes Cash Relief for Guard, MIAMI HERALD, Feb. 14, 2005, at 1B.
143. Dalia Naamani-Goldman, Military Praises Employers, MIAMI HERALD, Apr. 29, 2005, at 5B.
145. 411 F.3d 1231 (11th Cir. 2005).
146. See 38 U.S.C. §§ 4301-4333. This Federal Act codifies veterans’ reemployment rights. Id.
The final rules issued by the Department of Labor on December 19, 2005 state that employees returning from military service are entitled to unbroken pension participation, vesting, and accrual of benefits.\textsuperscript{148} The final rules apply to state and local governments as well as private employers.\textsuperscript{149} Returning service members must receive the same seniority, status, and pay as they would have earned had they not left for military service.\textsuperscript{150} Additionally, disability incurred during military service does not foreclose reinstatement at the same seniority, status, and pay.\textsuperscript{151} Employers owe a duty to reasonably accommodate a returning service member’s disability.\textsuperscript{152}

5. Missed Work Pay Due to Hurricanes

As a general rule, hourly employees are not paid for hours they do not work.\textsuperscript{153} Only salaried employees, who are exempt from overtime, are entitled to be paid for time missed in the wake of a hurricane.\textsuperscript{154} Hourly workers need not be paid even if the workplace closes due to power failure or hurricane damage.\textsuperscript{155} Such employees may be eligible for unemployment or disaster assistance.\textsuperscript{156} Disaster Unemployment Assistance (DUA) is only available for workers “left jobless as a direct result of a declared disaster.”\textsuperscript{157} However, “DUA cannot supplement regular unemployment compensation.”\textsuperscript{158}

6. The Wage Gap Between Men and Women

Men, on average, earn more money than women.\textsuperscript{159} “[A] woman earns only 77 percent as much as her male counterpart with the same job descrip-
tion and experience.”

African-American women earn even less, while Hispanic women earn the least of all. The wage gap has not narrowed in ten years. Over a lifetime, the wage gap can make an enormous difference in retirement savings, among other things. April 25th has been declared National Pay Equity Day and it serves to draw attention to the inequity of the wage gap.

7. Living Wage Laws

In 2005, full-time workers earning minimum wage netted $12,300 annually, about “40 percent below the federal poverty level for a family of four.” To remedy the plight of the public-sector working poor, Miami-Dade County enacted a living wage ordinance in 1999. Miami Beach followed in 2001 and Broward County in 2002. A study of Miami-Dade County’s living wage ordinance found that after earning an extra $5,720 a year, workers were better able to reduce debt, save more, and live better. “The ordinance covers all county employees and service contractors, Public Health Trust workers, and ground service providers at Miami International Airport.” In 2006, the Miami City Commission “unanimously gave tentative approval to a living wage ordinance for city workers and employees of [city contractors].” If approved, covered “workers would be guaranteed an hourly wage of $10.58, if they receive health insurance coverage,” or $11.83 an hour if health insurance is not offered.

161. Id.
162. Id.
163. Id.
164. Id.
166. Id.
167. Id.
168. Niala Boodhoo, County’s Living Wage Success with Workers, MIAMI HERALD, Feb. 16, 2006, at 3C.
169. Id.
170. Michael Vasquez, Tentative Approval for Living Wage Rule, MIAMI HERALD, Mar. 24, 2006, at 3B.
171. Id.
B. Health Benefits

According to a recent study, 41% of working-age Americans with mid-level incomes lack full-time health insurance, up from 28% in 2001.\textsuperscript{172} To make matters worse, more employers are eliminating coverage or offering health benefits that are too expensive for many workers to afford.\textsuperscript{173}

In 2006, Florida International University became the first Florida university—public or private—"to offer six months' paid leave to either parent" in order to care for a newborn child.\textsuperscript{174}

Alongside workplace smoking bans, more and more public and private employers are forcing "employees who use tobacco to pay higher health [insurance] premiums."\textsuperscript{175} In light of the fact that smokers cost employers around 25% more than nonsmokers when it comes to healthcare, some companies “charge smokers higher premiums, [ranging] from . . . $20 to $50 a month.”\textsuperscript{176} For a number of reasons, public employers are increasingly hiring only non-smokers: not only individuals who do not smoke at work but also individuals who do not smoke at all. In this regard, the Supreme Court of Florida has ruled that there is no privacy violation for a city to require job applicants to sign affidavits vowing they had not used tobacco for a year.\textsuperscript{177}

More and more, public and private employers provide dependent health benefits to "spousal equivalents" of its employees.\textsuperscript{178} For example, in 2006,
Florida International University "join[ed] the University of Florida in extending healthcare benefits to same-sex domestic partners."\textsuperscript{179}

Seven years after "Broward County became one of the first local governments in Florida to extend domestic partner benefits to employees," "only a few cities in Broward have followed [suit]\textsuperscript{180} Like Broward County, "Hollywood, Miramar, Oakland Park, and Wilton Manors [offer] domestic partner benefits" to employees.\textsuperscript{181} In 2005, the Miami Beach City Commission approved a measure that "required city contractors to [offer] the same benefits for domestic partners as they do for spouses."\textsuperscript{182} The ordinance is unique in Florida.\textsuperscript{183}

Medical insurance costs for United States workers and retirees amounted to $13,382 in 2006 for a family of four, up 9.6\% from 2005.\textsuperscript{184} Moreover, 14\% of employers in one survey "expect to eliminate retiree health benefits for current workers."\textsuperscript{185} About 160 million workers, retirees, and their families are covered by health insurance purchased by employers.\textsuperscript{186}

Kidcare is Florida's subsidized health insurance program for children.\textsuperscript{187} A child is eligible for coverage only if both parents work.\textsuperscript{188} In the past, enrollment periods were limited, but Governor Jeb Bush signed a law that entitles parents to enroll their children in Kidcare at any time.\textsuperscript{189}

C. Guns at the Workplace

In 2006, the National Rifle Association supported a measure that would punish "Florida employers with prison time and lawsuits if they [forbade their workers] from keeping [firearms] in their cars in workplace parking

\textsuperscript{179} Id. The Supreme Court of Alaska ruled in 2005 that "it was unconstitutional to bar benefits to the same-sex partners of public employees." \textit{National Briefing Northwest: Alaska: Ruling on Same-Sex Partners}, \textit{N.Y. Times}, Oct. 29, 2005, at 16A.

\textsuperscript{180} Amy Sherman, \textit{Partner Benefits Again an Issue}, \textit{MIAMI HERALD}, Mar. 13, 2006, at 1B.

\textsuperscript{181} Id.

\textsuperscript{182} \textit{Gay-Benefits Package Passes}, \textit{MIAMI HERALD}, Oct. 20, 2005, at 3B.

\textsuperscript{183} Id. Broward County gives preference to contractors who extend domestic partnership benefits, but does not require them. Id.

\textsuperscript{184} \textit{Business Briefs: Medical Costs Are Up}, \textit{MIAMI HERALD}, July 6, 2006, at 1C.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} Deborah Circelli, \textit{Enrollment Now Open for State KidCare Program}, \textit{DAYTONA News-J}, June 11, 2005, at 03C.

\textsuperscript{188} See id.

\textsuperscript{189} Id.

In response, Florida employers claim the law intrudes on their private property rights. The bill would not apply to schools where guns are banned by law. Under the bill, employers would be relieved of liability in the event an employee committed a crime with a gun left in their car. "Shootings accounted for three-quarters of the 551 workplace homicides in the United States" in 2004.

D. Workers' Compensation

"In 2000, Florida had the highest workers' compensation rates [nation-wide]." In 2003, Florida's workers' compensation insurance underwent reform and insurance rates declined 14%. In 2005, Florida's Chief Financial Officer, who was running for Governor, proposed "a [twenty-two] percent cut in workers' compensation insurance rates."

E. Unemployment Compensation

In 2005, Florida's unemployment rate was at an all-time low of 3.8%. With the Federal Reserve raising interest rates eighteen times in an effort to forestall inflation, overall spending is reduced, employers hire fewer workers, and unemployment rises. Commentators disagree about whether inflation or rising unemployment poses the greater concern.

191. Id.
192. Id.
196. Id.
197. Id.
198. Roberto Santiago, Florida Workers Have Scant Job Protection, MIAMI HERALD, Sept. 5, 2005, at 5B.
F. Public Pensions

In 2006, of the nearly $240 million the City of Miami plans to collect in taxes, about $80 million will go to fund its "generous—and occasionally scandal-plagued—pension funds." Apparently, the fund suffered years of neglect during the 1990s, when the City of Miami narrowly avoided bankruptcy and relied on stock market gains to shore up retirement benefits. The troubled fund faces not only public resentment over budget-crippling payments, but also charges of faulty management. For example, a city auditor found that twenty-five public employees were deemed permanently disabled without medical evidence of their injuries.

IV. DISCIPLINE, RETALIATIONS, AND DISCRIMINATION

A. Discipline

A Martin County deputy sheriff was dismissed for using the video camera in his patrol car to zoom in on and record bikini-clad girls while on duty. The deputy is challenging his dismissal and nothing is final until a panel conducts a hearing and votes on whether the discipline is warranted. A Lauderhill firefighter-paramedic was dismissed for not reporting to duty during a hurricane, and his firing was subsequently upheld in 2005. The firefighter refused to work, stating that he had been drinking wine; however, department policy bars on-call employees from drinking alcohol once a hurricane watch goes into effect.

B. Retaliation, Whistle-Blowing, and the First Amendment

In 2006, the United States Supreme Court handed down two major decisions involving retaliatory discharge: one concerning Title VII, and an-
other implicating the First Amendment. In the latter, Garcetti v. Ceballos, a supervising deputy district attorney claimed that he was retaliated against for writing a memo in the course of his employment that pointed out inaccuracies in an affidavit police used to secure a search warrant. The United States Supreme Court ruled that public employees who utter statements in the course of their official duties are not speaking as citizens for First Amendment purposes and, consequently, are not constitutionally immune from employer discipline stemming from their communications. Writing on behalf of five justices, Justice Kennedy made clear that the dispositive factor was not that Ceballos expressed his views inside his office rather than publicly, but that the employer is properly entitled to exercise control over what it has commissioned or created. In dissent, Justice Souter wrote:

that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

In the other retaliatory discharge ruling, the United States Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White markedly strengthened legal protection against retaliation for employees who protest discrimination or harassment on the job. Title VII, the basic federal law banning discrimination in employment, also “prohibits employers from retaliating against [employees] who complain about discrimination.” According to Justice Breyer’s unanimous opinion, retaliation does not need to result in dismissal because any “materially adverse employment action that

211. See id. at 10.
212. See id. at 10–11.
213. Id. at 1 (Souter, J., dissenting).
214. No. 05-259, slip. op. at 1 (U.S. June 22, 2006).
215. Id. at 3; see Linda Greenhouse, Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace, N.Y. TIMES, June 23, 2006, at A24 [hereinafter Greenhouse, Supreme Court].
216. Greenhouse, Supreme Court, supra note 215.
'might have dissuaded a reasonable worker'\textsuperscript{217} from protesting discrimination qualifies as prohibited retaliation under Title VII.\textsuperscript{218}

According to the \textit{New York Times}, around "20,000 retaliation cases were filed with the Equal Employment Opportunity Commission in 2004."\textsuperscript{219} This new ruling by the United States Supreme Court is likely to substantially increase the number of retaliation cases.\textsuperscript{220}

In 2005, the United States Supreme Court ruled that the six-year statute of limitations for \textit{qui tam} suits under the False Claims Act (FCA) does not govern whistle-blower retaliation suits.\textsuperscript{221} Instead, FCA retaliation claims are governed by the more "analogous state statute of limitations."\textsuperscript{222}

On September 29, 2005, the United States House Committee on Government Reform approved a measure that would strengthen whistle-blower protections for federal employees, including the right to jury trials.\textsuperscript{223}

At the state level, a former marine biologist sued the State of Florida under Florida's Whistle-Blower's Act,\textsuperscript{224} alleging that his protests over a plan to broaden the highway into the Florida Keys cost him his job.\textsuperscript{225} In 2005, the Hallandale Beach Civil Service Board recommended that a firefighter-paramedic finally be promoted and awarded back pay after he was continually passed over for promotion, because the "decisions he made while on the Civil Service Board" were controversial.\textsuperscript{226}

\section*{C. Employment Claims}

From 2004 to 2005, the backlog of discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) increased 12%, amounting to 33,562 claims last year.\textsuperscript{227} Since 2001, "[t]he EEOC has lost 20% of its staff since 2001, when a hiring freeze was instituted, and it now

\begin{itemize}
\item \textsuperscript{217} \textit{Id.} (quoting \textit{Burlington N. & Santa Fe Ry. Co.}, No. 05-259, slip op. at 13).
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.} This number has "doubled" since 1992. \textit{Id.}
\item \textsuperscript{220} Greenhouse, \textit{Supreme Court, supra} note 215.
\item \textsuperscript{221} \textit{See Graham County Soil & Water Conservation Dist. v. United States}, No. 04-169, slip op. at 1 (U.S. June 20, 2005).
\item \textsuperscript{222} \textit{Id.} at 12.
\item \textsuperscript{223} \textit{See \textsc{FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT, H.R. REP. NO. 109-544, pt. 1, at 6}} (2006).
\item \textsuperscript{224} \textit{Fla. Stat.} §§ 112.3187-.31895 (2006).
\item \textsuperscript{225} Luisa Yanez, \textit{Biologist Who Lost Job Fights Firing in a Lawsuit}, \textsc{Miami Herald}, Aug. 4, 2005, at 3B.
\item \textsuperscript{226} Diana Moskovitz, \textit{Board Rules Fireman Unfairly Passed Over}, \textsc{Miami Herald}, Oct. 20, 2005, at 5B.
\item \textsuperscript{227} Marni Goldberg, \textit{Job-Discrimination Claims Pile up with Budget Cuts}, \textsc{L.A. Times}, June 17, 2006, at A6.
\end{itemize}
faces budget reductions, with the Bush administration proposing to cut the agency’s budget by $4 million next year.\textsuperscript{228} For over forty years, “the EEOC has investigated workplace discrimination based on sex, race, age, national origin, religion, and disability.”\textsuperscript{229} To make matters worse, a controversial reorganization plan recommends a national call center staffed by non-professionals, instead of trained specialists, to answer public questions.\textsuperscript{230}

According to a 2005 EEOC Advisory Letter, it is unlawful to compel answers to internet job questionnaires that inquire about “race, color, religion, sex, national origin, age, and disability.”\textsuperscript{231} In the 2005 fiscal year, the EEOC helped secure roughly “$378 million in total monetary benefits” for job discrimination victims, “down from . . . $415.4 million in fiscal [year] 2004.”\textsuperscript{232}

In Florida, employers are not allowed to terminate or discriminate against employees on the basis “of age, race, religion, sex, national origin, or pregnancy.”\textsuperscript{233} In addition, the Family and Medical Leave Act of 1993\textsuperscript{234} prohibits terminating an employee for taking a leave in certain circumstances.\textsuperscript{235} One provision of an anti-bullying bill, currently making its way through the Florida Legislature, prohibits “‘bullying and harassment’ of . . . school employees in Florida’s public schools.”\textsuperscript{236}

V. EMPLOYMENT DISCRIMINATION

A. Generally

Title VII covers employers with “fifteen or more employees.”\textsuperscript{237} In 2006, the United States Supreme Court, in \textit{Arbaugh v. Y & H Corp.},\textsuperscript{238} ruled that the fifteen-employee requirement is not similar to a jurisdictional issue, which can be raised at any time, but instead is merely a defense to the dis-

\begin{itemize}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{232} \textit{EEOC’s Benefits Dropped Slightly in 2005, Charge Filings Continued Three-Year Decline}, 74 U.S.L. Wk. 2376, Jan. 3, 2006.
\item \textsuperscript{233} Santiago, \textit{supra} note 198.
\item \textsuperscript{234} 29 C.F.R. §§ 825.100-.800 (2006).
\item \textsuperscript{235} \textit{Id.} § 825.112(a)(1)-(4).
\item \textsuperscript{236} \textit{Fix Anti-Bullying Bill}, \textit{MIAMI HERALD}, Apr. 25, 2006, at 28A.
\item \textsuperscript{237} 42 U.S.C. § 2000e(b) (2000).
\item \textsuperscript{238} No. 04-944 (U.S. Feb. 22, 2006).
\end{itemize}
This defense can be waived by failure to raise it in a timely fashion.

B. Race and National Origin

Both federal and state laws ban employment discrimination based on a person's race. During the past year, the rulings in this area had the effect of binding Florida employers. Under the Florida Civil Rights Act of 1992 (FCRA), employers are prohibited from discriminating in the workplace on grounds of race, among other categories. The Sovereign Immunity Tort Law (SITL) allows persons to sue state agencies, counties, and subdivisions of state government. The provision, however, limits recovery. In Gallagher v. Manatee County, a Florida appellate court ruled that a $100,000 cap in the SITL applies to all damages that an employee can recover under the FCRA.

Hostile work environments may be based on race as well as on sex. In Webb v. Worldwide Flight Service, Inc., the Eleventh Circuit Court of Appeals upheld a judgment of $100,000 in compensatory damages and $100,000 in punitive damages, under the FCRA, to a victim of racial comments that created a hostile work environment. In 2005, "[a] Fort Lauderdale police officer was suspended without pay . . . for [uttering] racist remarks to a teenager and [then] lying about it [in the course of] an investigation." Additionally, "[s]even lawyers' groups representing minorities and women [proposed that] Broward County judges . . . undergo training to be

239. See id. at 2, 12.
240. See id. at 2.
244. Id. § 760.10(1)(a).
245. Id. § 768.28.
246. Id. § 768.28(1).
247. Id. § 768.28(5).
248. 927 So. 2d 914 (Fla. 2d Dist. Ct. App. 2006).
249. See id. at 916, 919.
251. 407 F.3d at 1192.
252. Id. at 1193.
253. Darran Simon, Police Officer Is Suspended for Alleged Racist Remark, MIAMI HERALD, July 29, 2005, at 3B.
more sensitive toward black and Hispanic defendants."^{254} Further, in Orlando, an elementary school teacher resigned over a letter she wrote.\textsuperscript{255} The letter was published in a Spanish-language daily newspaper "disparaging Hispanics and other minorities."\textsuperscript{256} Also, the Davie Town Council decided not to terminate a planning board member charged with circulating a cartoon that some on the council considered racist.\textsuperscript{257} Moreover, the Eleventh Circuit ruled that a district court properly reduced a national origin bias award of back pay and compensatory damages from $700,000 to $1\textsuperscript{258} because the claimant failed to produce any evidence of his actual earnings while employed.\textsuperscript{259}

C. Gender and Same-Sex Discrimination

Over the past two years, various examples of gender discrimination in both state and federal settings have arisen. In 2005, the United States Department of Labor's Bureau of Labor Statistics stopped collecting data on the number of women employees in the workplace for its monthly payroll employment survey.\textsuperscript{260} Further, in 2005, the Eleventh Circuit Court of Appeals ruled that an employee, who sues for sex discrimination in pay, under an annual salary review system, could recover on her disparate pay gap claim only as far back as the last salary decision that affected her pay, within Title VII's 180-day filing period.\textsuperscript{261} Also, in 2006, the EEOC sued a Miami-based company for pregnancy discrimination, alleging that the employer illegally dismissed a worker after she mentioned she would need a cesarean.\textsuperscript{262} According to the EEOC, pregnancy discrimination claims in Florida "have almost doubled since 1992."\textsuperscript{263}

In the same-sex discrimination arena, "most urban police departments [nationwide] are actively recruiting gays and lesbians[;] . . . in South Florida,
most gay police officers remain in the closet.\textsuperscript{264} "[O]nly three [South Florida police departments]—Miami Beach, Key West, and Fort Lauderdale—have liaisons to the gay community.\textsuperscript{265} While gay police officers are no longer bullied or abused by co-workers in South Florida, most continue to stay in the closet for fear of harassment.\textsuperscript{266} "[In] Florida, gay workers . . . have no specific protection against being [dismissed] on the basis of their sexual orientations."\textsuperscript{267} Florida Law Enforcement Gays and Lesbians (LEGAL) is an organization that has about eighty members.\textsuperscript{268}

D. Age Discrimination

In 2005, the United States Supreme Court settled a difference of opinion amongst the circuits by ruling that a disparate impact analysis is an available framework under the Age Discrimination in Employment Act (ADEA).\textsuperscript{269} Employers, however, may still prevail by raising the potent defense of "reasonable [factors] other than age" under the ADEA.\textsuperscript{270}

E. Disability Discrimination

In 2006, the United States Supreme Court ruled that Title II of the Americans with Disabilities Act (ADA) "validly abrogate[d] [the] state[s'] sovereign immunity" in lawsuits for money damages, from prisoner suits that raise constitutional violations.\textsuperscript{271} This ruling has potential implications for public employers in Florida because the Eleventh Circuit Court of Appeals ruled in 1998 that public employers may also face liability under Title II of the ADA.\textsuperscript{272}

Although the ADA prohibits disability-related questions before an applicant is hired, an EEOC advisory letter carves out an exception when an employer seeks to hire individuals with disabilities "as part of an affirmative

\textsuperscript{264} Wanda J. DeMarzo & Steve Rothaus, \textit{Despite Some Progress, Many Gay Officers Still in Closet}, MIAMI HERALD, Jan. 28, 2006, at 23A.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Smith v. City of Jackson, 544 U.S. 228, 232 (2005).
\textsuperscript{270} Id. at 242–43.
\textsuperscript{271} United States v. Georgia, No. 04-1203, slip op. at 7 (U.S. Jan. 10, 2006).
\textsuperscript{272} Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 825 (11th Cir. 1998).
According to a 2005 EEOC advisory letter, pregnancy-related disabilities are treated the same as other disabilities when relating to fringe benefits.\(^{274}\)

The circuit courts are split over whether employees regarded as disabled are entitled to the same reasonable accommodation as employees who are actually disabled.\(^{275}\) The Eleventh Circuit Court of Appeals follows the minority view that employees regarded as disabled are entitled to the same reasonable accommodation as employees who are actually disabled.\(^{276}\)

The Eleventh Circuit Court of Appeals ruled in 2005 that although the "don't-look-back" rule bars a trial court from revisiting whether a "prima facie case [exists] after all the evidence is [introduced],"\(^{277}\) the issue of the employee's disability can be reconsidered even after the case is submitted to the jury.\(^{278}\)

VI. CONCLUSION

The period of 2005-06 produced a wide array of public employment legal issues. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, creates issues at the federal, state, and local levels. In contrast to private sector employment, which by and large escapes public scrutiny, public sector employment captures widespread media attention. Besides case law and legislative enactments, news stories afford a wealth of insight and detail to this corner of the law.


\(^{275}\) D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005).

\(^{276}\) Id.

\(^{277}\) Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1151–52 (11th Cir. 2005).

\(^{278}\) See id. at 1153–54.
FLORIDA’S “UNRELATED WORKS” EXCEPTION TO WORKERS’ COMPENSATION IMMUNITY

ROSS D. KULBERG*

I. INTRODUCTION.................................................................................. 157

II. ORIGINS AND HISTORY OF WORKERS’ COMPENSATION LAW AND THE “UNRELATED WORKS” EXCEPTION ........................................ 159

A. Workers’ Compensation Law ........................................................... 159

   1. Generally ....................................................................................... 159

   2. Purpose ......................................................................................... 160

B. “Unrelated Works” Exception ........................................................... 161

III. VARYING INTERPRETATIONS OF “UNRELATED WORKS” BEFORE TAYLOR AND ARAVENA ............................................................... 163

A. Same-Project Test ........................................................................... 164

B. Bright-Line Test .............................................................................. 169

IV. TAYLOR V. SCHOOL BOARD OF BREVARD COUNTY ....................... 171

A. Per Curiam Opinion ........................................................................ 173

B. Justice Lewis’ Concurrence ............................................................. 174

C. Reaction to Taylor II ........................................................................ 175

V. ARAVENA V. MIAMI-DADE COUNTY ............................................. 176

A. Majority Opinion by Justice Pariente .............................................. 178

B. Justice Wells’ Dissent ...................................................................... 181

VI. ARAVENA’S EFFECT ON THE “UNRELATED WORKS” EXCEPTION ... 182

VII. CONCLUSION AND PROPOSAL .................................................. 183

I. INTRODUCTION

An employee slips and falls in the stairwell of a hotel due to the negligence of a co-employee. Workers’ compensation laws would normally award compensation to the injured employee automatically through the em-

* The author is a J.D. Candidate, May 2007, Nova Southeastern University; Shepard Broad Law Center. Ross D. Kulberg earned his B.A. in Hospitality Business in 2001 from Eli Broad College of Business; Michigan State University. The author would like to thank his family and friends for their never ending encouragement and support, the law school faculty, and the members of Nova Law Review for their hard work and dedication in the editing of this article.
ployer. Under Florida law, however, if the two employees are "assigned primarily to unrelated works," then the injured employee also has a right to bring common law tort claims against the employee who was negligent. Therefore, in Florida, employees have a chance to collect twice—under both workers' compensation and common law tort awards—for workplace injuries caused by the negligence of an unrelated co-employee.

Florida courts have struggled with the application of the "unrelated works" exception to workers' compensation since it was enacted by the Florida Legislature in 1978. The Legislature did not give any guidance to the courts in defining what is meant by "unrelated works." As a result, for many years it was left up to the courts to structure a test that will fairly interpret the law. Generally, the courts struggled with whether to interpret "unrelated works" in a broad or narrow sense, because it is unclear if the legislature intended for the exception to be applied frequently or infrequently.

The Supreme Court of Florida has attempted to answer this question of statutory interpretation created by the legislature. However, two Supreme Court of Florida decisions resulted in contrary findings, meaning the test for determining whether a co-employee's works are unrelated remains unclear.

This article will discuss the evolution of the "unrelated works" exception to workers' compensation law. Part II will discuss workers' compensation laws in Florida and the origins of the "unrelated works" exception. Part III will discuss the different methods that Florida courts have used to define the exception. Part IV will discuss Taylor v. School Board of Brevard County (Taylor II) and its effect on the exception. Part V will discuss Aravena v. Miami-Dade County (Aravena II) and its expansion of Taylor II. Finally, this article will propose a new test for the application of the "unrelated works" exception.

3. See id.
5. See Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1, 8 (Fla. 2004) (Lewis, J. concurring); see also Fla. Stat. § 440.02 (2006).
6. See Taylor II, 888 So. 2d at 8.
7. See id. at 5; see also Fla. Stat. § 440.015 (2006).
8. See Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1169 ( Fla. 2006); Taylor II, 888 So. 2d at 5.
9. See Aravena II, 928 So. 2d at 1174; Taylor II, 888 So. 2d at 5–6.
10. 888 So. 2d 1 (Fla. 2004).
11. 928 So. 2d 1163 (Fla. 2006).
II. ORIGINS AND HISTORY OF WORKERS’ COMPENSATION LAW AND THE "UNRELATED WORKS" EXCEPTION

A. Workers’ Compensation Law

1. Generally

Workers’ compensation refers to “laws [that] provide compensation for loss [resulting] from the injury, [disablement], or death of a worker caused by industrial accident, casualty, or disease . . . based on the loss or impairment of the worker’s wage-earning power.”12 Workers’ compensation laws are not based on tort liability.13 Thus, for recovery, no proof of fault is required.14 Instead, coverage turns on the relationship between the injuring event and the employment.15 Once that “course of employment” relationship is present, it is assumed that the employee will be covered automatically.16 Benefits of workers’ compensation include only that amount which will allow the employee to “exist without being a burden to others.”17 This is drastically different than regular tort recovery, which seeks to restore the plaintiff to where he was before the incident.18

While the amount of recovery under workers’ compensation is less than an anticipated recovery under common law, it is a necessary tradeoff that mutually benefits the employer and employee.19 Employees receive the right to automatic recovery should they be injured on the job, while employers’ liability is greatly reduced due to the elimination of unknown jury verdicts and potentially large sum awards.20 Furthermore, some argue that if compensation payments were higher, perhaps equivalent to tort recovery, the purpose of the workers’ compensation statute would be lost, because larger than necessary payments would encourage malingering.21

13. See FLA. STAT. § 440.11 (2006); LARSON & LARSON, supra note 1, § 1.03(1).
14. See § 440.11; LARSON & LARSON, supra note 1, § 1.01.
15. See LARSON & LARSON, supra note 1, § 1.03(1).
16. Id. § 1.01.
17. Id. § 1.03(5).
18. Id.
20. See id.
21. See LARSON & LARSON, supra note 1, § 1.03(5).
2. Purpose

Florida's Legislature has codified the purpose of workers' compensation laws. The statute expresses the legislature's intent "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." The law "is designed to promote efficiency and fairness" between employees, employers, and insurance carriers. Further, the legislature specifically intends "that workers' compensation cases shall be decided on their merits." Additionally, disputes concerning the facts and workers' compensation laws are not to be interpreted liberally in favor of either the employee or the employer. Rather, workers' compensation laws should be interpreted using "basic principles of statutory construction."

In examining this statute, the Supreme Court of Florida determined that there are two basic purposes behind workers' compensation law: "(1) [T]o see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents." Mutual benefits for the employer, the employee and his dependants, and society as a whole have resulted from this legislation. The employee gets an automatic reasonable recovery and the employer, as well as co-employees, receive the reduction in liability from multiple unknown and unforeseeable case outcomes. Workers' compensation law is intended "to speed an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial proceedings." This mutual advantage has "a stabilizing influence on business and the general economy" by making definite and predictable outcomes,
FLORIDA'S "UNRELATED WORKS" EXCEPTION

should an employee be injured on the job.\textsuperscript{32} This in turn allows for reasonable workers' compensation insurance coverage and reduces the fear of rising insurance costs or dropped coverage due to an unpredictable loss of a common law tort action.\textsuperscript{33} Furthermore, the law relieves pressures on society by placing the burden of care of injured employees on industry rather than society itself, by preventing those that were dependent on the employee's wages from being "charges on the community."\textsuperscript{34}

B. "Unrelated Works" Exception

Most states recognize, within their workers' compensation statutes, that co-employees are immune from common law tort claims.\textsuperscript{35} The effect of this clause bars all suits against co-employees.\textsuperscript{36}

While Florida follows the majority in granting immunity to co-employees, it is the only state which has two exceptions to the immunity.\textsuperscript{37} First, co-employee immunity in Florida is not applicable when an employee "acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence [and] when such acts result in injury or death or such acts proximately cause such injury or death,"\textsuperscript{38} The second instance, in which co-employee immunity does not apply, is "when each [employee] is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment."\textsuperscript{39}

The first exception is common among most states.\textsuperscript{40} Co-employees who act with intent to injure or with gross negligence cannot take advantage of the immunity granted by the workers' compensation statute.\textsuperscript{41} This means that if co-employees act in such a manner, they can be sued by the injured employee under common law tort theories.\textsuperscript{42} Many states only exempt inten-

\textsuperscript{32} Fla. Game & Fresh Water Fish Comm'n v. Driggers, 65 So. 2d 723, 725 (Fla. 1953).
\textsuperscript{33} See id.
\textsuperscript{34} McCoy v. Fla. Power & Light Co., 87 So. 2d 809, 810 (Fla. 1956); see Sullivan v. Mayo, 121 So. 2d 424, 430 (Fla. 1960).
\textsuperscript{35} LARSON & LARSON, supra note 1, § 111.03(1).
\textsuperscript{36} Id.
\textsuperscript{37} Id.; see Fla. Stat. § 440.11(1)(b)(2) (2006).
\textsuperscript{38} § 440.11(1)(b)(2).
\textsuperscript{39} Id. (emphasis added).
\textsuperscript{40} See LARSON & LARSON, supra note 1, § 111.03(1).
\textsuperscript{41} See § 440.11(1)(b)(2).
\textsuperscript{42} See, e.g., Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163 (Fla. 2006).
national acts, but Florida goes a bit further by exempting grossly negligent acts as well. 43

The second exception, the "unrelated works" exception, is what this article will focus on. This "unrelated works" exception is unique to Florida. 44 The legislature has stated that when employees are "assigned primarily to unrelated works," co-employee immunity will not apply, meaning the injured employee can sue the co-employee under common law tort theories. 45 In most instances, even though the employee has the right to bring common law tort claims against his co-employee, the employer is added to the suit for various reasons. 46

In a case involving governmental co-employees, the civil action is automatically brought against the government employer when the "unrelated works" exception applies. 47 It has been argued that Florida's sovereign immunity statute, which bars all claims against the state, would supersede the statute that granted standing to government employees. 48 Courts have held to the contrary, however, and thus government co-employees who fall under the "unrelated works" exception can bring their common law tort claims directly against the state employer. 49

In the case of a non-governmental employer, the outcome is generally the same. 50 When the "unrelated works" exception is found to apply, it is presumed that the employee can make common law tort claims against the employer directly based upon respondeat superior tort principles. 51 Thus, the employer, as well as the employer's insurer, will be liable for these "unrelated works" cases as long as the employee is acting within the scope of his employment. 52

With employers bearing the brunt of these "unrelated works" cases and no guidance from the Florida Legislature about what they intended "assigned primarily to unrelated works" to mean, courts have been left to establish their

43. § 440.11(1)(b)(2); see Larson & Larson, supra note 1, § 111.03(1).
44. Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1, 8 (Fla. 2004).
45. § 440.11(1)(b)(2).
46. See id.
49. See id. at 8; see also Duffell, 651 So. 2d at 1179. The common law right to recovery was created by the "unrelated works" exception. Koch, 582 So. 2d at 8.
51. See BLACK'S LAW DICTIONARY 1338 (8th ed. 2004) (defining respondeat superior as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency").
52. Duffell, 651 So. 2d at 1179 (Anstead, J., concurring).
FLORIDA'S "UNRELATED WORKS" EXCEPTION

own tests to determine if works are unrelated.\textsuperscript{53} The next section is a summary of various Florida appellate court decisions which have dealt with this issue.

III. VARYING INTERPRETATIONS OF "UNRELATED WORKS" BEFORE TAYLOR AND ARAVENA

Given the lack of legislative history and definitional guidance, Florida courts in all jurisdictions have struggled with interpreting what the legislature intended "unrelated works" to mean.\textsuperscript{54} Depending on the jurisdiction, the courts have used a variety of tests or a combination of tests to determine its meaning which, in turn, determines whether the exception to workers' compensation immunity from suits will apply.\textsuperscript{55}

It is a basic rule of statutory construction that exceptions to the rule are to be interpreted narrowly.\textsuperscript{56} "An exception is [to be] carved out of the general rule or coverage of the statute. The coverage of the statute is the norm and the exception is the unusual . . . .\textsuperscript{57} Therefore, following this rule of construction, the "unrelated works" exception should be interpreted narrowly.\textsuperscript{58} Florida courts have determined the same because "[a]n expansive construction would obliterate the legislative intent that the system operate at a 'reasonable cost' to the employer."\textsuperscript{59} Interpreting the statute broadly would lead "to a profusion of suits and a proliferation of costs."\textsuperscript{60} Moreover, these costs are likely to be passed on to the employer.\textsuperscript{61}

Regardless of what test is used to determine what "unrelated works" are, any analysis that views "unrelated works" in a broad sense will result in fewer instances of the exception applying.\textsuperscript{62} Interpreting works in a broad sense means more employees of the same company are viewed as working on related works.\textsuperscript{63} Thus, a broad finding which includes more employees

\textsuperscript{53.} See Aravena v. Miami-Dade County (Aravena I), 928 So. 2d 1163, 1173 (Fla. 2006).
\textsuperscript{54.} See id. at 1168.
\textsuperscript{55.} See id. at 1168–69.
\textsuperscript{56.} RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 82 (2002).
\textsuperscript{57.} Id.
\textsuperscript{58.} See id.
\textsuperscript{60.} Id.
\textsuperscript{61.} Id. at 462; see also Holmes County Sch. Bd. v. Duffell 651 So. 2d 1176, 1179 (Fla. 1995) (Anstead, J., specially concurring).
\textsuperscript{62.} See Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1168 (Fla. 2006).
\textsuperscript{63.} See id.
within a related group leads to fewer instances when the "unrelated works" exception will apply. This is the result of a narrow interpretation of the "unrelated works" statute. Conversely, a broad view of the phrase "unrelated works," leads to more works being deemed unrelated and, thus, is an expansive and broad interpretation of the statute. 

The next section will discuss the different tests the courts have used and the outcomes that have resulted.

A. Same-Project Test

The same-project test is the analysis most widely used in Florida courts. This test takes a broad approach in interpreting works by looking at the project that the co-employees are working to accomplish. Under the same-project test, courts do not apply the exception if the projects that the co-employees are working to accomplish are the same. If the projects are the same, then the employees are not "assigned primarily to unrelated works" or, in other words, are assigned to related works.

The problem becomes that a court's application of this test can vary greatly depending on how it decides to view the employees' projects. For instance, taking a big picture point-of-view, a court could decide that co-employees in a hotel are all working on the same project of providing a service to guests. Another court viewing the same case could, for example, determine that the hotel comptroller is working on the project of keeping the books and the hotel housekeeper is working on the project of cleaning rooms. In the latter case, the employees would be working on different projects, and thus "unrelated works." In the former case, again using the same-project test, all employees of the hotel who work on the general project
of providing a service to guests would be considered not “assigned primarily to unrelated works.” Therefore, since the size of a judge’s view-finder can vary greatly, this test alone has the possibility of providing inconsistent results.

Surprisingly, the potential variation problem outlined above has not necessarily been the case in “unrelated works” decisions. In fact, most Florida appellate courts that have applied the “same-project test” have used a big picture approach and, therefore, found that the co-employees were assigned to related works.

In *Dade County School Board v. Laing*, the plaintiff, a teacher, was “leaving [his] classroom when he was hit by a golf cart [driven] by a school custodian.” The teacher, who claimed workers’ compensation, could only bring a common law tort claim if co-employee immunity was exempted in one of two ways. Here, the “unrelated works” exception applied, because the trial court held that the custodian and the teacher were assigned to “unrelated works.” Therefore, this ruling, read together with Florida statutes, allowed the teacher to pursue his negligence claim against the school board. The Third District Court of Appeal, however, overturned this ruling and noted that “the fact that employees have different duties does not necessarily mean they are involved in ‘unrelated works.’” The court then used the “same-project test” and stated that “[t]he pertinent factor is whether the co-employees are involved in different projects, . . . [and] the focus is upon the nature of the project involved, as opposed to the specific work skills of individual employees.” Here, the court noted that the project the co-employees were working on was “providing education[al] related services to

---

75. See id. at 1168.
78. 731 So. 2d at 19.
79. Id. at 20.
80. Id.
81. Id.
82. Id.; see Fla. STAT. § 768.28(9)(a) (2006).
83. Laing, 731 So. 2d at 20 (emphasis added) (citing Johnson v. Comet Steel Erection, Inc., 435 So. 2d 908 (Fla. 3d Dist. Ct. App. 1983)).
84. Id. (citing Vause v. Bay Medical Ctr., 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996); Abraham v. Dzafic, 666 So. 2d 232 (Fla. 2d Dist. Ct. App. 1995)).
students at Hialeah High School. As a result of this broad language, the effect of the “same-project test” was that regardless of what jobs school employees were assigned, they were all related in the eyes of the court.

Johnson v. Comet Steel Erection, Inc., was the basis for the Laing decision. In Johnson, however, the employees were employed by different employers even though they were both working on “the same construction project . . . .” One worked for a general contractor as a common laborer, and the other worked as “a welder for [a] subcontractor.” This case, which was the first to consider the meaning of the “unrelated works” statute, looked to previous cases that discussed the “broad scope of immunity afforded [to] a subcontractor for injuries to an employee of a general contractor.” Using this previously established theory of broad immunity, the court held that because the two employees were assigned to the same construction project, the fact that they had different employers did not matter. Thus, the “same-project test” was born, starting a trend of narrowly construing the “unrelated works” statute by looking at the general project of the employees. Generally, other courts that have used this test have viewed the employees’ “project” in the broadest possible sense, and the result was the infrequent application of the “unrelated works” exception.

In Vause v. Bay Medical Center, the First District Court of Appeal followed the Johnson decision. The Vause case involved a nurse who passed away from decompression sickness after giving treatment to a patient in a

85. Id.
86. See id.; see also Sanchez v. Dade County Sch. Bd., 784 So. 2d 1172, 1172–73 (Fla. 3d Dist. Ct. App. 2001) (holding that a teacher who was sexually assaulted by a school security guard was not assigned primarily to “unrelated works” because both the teacher and the guard were engaged in activities related to providing educational services). Thus, there was “no distinction between the teacher-custodian relationship in Laing and the teacher-security personnel relationship.” Id. at 1173.
87. 435 So. 2d at 908.
88. Laing, 731 So. 2d at 20.
89. Johnson, 435 So. 2d at 909.
90. Id.
92. Id.
93. See id.
94. See, e.g., Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1174 (Fla. 2006).
95. 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996).
96. See id. at 262–63.
hyperbaric chamber. The nurse's primary assignment within the hospital was to the obstetrics department, but on the day of the accident she was working in the hyperbaric medicine department. The issue decided was whether the nurse was "assigned primarily to unrelated works" from her co-employees who were alleged to have been negligent, merely because the nurse's main duties in the hospital were normally in a different department of the hospital. The First District Court of Appeal, relying on the "same-project test," analogized this work situation to the situation in Johnson.

Taking a big picture approach, the court noted that the co-employees' duties all included the "provision of health care to a patient, . . . [and they] were both involved in the same project, . . . the care of one particular patient." Furthermore, the court noted that even the administrators of the hospital, who were not present during the treatment in question, were involved in the project of "[t]he provision of health care to patients of the medical center." Thus, following this case, all employees working on the project of patient care would be assigned to related works, and the broad immunity against co-employee suits contemplated by the legislature was strongly intact.

The Vause dissent did not agree with this assessment. Judge Miner opined that being "primarily assigned to unrelated works within the employment, does not mean that . . . [the employee's] work assignment at the time of injury must be unrelated to his primary assigned employment." Rather, the court should look at the primary assignment of the injured, and if he is carrying out an assignment that is unrelated to his primary assignment, immunity should not be afforded. Here, Nurse Vause was primarily assigned to the obstetrics department, unrelated to the works of those in the hyperbaric chamber. "Decompression sickness can result from the formation of nitrogen bubbles in the blood or body tissue due to changes of atmospheric pressure. . . . A hyperbaric chamber is an artificial environment which is used to cure decompression sickness. The hyperbaric chamber is a cylindrical metal tank."
hyperbaric medicine department, her secondary assignment. This is in
sharp contrast to the majority opinion, which compared the works of co-
employees rather than the works of the primary and secondary assign-
ments. But even using that model, Judge Miner disagreed that the co-
employees' works were related. "In terms of relatedness, it seems to me
that providing nursing service . . . is light-years away from overseeing the
turning of dials and gauges . . . or establishing protocols for operation . . . or
administering the overall affairs of the hospital." Furthermore, Judge
Miner concluded that under the majority opinion's broad construction of the
hospital employees' works, he could not "conceive of any situation . . .
[where the exception would] ever apply."

In many instances, the "same-project test" does not deliver consistent
outcomes when determining whether works are unrelated because it may be
unclear as to which project the employees are working. In State Department
of Corrections v. Koch, looking at two co-employees who worked for the
State of Florida, the court noted that it was obvious they were assigned pri-
marily to "unrelated works" because the injured employee worked for the
Department of Transportation (DOT), and the allegedly negligent employee
worked for the Department of Corrections (DOC). The DOC employee
had just picked up a truck used to transport inmates, and while leaving, fa-
tally hit the "DOT employee who was crossing the street on his way to
work."

The Koch court never decided on the "unrelated works" issue because
neither party disputed that the works were unrelated. However, had they
disputed the claim, the "same-project test" would have resulted in different
interpretations of the same situation. One interpretation could be that the
employees were assigned primarily to different projects and "unrelated
works," because the DOC employee was responsible for prisoner care and
the DOT employee was responsible for road maintenance. However, a
second interpretation could broaden the view of the DOC employee's work

107. Id. at 269.
108. Vause, 687 So. 2d at 263.
109. See id. at 269 (Miner, J., concurring in part and dissenting in part).
110. Id.
111. Id.
113. Id. at 6.
114. Id. n.1.
115. Id. at 7.
116. See id. at 6 n.1.
117. See Koch, 582 So. 2d at 6 n.1.
to show that he was working on the same project as the DOT employee.\footnote{118}{See id.} Expanding one’s view of the scope of the DOC employee’s work shows that he was using the truck to pick up prisoners for the purpose of transporting them to road-side maintenance locations, the very same project that the DOT employee was assigned.\footnote{119}{See id.} Thus, different work projects and purposes will be determinative, depending on whether the view of an employee’s work is broad or narrow.\footnote{120}{Compare Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1165 (Fla. 2006) (using a narrow view of the employees’ work), with Dade County Sch. Bd. v. Laing, 731 So. 2d 19, 20 (Fla. 3d Dist. Ct. App. 1999) (using a broad view of the employees’ work).}

Furthermore, if one follows the Vause dissent, which suggested looking at the workers’ primary assignments regardless of what they were doing on the day in question, a court could determine that the two employees’ works were unrelated.\footnote{121}{See Vause v. Bay Med. Ctr., 687 So. 2d 258, 267–68 (Fla. 1st Dist. Ct. App. 1996) (Miner, J., dissenting in part and concurring in part).} If the primary assignments purposes did not match, then the employees would be considered “primarily assigned to unrelated works.”\footnote{122}{Id. at 269.} As illustrated by the different applications of the same-project test, there is a lot of room for inconsistent interpretation.

B. Bright-Line Test

The bright-line test was developed as an attempt to break through what appeared to be inconsistent rulings about the “unrelated works” exception.\footnote{123}{Compare Vause, 687 So. 2d 258, 263 (holding that immunity applied because the co-employees were both assigned to the same-project of “provision of health care to patients of the medical center”), with Holmes County Sch. Bd. v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995) (affirming a decision which found that a school bus driver and a custodian were engaged in unrelated works).} In an effort to make decisions consistent across the board, it was held in Lopez v. Vilches,\footnote{124}{734 So. 2d 1095 (Fla. 2d Dist. Ct. App. 1999), overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1 (Fla. 2004).} that inconsistent decisions “might be reconciled by applying a test based on the physical location where the employees were primarily assigned and the unity of their business purpose.”\footnote{125}{Id. at 1097.}

In Lopez, the plaintiff was injured while operating a vehicle maintained by his co-employees.\footnote{126}{Id. at 1096.} The Second District Court of Appeal looked to the meaning of the word “works” in the dictionary and found one of the defini-
tions to be "'[a] factory, plant, or similar building or system of buildings
where a specific type of business or industry is carried on.'"127 Using this
definition, the court applied a physical location test to determine if works
were unrelated.128 If the primarily assigned location of work was different
for the co-employees, then the immunity granted to co-employees may not
apply.129 Applying this new rule to the current case, the court noted that the
location of the workers was different and compared their duties against each
other.130 One was involved in vehicle maintenance and the other was in-
volved in "general funeral home duties."131 Consequently, since the loca-
tions and the duties were different, the court found that their works were
unrelated and the exception to co-employee immunity could apply, and re-
manded the case for trial.132

It is important to note here that the dissent did not agree with the bright-
line test used by the majority.133 Judge Quince used the same-project test to
determine that both co-employees' works were related because each of them
had duties relating to the vehicle in question.134 The location, in the Dis-
sent's view, was irrelevant.135

The Fourth District Court of Appeal has also used the bright-line test to
determine whether the works were unrelated, and thus, whether the exception
would apply.136 In Palm Beach County v. Kelly,137 a county employee on his
way home from work in his car was struck by another county employee's
car.138 The plaintiff worked in maintenance at the Palm Beach Airport and
the allegedly negligent co-employee worked as an equipment operator for the
airport.139 Their reporting locations were the same, but they worked on dif-
ferent projects in different locations during the work day and had unrelated
duties.140 The court held that because the employees were primarily in dif-
ferent locations throughout the day and had two separate purposes, mainte-

127. Id. (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2056 (3d
ed. 1992)).
128. See id. at 1097.
129. See Lopez, 734 So. 2d at 1097.
130. Id.
131. Id.
132. See id. at 1098.
133. Id. (Quince, J., dissenting).
134. Lopez, 734 So. 2d at 1098 (Quince, J., dissenting).
135. See id.
2003); Palm Beach County v. Kelly, 810 So. 2d 560, 562 (Fla. 4th Dist. Ct. App. 2002).
137. Kelly, 810 So. 2d at 560.
138. Id. at 561.
139. Id.
140. Id. at 562.
nance and operation, they were unrelated and the co-employee immunity would stand. The court also used the same-project test and determined that the same outcome would result because “Kelly and John had different job duties and did not work cooperatively as a team but, rather, worked on two entirely different projects.”

In Fitzgerald v. South Broward Hospital District, the Fourth District Court of Appeal agreed with the approach used in Kelly. The plaintiff, a nurse, was injured while using the restroom when a bathroom stall’s door fell off its hinges. The plaintiff’s complaint alleged that but for the negligent acts of her co-employee, she would not have been injured. To determine if the co-employees’ works were unrelated, the court used the same-project test and the bright-line test and came up with the same result under both tests. While the plaintiff and his co-employee had different duties in the hospital, the projects of each were broadly held as “the treatment of patients.” Furthermore, applying the bright-line test, the court held that the employees worked in the same physical location with a “unified business purpose.” Therefore, because the application of both tests reached the same result, the court held that the works were related and the co-employee immunity would remain.

IV. TAYLOR v. SCHOOL BOARD OF BREvard COUNTY

In Taylor v. School Board of Brevard County (Taylor I), the plaintiff, Lawrence Taylor, was injured when a wheelchair lift fell on him while working as a bus attendant. He claimed that his employer, the School Board, was responsible for his common law tort claim against his co-employees based on the “unrelated works” exception. “The trial court granted a summary judgment in favor of the school board on the grounds that the alleged negligent employees, school board transportation department mechan-

141. Id.
142. Kelly, 810 So. 2d at 562.
143. 840 So. 2d 460 (Fla. 4th Dist. Ct. App. 2003).
144. Id. at 464.
145. Id. at 461.
146. See id.
147. Id. at 464.
148. Fitzgerald, 840 So. 2d at 464.
149. Id.
150. Id.
151. 790 So. 2d 1156 (Fla. 5th Dist. Ct. App. 2001).
152. Id. at 1157.
153. Id.
ics, and Taylor, a school bus attendant whose responsibilities included operation of the wheelchair lift which caused his injury, were assigned to related works." On appeal, the Fifth District Court of Appeal noted that Taylor and the alleged negligent mechanics worked at the same location that Taylor "was responsible for the operation of the wheelchair lift" and the mechanics were responsible for the maintenance and repair of the wheelchair lift. Since Taylor and his co-employee were involved in some way with the wheelchair lift, the court affirmed the trial court's opinion that the co-employees were working on related projects. However, the court noted that its opinion did not follow the bright-line test used by the recent Lopez Court to determine if the co-employees' works were unrelated.

Because of this conflict, the Supreme Court of Florida granted review of the Taylor I and Lopez decisions. In the Supreme Court's per curiam opinion, the justices attempted to resolve the inconsistent opinions and tests by determining "whether the Legislature intended that the unrelated works exception be construed liberally or narrowly." Looking to the intent of the legislature, the only clause referring to their intent in enacting the workers compensation statutes was that, because this is a "mutual renunciation of common-law rights and defenses by employers and employees alike," workers' compensation laws should not be construed "liberally in favor of the employee or the employer." Furthermore, workers' compensation is intended to be self-executing and "not an economic or administrative burden." The Legislature further points out ambiguous laws should be interpreted using "the basic principles of statutory construction."

The basic purpose behind workers' compensation law [is] two-fold: (1) To see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy

154. Id. (emphasis added).
155. Id. at 1157–58.
156. See Taylor I, 790 So. 2d at 1158.
157. See id.; see also Lopez v. Vilches, 734 So. 2d 1095, 1098 (Fla. 2d Dist. Ct. App. 1999), overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1 (Fla. 2004) (holding that two co-employees whose responsibilities both involved the same funeral home vehicle but worked in different locations were assigned to unrelated works).
158. Taylor II, 888 So. 2d at 2.
159. Id. at 4.
161. Id.
162. Id.
163. Id.; see also BROWN & BROWN, supra note 56, at 82.
tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.164

The Taylor II court was faced with the decision of whether to interpret the "unrelated works" exception liberally or narrowly.165 A liberal construction would include more work situations as unrelated, and a narrow construction would result in fewer work situations deemed to be unrelated.166 The court determined that the statute should be narrowly interpreted in its per curiam opinion; however, Justice Lewis and Justice Pariente did not believe that lower courts were given enough guidance on how to interpret the statute in the future.167

A. Per Curiam Opinion

The Taylor II court’s analysis began by pointing out how easy it is to view any two co-employees’ positions as either related or unrelated, depending on how the works are viewed.168 On the one hand, "all employees of the same employer could always be considered engaged in related works since they are all charged to carry out the mission of the employer."169 On the other hand, "some distinction could always be drawn between the work of most employees so as to make their work unrelated."170 This point is the reason why the "unrelated works" exception has been so hard to interpret, and why the varying interpretations have come up with a wide variety of conclusions.171

The Court then held that the statute must be interpreted narrowly.172 The Court observed that applying the exception liberally would handicap the purpose of workers' compensation.173 This interpretation compensates employees based on the fault of their co-employees.174 The Court explained that while the exception should be applied narrowly, they could not illustrate

164. Taylor II, 888 So. 2d at 3 (citing De Ayala v. Fla. Farm Bureau Cas. Ins. Co., 543 So. 2d 204, 206 (Fla. 1989)).
165. Id. at 4.
166. See id. at 4–5.
167. Id. at 6 (Lewis, J., concurring).
168. Id. at 5.
169. Taylor II, 888 So. 2d at 5.
170. Id.
171. See id. at 13 (Lewis, J., concurring).
172. Id. at 5.
173. Id.
174. See Taylor II, 888 So. 2d at 5.
a test to encompass the many factual circumstances that could arise under the "unrelated works" exception. Instead, the Court noted that only when it is clearly demonstrated that the works are unrelated will the exception apply. The Court also noted that the Lopez bright-line location test is disapproved, agreeing with the dissent that all of the employees had duties related to the vehicle in question.

B. Justice Lewis' Concurrence

Justice Lewis, while agreeing with the majority in Taylor II, wrote an opinion that lays out a new test to determine if works are unrelated and greatly expands upon the application of the "unrelated works" exception. Justice Lewis felt that the majority opinion applied the exception too narrowly and said that the majority "fails to adopt parameters to provide assistance to the lower courts in the application" of the exception. He also said that difficulty in applying one test to a myriad of factual occurrences should not result in a failure to provide analytical parameters to the lower courts. This concurrence, illustrating the varying opinions on this issue, then attempted to develop the parameters that were overlooked in the majority opinion.

Justice Lewis notes that the majority opinion is based on a faulty premise that co-employee immunity principles result from a "mutual renunciation of common law rights." There was not a mutual renunciation because negligent employees did not give up any rights since their employers are the ones that provide benefits. He also noted that the legislature could have provided a broad immunity to co-employees if they had intended to, but

175. Id. The "unrelated works" exception to the workers compensation scheme: should be applied only when it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee.

While we would like to be more precise in providing guidance to those initially charged with deciding disputes based upon this exception, we are limited by our lack of precise knowledge of the legislative intent behind the exception and the reality that we could not hope to contemplate the myriad of factual circumstances that may give rise to the issue.

176. Id.

177. Id. at 6; see also Lopez v. Vilches, 734 So. 2d 1095, 1098 (Fla. 2d Dist. Ct. App. 1999) (Quince, J., dissenting), overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1 (Fla. 2004).

178. Taylor II, 888 So. 2d at 6 (Lewis, J., concurring).

179. Id.

180. Id. at 13.

181. Id. at 6.

182. Id. at 8.

183. See Taylor II, 888 So. 2d at 8–9.
FLORIDA'S "UNRELATED WORKS" EXCEPTION

since they added the "unrelated works' exception . . . to immunity," they did not intend for it to be so broad. 184 Therefore, in determining the new parameters, Justice Lewis wanted the exception to apply more often than it would under the Taylor II majority opinion. 185

In doing so, he defined works as having two components, operational and locational. 186 Noting this, he split up the myriad of factual occurrences into four categories to determine whether each would fall under the "unrelated works" exception. 187 First, co-employees with the same workplace location and assigned to the same project or team would be related. 188 Second, co-employees with different workplace locations but still assigned to the same project or team would also be related. 189 Third, co-employees with both different workplace locations and assigned to different projects or teams would be unrelated. 190 Finally, co-employees that worked at the same location, but were assigned to different projects or teams, would probably be unrelated, but the court should first view factors to necessarily determine the relatedness of the works. 191 The factors include "the size of the facility, the diversity of the acts performed there, and the relationship of the diverse activities being performed at the location." 192 Furthermore, the concept of team or project "should not be so broadly defined as to render the exception meaningless, nor defined so narrowly as to permit the exception to totally eviscerate the fundamental rule of co-employee immunity." 193

C. Reaction to Taylor II

The Taylor II decision's effect on the "unrelated works" exception is clear. The Court has made it known that the exception should be interpreted narrowly. 194 Further, the exception is only applied when it is clear that works are unrelated. 195 The reason for this narrow construction of the exception is clear because "[a]n expansive construction would obliterate the [legis-

184. Id. at 9.
185. See id.
186. Id.
187. See id. at 14.
188. Taylor II, 888 So. 2d at 14.
189. Id.
190. Id.
191. Id. at 14–15.
192. Id. at 15.
194. See id. at 6.
195. Id. at 5.
lature's] intent that the system operate at 'a reasonable cost' to the employer." 196

However, there are many unanswered questions regarding what the
definition of "works" is, and what exactly is considered "unrelated works." 197
These questions and the fact that the Court stated that the application should
be narrow makes it difficult to apply the exception at all. 198 Thus, the clear
result following Taylor II is less cases where the co-employee's immunity is
removed. 199

Defense attorneys were happy with this decision and its outcome. 200
Plaintiff's attorneys believe the decision was "essentially a judicial repeal of
the unrelated works exception." 201 Furthermore, employers and their insur-
ance providers are better off because of this opinion due to the limited appli-
cation of the exception. 202

The Taylor II holding did not last long. Due largely to the lack of guid-
ance given to the lower courts, the Supreme Court decided to revisit the "un-
related works" exception in Aravena II. 203 The Taylor II holding was not
overturned, but the narrow application of the Taylor II case, described above,
was greatly expanded, and the exception was given a new test to determine
its application. 204

V. Aravena v. Miami-Dade County

In Aravena I, a school crossing guard was killed when a car veered off
the road due to the traffic lights malfunctioning at that intersection. 205 The
traffic lights were maintained by the county but were not repaired even
though the county was aware of the malfunction. 206 The trial court denied a

196. Id. at 6 (quoting Fitzgerald v. S. Broward Hosp. Dist., 840 So. 2d 460, 463 (Fla. 4th
Dist. Ct. App. 2003)).
197. See William S. Dufoe, The "Unrelated Works" Exception to Workers' Compensation
198. Recent Developments, Florida Case Law: Worker's Compensation, 32 FLA. ST. U.
199. See id. at 988.
200. See Tracy Raffles Gunn, Amicus Case Highlight: Taylor v. School Board of Brevard
201. See Joseph H. Williams, Letter, More on Unrelated Works Exception, 79 FLA B.J. 4, 4
(Mar. 2005).
203. Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1164 (Fla. 2006).
204. See Miami-Dade County v. Aravena (Aravena I), 886 So. 2d 303, 305 (Fla. 3d Dist.
205. Id. at 304.
206. Id.
motion for judgment, not withstanding the verdict for the county, saying that
the two county employees, the traffic signal repair personnel and the crossing
guard, were assigned primarily to unrelated works. Thus, the exception
would apply and Aravena, the husband of the crossing guard, would be able
to bring a wrongful death action against the county.

On appeal, the Third District Court of Appeal did not agree with the
trial court. Citing Taylor II, the court noted that the co-employees here
worked on somewhat similar projects and their work could not be deemed
unrelated. Both co-employees worked on projects relating to the regula-
tion of pedestrian and vehicular traffic. Each relied on the other in this
situation, in order to fulfill the county's goal of safe moving traffic. The
court opined, "[t]o hold otherwise would contravene the overall legislative
intent of the workers' compensation law, which 'was meant to systematically
resolve nearly every workplace injury case on behalf of both the employee
and the employer.'" Thus, the Third District Court of Appeal reversed the
trial court's ruling and ruled in favor of the employer.

The Third District Court of Appeal, looking at recent "unrelated works"
cases, compared the Kelly case from the Fourth District Court of Appeal to
its holding. Kelly held that the exception would apply to the plaintiff, who
worked in maintenance at the Palm Beach Airport, and his co-employee, who
worked as an equipment operator for the airport, because their works were
unrelated. While they had the same job location, the co-employees
worked on entirely different projects and had different duties, according to
the court, and was a clear example of "unrelated works." Aravena I,
when taking a broad approach to viewing the jobs of the co-
employees, is distinguishable from Kelly. The employees had similar gen-

207. Id.
208. See id.
209. Aravena I, 886 So. 2d at 304.
210. Id. at 305.
211. Id.
212. Id.
213. Id. (emphasis added) (citing Taylor v. Sch. Bd. Of Brevard County (Taylor II), 888 So. 2d 1, 6 (Fla. 2004)).
214. Aravena I, 886 So. 2d at 305.
215. Compare id. (holding inapplicable the “unrelated works” exception to workers’ compen-
sation immunity), with Palm Beach County v. Kelly, 810 So. 2d 560, 562 (Fla. 4th Dist. Ct. App. 2002) (holding that the “unrelated works” exception applied to the workers’ compensation case).
216. Kelly, 810 So. 2d at 562.
217. See id.
218. Compare Aravena I, 886 So. 2d at 303, with Kelly, 810 So. 2d at 560.
eral purposes of regulating vehicular and pedestrian traffic. However, the
Third District Court of Appeal in Aravena I said that it was not clearly dem-
onstrated that the employees’ works were unrelated as required by Taylor
II.

A. Majority Opinion by Justice Pariente

The Aravena II opinion was written by Justice Pariente, who concurred
with Justice Lewis’ opinion in Taylor II. The Court noted that Aravena I
“expressly and directly conflicts with the Fourth District Court of Appeal’s
decision in” Kelly. The conflict existed because the Court described the
Aravena I case and the Kelly case as having similar factual situations.
Both the Aravena I and Kelly facts were described as “employees who work
at different physical locations for different departments, have different su-
ervisors, and perform different duties and functions in their primary as-
signments.” The Court disagreed with the prior Aravena I decision, which
viewed the co-employees as having related purposes, essentially a broad use
of the same-project test. The Aravena II Court also noted that the facts in
Kelly showed more of a connection between the employees as the employees
“in Kelly began and ended their days at the same location.” Because the
Court found the facts to be similar, and the Kelly case held the works were
unrelated, and the Aravena I court held that there was a stronger connection
between the Aravena employees, the Court held the two decisions were ir-
reconcilable. This finding of conflict is what gave the Court jurisdiction to
decide on the issue of “unrelated works.”

The Court reviewed the decisions from all of the district courts of appeal.
The Court then reviewed the previous Supreme Court of Florida

219. Aravena I, 886 So. 2d at 305.
220. Id.
221. Aravena v. Miami-Dade County (Aravena II), 928 So. 2d 1163, 1164 (Fla. 2006); see
Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1, 6 (Fla. 2004).
222. Aravena II, 928 So. 2d at 1164.
223. See id. at 1166.
224. Id. at 1164–65.
225. See id. at 1174; see also Aravena I, 886 So. 2d at 305.
226. Aravena II, 928 So. 2d at 1166.
227. Id.
228. See id. at 1167.
229. Id. at 1168–70.

The scope of the unrelated works exception has been addressed by all of the district courts
of appeal. The First, Third, and Fifth District Courts of Appeal applied a broad
“same-project” test.

Published by NSUWorks, 2006
decision, *Taylor II*, and confirmed its holdings that "the unrelated works exception must be interpreted narrowly" and should only be applied when "it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee." According to *Taylor II*, the common goal between the employees, a bus driver and a bus mechanic, was to provide safe transportation to the students. Clearly, the *Taylor II* Court utilized a broad approach in viewing these employees' works.

However, in *Aravena II*, the Supreme Court of Florida, after recognizing and agreeing with the Court's broad approach in *Taylor II*, held that "regulating vehicular and pedestrian traffic" was an overly broad definition of the co-employees duties in *Aravena*, and found their works to be unrelated. The Court then rationalized why one broad definition of duties was not the same as another in a different case. In *Taylor*, both "had duties relating to the same equipment," which caused the injury and both worked out of the same facility. Here, the Court noted, plaintiff "and the traffic signal repair personnel did not work out of the same facility or with the same equipment." Therefore, reliance solely on a broad definition of duties, the Court notes, without regard to other factors, is not supported by *Taylor II*. 

*The Third District erred in holding that...* [citations omitted].

*Id.* at 1168–69 (citations omitted).

230. *Aravena II*, 928 So. 2d at 1169; see *Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 4–5 (Fla. 2004).

231. *Taylor II*, 888 So. 2d at 5.

232. *Id.* at 5–6.

233. *See id.*

234. *Aravena II*, 928 So. 2d at 1170 (quoting *Aravena v. Miami-Dade County (Aravena I)*, 886 So. 2d 303, 305 (Fla. 3d Dist. Ct. App. 2004)).

235. *See id.*

236. *Id.*

237. *Id.*

238. *Id.; see Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146, 1149–50 (Fla. 3d Dist. Ct. App. 2005) (holding that co-employees whose duties had nothing in common, worked in separate locations, and took directions from different supervisors were assigned primarily to unrelated works). The Supreme Court of Florida noted that *Lluch* was similar to *Aravena* in that they each worked for different employers, they were not supervised by the same people, and they did not have similar duties. *Aravena II*, 928 So. 2d at 1172. There was further distinction to the fact that the co-employees did not work in the same location, whereas in *Lluch* they did, and were still considered assigned primarily to unrelated works. *Id.*
traffic signal repair personnel were engaged in related works”239 and “ignored the other factors”240 considered in Lluch v. American Airlines, Inc.241

This led the Supreme Court of Florida to adopt a new factors test which includes both location and operational components that must be considered when a court is determining whether co-employees are “‘assigned primarily to unrelated works.’”242

These include: (1) whether the coemployees work at the same location; (2) whether the coemployees must cooperate as a team to accomplish a specific mission; (3) the size of the employer; (4) whether the coemployees have similar job duties; (5) whether the coemployees have the same supervisor; and (6) whether the coemployees work with the same equipment.243

In order to determine whether works were unrelated, this Court instructed lower courts on how to apply the new factors test.244 First, a court must look to whether the co-employees are working at the same location, and then determine if they are working on the same team in order to accomplish a specific mission for the employer.245 The Court noted that if the coemployees are working at the same location, then they are more likely to have related works.246 If the employees are not, then they are less likely to have related works.247 Once the location is determined, a court must then look to whether or not a team exists by analyzing the last four factors: 1) employer size; 2) job duties of the co-employees; 3) supervisor; and 4) equipment used.248

Thus, Aravena II gave birth to a new factors test.249 As compared to Taylor II, the result of this test is an expansion in the application of the “unrelated works” exception.250 The majority in Aravena II stated “we hope that

239. Aravena II, 928 So. 2d at 1173.
240. Id. at 1172.
241. Id.; see Lluch, 899 So. 2d at 1146; see also supra note 238 and accompanying text.
242. Aravena II, 928 So. 2d at 1173 (quoting FLA. STAT. § 440.11(b)(2) (2006)).
243. Id.
244. See id.
245. Id.
246. Id.
247. See Aravena II, 928 So. 2d at 1173.
248. Id.
249. See id.
250. See id. at 1176 (Wells, J., dissenting). In comparing the decision in Taylor II to the majority opinion in Aravena II, Justice Wells stated "By broadening this exception so that many county employees will not be subject to workers' compensation immunity, the majority
the factors we have identified will provide guidance to the lower courts in applying this exception narrowly without eviscerating it."251

B. Justice Wells' Dissent

Justice Wells did not approve of the majority opinion in Aravena II, because it was "a substantial variance from the majority opinion . . . in Taylor [II]."252 The Taylor II opinion was characterized as narrowly interpreting the exception so as not to "obliterate the legislative intent that the [workers’ compensation scheme] . . . operate at "a reasonable cost" to the employer."253 Agreeing with this, Justice Wells indicated that the Third District Court of Appeal interpreted it correctly in Aravena I.254 The Aravena I court could not clearly demonstrate that the works of the traffic signal repair personnel and the crossing guard were assigned to "unrelated works," because each co-employee was responsible in some way for regulating vehicular and pedestrian traffic.255 Justice Wells concluded that the decision of "[t]he district court should not be quashed for following this Court’s majority opinion."256

Furthermore, Justice Wells noted that the majority opinion greatly expanded the application of the exception.257 This expansion "subjects counties to many employees collecting both workers’ compensation benefits and common law damages from counties."258 In turn, if the exception is applied more frequently, lawsuits will become even more unpredictable and expensive, thus causing increased liability for employers.259 In Justice Wells’ view, this result is contrary to prior decisions issued by the Supreme Court of Florida.260

251. Aravena II, 928 So. 2d at 1174.
252. Id. at 1175 (Wells, J., dissenting).
253. Id. (quoting Taylor v. Sch. Bd. of Brevard County (Taylor II), 888 So. 2d 1, 6 (Fla. 2004)).
254. Id.; see Miami-Dade County v. Aravena (Aravena I), 886 So. 2d 303, 305 (Fla. 3d Dist. Ct. App. 2004).
255. Aravena II, 928 So. 2d at 1175 (Wells, J., dissenting) (citing Aravena I, 886 So. 2d at 305).
256. Id. at 1175.
257. Id. at 1175–76.
258. Id.
259. Id. (Wells, J., dissenting).
260. Aravena II, 928 So. 2d at 1175–76 (Wells, J., dissenting). Justice Wells cited Holmes County School Board v. Duffell, 651 So. 2d 1176 (Fla. 1995), stating that it “only made sense
Justice Wells also thought the Court should have held the “unrelated works” cases to be a question of law, rather than, as in Lluch, a question of fact. However, the majority did not resolve this issue and left it to the lower courts for decision. To regard the issue as a question of fact would put the determination into the hands of a jury. However, “different juries can conclude that the same jobs are both within the unrelated works exception and not within the unrelated works exception . . . [thus] lead[ing] to inequitable results.”

VI. ARAVENA’S EFFECT ON THE “UNRELATED WORKS” EXCEPTION

The clear result of Aravena II is an expansion of the “unrelated works” exception when compared to the Taylor II holding. The Aravena II Court laid out the factors to use when determining whether the exception will apply. However, it appears that the majority decision opened the legal floodgates and put employers under great liability for their employees’ workplace torts. It appears that the Aravena II majority held that in order to effectuate the Taylor II holding, “the exception should be narrowly tailored.” To be narrowly tailored, “courts should . . . consider whether the coemployees must cooperate as a team to further a specific mission of the employer, not . . . [a] general mission.” This is faulty logic, because when comparing the specific missions of employees, the outcome will most likely be that the works are unrelated and, therefore, the exception will not be applied narrowly. For example, in the hypothetical outlined briefly in the introduction of this paper, only if the co-employees of the hotel participated in the same project or specific mission, would their works be considered related. If the injured employee was a front desk clerk and the negligent employee was a housekeeper, their general missions of providing guest services would be the

because the unrelated works exception was very narrow and only a few county employees would have the right to both.” Id. at 1176.

262. Aravena II, 928 So. 2d at 1176 (Wells, J., dissenting).
263. Id.
264. Id.
265. Id. at 1175.
266. Id. at 1173.
267. Aravena II, 928 So. 2d at 1175–76 (Wells, J., dissenting).
268. Id. at 1173.
269. Id.
270. See, e.g., id.
same.\textsuperscript{271} However, their specific missions would be different.\textsuperscript{272} Therefore, when looking at the number of different positions in one hotel, it is easy to see the unlikelihood that a negligent employee would work on the same specific mission as an injured employee.\textsuperscript{273} Thus, most co-employees' works will be unrelated, allowing the "unrelated works" exception to be frequently applied, and leading to many more common law claims to be filed against employers.\textsuperscript{274} This result does not comport with the \textit{Taylor II} holding that the exception should be narrowly tailored. Rather, \textit{Aravena II} will result in a broad application of the exception.\textsuperscript{275}

The great divide in interpreting the "unrelated works" exception lies in the above analysis. Courts that compare the specific missions of employees instead of the general missions are going to apply the exception more frequently.\textsuperscript{276} This leads to frequent litigation and increased liability for the employer.\textsuperscript{277} The purpose of workers' compensation is therefore defeated.\textsuperscript{278} There is no reasonable cost to the employer when the employer is subject to common law tort claims where the outcomes are impossible to predict.\textsuperscript{279} Furthermore, there is no quick and efficient delivery of benefits when so many cases are stuck in the court system creating an economic and administrative burden.

\section*{VII. CONCLUSION AND PROPOSAL}

The "unrelated works" exception has been puzzling Florida courts for years.\textsuperscript{280} Many courts have established tests in attempts to define what the legislature meant by "assigned primarily to unrelated works."\textsuperscript{281} Since the \textit{Aravena II} interpretation is contrary to the Supreme Court of Florida's previous \textit{Taylor II} decision, controversy is sure to remain within the courts. There

\begin{flushleft}
\footnotesize
\textsuperscript{271.} Id.  \\
\textsuperscript{272.} \textit{Aravena II}, 928 So. 2d at 1173.  \\
\textsuperscript{273.} Id. at 1170.  \\
\textsuperscript{274.} See id.  \\
\textsuperscript{275.} See id. at 1173; see Taylor v. Sch. Bd. of Brevard County (\textit{Taylor II}), 888 So. 2d 1, 6 (Fla. 2004).  \\
\textsuperscript{276.} See Dufoe, supra note 197, at 46–47.  \\
\textsuperscript{277.} See id. at 48.  \\
\textsuperscript{278.} Id.  \\
\textsuperscript{279.} See Gunn, supra note 200, at 6 (stating that case law reflects inconsistency in the application of the "unrelated works" exception); Dufoe, supra note 197, at 45–46 (discussing various outcomes that reflect the unpredictability of workers' compensation claims and common law tort claims).  \\
\textsuperscript{280.} See, e.g., \textit{Aravena II}, 928 So. 2d at 1163; \textit{Taylor II}, 888 So. 2d at 1; Lluch v. Am. Airlines, Inc., 899 So. 2d 1146 (Fla. 3d Dist. Ct. App. 2005).  \\
\textsuperscript{281.} See supra Parts III–V.
\end{flushleft}
is no disagreement that the Florida Legislature should enact a statute which
defines "unrelated works." Until that is done, courts must look to case law
that defines the "unrelated works" exception. Unfortunately, the case law is
inconsistent. Taylor II prescribes that the exception should be narrowly
tailored, and Aravena II develops a test in which the outcome is a broad
application of the exception. Florida courts now need to reconcile both hold-

Perhaps the factors test can still be used from the Aravena II case. However, instead of looking to the specific missions the employees are
working to accomplish, courts should analyze the employee's general mis-

Furthermore, when viewing the general mission of employees, courts should be careful not to include every person working for the em-

Courts should also be mindful not to be too specific when defining
an employee's general mission. For example, in the hypothetical dealing
with the hotel discussed earlier, the general mission of the housekeeper and
the front desk clerk is to provide guest service. However, a comptroller
for the same hotel, or someone working completely behind the scenes with
no guest contact, has a different general purpose. In this case, the comp-
troller will have the general mission of behind the scenes management.
A general mission of making a profit for the hotel is too broad because it would
include all employees working for the hotel. Similarly, a general mission to
input revenue statistics is too specific, excluding all others in his workplace.
Certainly, the makeup of each business is different. However, using the em-
ployer's organizational chart and these general principles as a guide, the right
balance between too specific and too general can be achieved.

\[\text{\textsuperscript{282. See Aravena II, }928 \text{ So. 2d at } 1174, 1176 (Bell, J., specially concurring & Wells, J.,
dissenting); Taylor II, 888 So. 2d at 1, 13 (Lewis, J., concurring in result only).}\]
\[\text{\textsuperscript{283. See supra Part VI.}}\]
\[\text{\textsuperscript{284. Compare Taylor II, 888 So. 2d at 6 ("[T]he unrelated works exception should be
narrowly construed."), with Aravena II, 928 So. 2d at 1173 ("[T]he courts should also consider
whether the coemployees must cooperate as a team to further a specific mission of the
employer, [and] not . . . the same general mission.").}\]
\[\text{\textsuperscript{285. See Aravena II, }928 \text{ So. 2d at } 1173.}\]
\[\text{\textsuperscript{286. See supra Part VI.}}\]
\[\text{\textsuperscript{287. See, e.g., Taylor II, 888 So. 2d at 14–15 (Lewis, J., concurring in result only) ("[T]he
concept . . . should not be so broadly defined as to render the exception meaningless nor defin-
ed so narrowly as to permit the exception to totally eviscerate the fundamental rule of co-
employee immunity.").}\]
\[\text{\textsuperscript{288. See id.}}\]
\[\text{\textsuperscript{289. See Aravena II, }928 \text{ So. 2d at } 1163 (outlining how to differentiate between an
employee's specific and general missions).}\]
\[\text{\textsuperscript{290. See id.}}\]
\[\text{\textsuperscript{291. See id.}}\]
Moreover, this test, if applied to the facts of *Aravena II*, will recognize that both the crossing guard and the traffic signal repair personnel each had a general mission of regulating pedestrian and vehicular traffic.\(^{292}\) This recognition, that the co-employees were each regulating pedestrian and vehicular traffic, would have led to the correct result of finding the co-employees' works to be related. Applying this same test to *Lluch*, on which the *Aravena II* decision was based, would also lead to the correct result that the employee's general missions were unrelated.\(^{293}\) *Lluch* was primarily responsible for the cleaning and maintenance of offices, whereas his co-employee was a baggage handler.\(^{294}\) It is clear that their works were unrelated, because their general missions were different.\(^{295}\) Furthermore, applying the factors provided in *Aravena II* shows that the co-employees worked at different locations and had different employers.\(^{296}\) Thus, using the general mission test, along with the factors test, results in the co-employees' works in *Lluch* to be completely unrelated.\(^{297}\)

Without this proposed general mission test, Florida courts will continue to struggle with the interpretation of the "unrelated works" exception.\(^{298}\) When interpreting this exception, courts must recognize that while the legislature did not define "unrelated works," they have indicated that the workers' compensation scheme should operate "at a reasonable cost" to employers.\(^{299}\) Without any change, the "unrelated works" exception will be applied more frequently and will greatly increase employers' liabilities and costs,\(^{300}\) thereby defeating the initial purpose for enacting workers' compensation.\(^{301}\) With this in mind, courts can now narrowly apply the "unrelated works" exception without eviscerating it completely.\(^{302}\) This would ensure that the exception is accurately tailored to the existing legislative intent.

\(^{292}\) *See id.* at 1170.
\(^{293}\) *See* *Lluch* v. Am. Airlines, Inc., 899 So. 2d 1146 (Fla. 3d Dist. Ct. App. 2005).
\(^{294}\) *Id.* at 1149.
\(^{295}\) *Id.* at 1146–47. *Lluch's* general mission was the maintenance and cleanliness of ramps, offices, gates, and common areas, whereas ABM's general mission involved maintaining the baggage loading area and conveyor belt. *Id.*
\(^{296}\) *See id.* at 1146.
\(^{297}\) *See Lluch*, 899 So. 2d at 1146–47.
\(^{298}\) *See Dufoe*, *supra* note 197, at 48.
\(^{299}\) *See* FLA. STAT. § 440.015 (2006).
\(^{300}\) *See Dufoe*, *supra* note 197, at 47–48.
\(^{301}\) § 440.015.
\(^{302}\) *Aravena* v. Miami-Dade County (*Aravena II*), 928 So. 2d 1163, 1174 (Fla. 2006).
SETTING THE STAGE FOR CREATIVE LAWYERING IN ERISA REIMBURSEMENT ACTIONS

ROBERT C. SHERES*

I. INTRODUCTION............................................................................... 188

II. ERISA AND REIMBURSEMENT...................................................... 190
A. ERISA Generally .......................................................................... 190
B. An Insurer's Action for Reimbursement or Subrogation .. 194

III. KNUDSON: THE LAW ESTABLISHED ......................................... 195
A. Great-West Life & Annuity Insurance Co. v. Knudson .... 195
B. Confusion Among the Circuits ................................................. 197

IV. SEREBOFF III: THE LAW CLARIFIED ........................................ 199
A. Sereboff v. Mid Atlantic Medical Services, Inc.
   (Sereboff III) ........................................................................... 200
B. Sereboff III Compared to Knudson......................................... 201
C. A Deeper Understanding of the Possession Theory ............ 202
   1. The Specifically Identifiable Requirement .............. 202
   2. The Belonging in Good Conscience Requirement 204
   3. The Possession Requirement ..................................... 206
      a. Possessory Funds.................................................... 206
      b. Non-possessory Funds .......................................... 207

V. THE LIKELY EFFECT OF SEREBOFF III AND THE POSSESSION THEORY ON FUTURE REIMBURSEMENT AND SUBROGATION CLAIMS BY INSURERS ...................................................... 208
A. Lawyering on the Part of Beneficiaries ................................. 209
   1. Basic Trusts................................................................. 210
   2. The Possession Requirement ...................................... 211
   3. Restrictions on the Use of Trusts ............................... 212
B. Lawyering on the Part of Insurers ............................................. 213

VI. CONCLUSION AND RECOMMENDATIONS................................. 214

* The author is a J.D. Candidate, May 2008, Nova Southeastern University, Shepard Broad Law Center. Robert C. Sheres earned his B.B.A. from the University of Miami, majoring in Entrepreneurship. The author wishes to thank his mother Claire, father Allan, and brother Gary, for their support and encouragement. He would also like to thank his colleagues on Nova Law Review and the faculty of the Law Center, extending special recognition to Professors Kathy Cerminara and Donna Litman for their guidance and suggestions.
I. INTRODUCTION

Imagine a car accident involving two vehicles that is caused solely due to the negligence of one driver, whereby the other driver is injured.1 An ambulance quickly arrives at the accident scene and rushes the injured driver to a nearby hospital, where he receives extensive medical treatment.2 After he is discharged from the hospital, he is handed a bill totaling $80,000 of medical expenses.3 Fortunately, the injured driver's medical expenses are covered by his employer-sponsored health plan,4 governed by the Employee Retirement Income Security Act (ERISA).5 However, as a result of the accident he also suffers an estimated $500,000 in non-economic damages, assuming a price can be placed on his pain and suffering.6 The injured driver hires an attorney and sues the party responsible for the accident.7 After months of negotiations, the injured driver finally recovers a settlement in the amount of $100,000.8 Although this will only compensate him for a fraction of his actual damages, he feels fortunate to recover anything at all.9 After $20,000 in attorney’s fees, his net recovery is $80,000.10

The next day, he receives a letter from his ERISA insurer, demanding reimbursement of the $80,000 in medical expenses that the insurer paid on his behalf.11 Confused and bewildered, the employee pulls out a copy of his health plan, and finds, amidst the hundreds of pages, a subrogation clause.12 The clause reads something like this:

This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the [e]mployer’s right to recover any payments made to you or your dependent by a third party ... because of an injury or illness caused by a third party. Third party means another person or organization.

2. See id.
3. See id.
4. See id.
7. See id.
8. See id.
9. See id.
10. See id.
12. See id. at 697–98.
If you or your dependent receives benefits and have a right to recover damages from a third party, the company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the company... for benefits paid. Any remainder will be yours or your dependents. The company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the company agrees in writing to a reduction.13

The injured driver finds this provision unjust.14 He believes that because the insurer has been collecting the premium payments, the insurer should not be reimbursed until after he has been fully compensated for his injuries.15 The insurer, on the other hand, maintains that the enforcement of the provision is just because the injured driver agreed to these terms by signing the insurance policy.16 As such, the injured driver refuses to reimburse the insurer and the insurer files a lawsuit against him17 to enforce the provision under ERISA section 502(a)(3).18 Depending on how the settlement proceeds are allocated, the creativity of the injured employee’s attorney, and how the insurer’s attorney states a claim, a court may or may not require the injured employee to fully reimburse the insurer.19

This Note discusses the issue of subrogation and reimbursement actions, brought by ERISA insurers, as they relate to situations such as the one presented in the hypothetical above. Part II presents a brief summary of ERISA and when it applies. This part also provides an overview of what reimbursement and subrogation actions are and when they arise under ERISA. Part III details federal circuit interpretations of the law established by the United States Supreme Court in the landmark case, Great-West Life & Annu-

13. Id. (emphasis added).
14. See id. at 693.
15. See id.
17. Id. at 693.
19. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002) (refusing to reimburse the insurer for medical expenses paid because the settlement proceeds were allocated to a trust that was not in the beneficiary’s possession and the insurer’s attorney sought a legal remedy); but see Sereboff v. Mid Atl. Med. Servs., Inc. (Sereboff III), No. 05-260, slip op. at 5 (U.S. May 15, 2006) (requiring reimbursement for medical expenses because the settlement proceeds were placed in an account that was in the beneficiary’s possession and the insurer’s attorney sought an equitable remedy).
Part IV discusses Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III), the most recent United States Supreme Court decision on the issue of ERISA reimbursement, and compares the facts and holding of this case to those of Knudson. Part IV also explains how Sereboff III clarified the conflict among the circuits regarding this issue, which was created by the Knudson decision. Part V focuses on the likely effect that the Sereboff III ruling will have on future reimbursement and subrogation actions brought by ERISA insurers. Finally, Part VI suggests solutions to the problems that will likely result from the Sereboff III decision.

II. ERISA AND REIMBURSEMENT

In order to fully understand the issues analyzed in this note, a basic understanding of ERISA, subrogation, and reimbursement is necessary. Section A of this part provides an overview of ERISA, why this statute was enacted, and a description of the ERISA provisions that are applicable to insurers’ reimbursement and subrogation actions. Section B defines and differentiates subrogation and reimbursement and explains when they apply in ERISA actions.

A. ERISA Generally

ERISA is a series of federal statutes that was enacted in 1974 in response to the mismanagement and failure of many employer-sponsored pension funds. This failure resulted in employees receiving only a small percentage of their promised benefits or none at all. Congress’ primary purposes for enacting ERISA were to regulate these pension funds and protect employees. However, the courts expanded the scope of ERISA’s coverage...
beyond pension fund regulation to all employer sponsored benefit plans. Since ERISA’s enactment, courts have concluded that Congress’ goals include developing a uniform federal common law, ensuring the solvency of employee benefit plans, and encouraging employers to provide fringe benefits to their employees. The two sections of ERISA that embody these purposes and goals are sections 514 and 502. Section 514 outlines ERISA’s preemptive effect on state laws, and section 502 outlines ERISA’s exclusive remedial scheme.

Section 514, sometimes called the “preemption clause,” provides that ERISA “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.” ERISA describes an “employee benefit plan” as any plan “established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.” The statutory text of ERISA does not indicate how close of a relationship is required to satisfy the “relate to” language for ERISA preemption; however, the United States Supreme Court has defined

1974 U.S.C.C.A.N. 4639, 4639. “The primary purpose of the bill is the protection of individual pension rights . . . .” Id.
27. 29 U.S.C. § 1003(a) (2000). This Act “shall apply to any employee benefit plan.” Id.

It is thus clear that ERISA’s pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Id.
30. See H.R. Rep. No. 93-533, pt. 1, at 4639–40. The bill was designed to promote the expansion of these plans and increase the number of employees receiving them. Id. at 4640.
33. Id. § 2-107.
34. Id. § 2-99.
the phrase “relate to” as having a “broad common sense meaning.” In 1995, the Court clarified that although Congress intended this provision to be applied broadly, it did not intend for it to preempt state laws that have only an indirect economic effect on the subject matter of an ERISA plan. A clause in section 514 limits the scope of ERISA from being read too broadly, by carving out an exception for state laws that regulate insurance. It also clarifies that self-insured employee benefit plans do not constitute insurance companies that are exempt from ERISA. In other words, an employer that acts like an insurance company by providing a set of benefits to its employees, such as promising to pay medical expenses, is governed by ERISA. These types of benefit plans fit easily into the category which ERISA defines as an “employee welfare benefit plan.” This is important because the vast majority of Americans receive their health coverage through some sort of employee welfare benefits plan governed by ERISA. Having the majority of Americans’ health plans governed by the same federal statute, as opposed to many different and perhaps conflicting state and local statutes, furthers

40. 29 U.S.C. § 1144(b)(2)(A) (2000). Section 1144(b)(2)(A) states that “nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.”
41. § 1144(b)(2)(B). Section 1144(b)(2)(B) states:

Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id.
43. See 29 U.S.C. § 1002(1) (2000). Section 1002(1) describes the term “employee welfare benefit plan” as follows:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .

Id.
44. Timothy S. Jost, Pegram v. Herdrich: The Supreme Court Confronts Managed Care, 1 YALE J. HEALTH POL’Y L. & ETHICS 187, 187 (2001) (estimating that eighty-eight percent of Americans with private health insurance have employment-based coverage).
Congress' goal of creating a uniform federal common law. Section 514 also has the effect of complete federal preemption, meaning that a defendant may remove any related lawsuit filed in state court to federal court, even if the plaintiff did not plead a federal law violation.

Section 502, ERISA's "[c]ivil enforcement" provision, enumerates the exclusive remedies available in ERISA actions. This provision states the following:

A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The other appropriate equitable relief language, of subsection B of this provision, has been interpreted to not include claims for punitive, consequential, or other state specific damages resulting from a breach of the benefits plan contract. Limiting the available remedies and enabling defendants to remove ERISA actions to federal court help achieve Congress' intended goals of ensuring the solvency of employee benefit plans and encouraging employers to provide benefits to their employees.

46.  Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). According to the "well-pleaded complaint rule," a defendant may not invoke federal subject matter jurisdiction if the plaintiff has not raised a federal law issue in the complaint. Id. However, the Court in Metropolitan. Life Insurance. Co. established that ERISA section 514(a) completely preempts state law claims, and according to the complete preemption doctrine, there is federal subject matter jurisdiction over these claims. Id. at 66. "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [section] 502(a) removable to federal court." Id.
48.  Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (stating that "ERISA's civil enforcement remedies were intended to be exclusive").
49.  § 1132(a)(3) (emphasis added).
B. An Insurer's Action for Reimbursement or Subrogation

Subrogation and reimbursement are related doctrines intended to prevent unearned enrichment and injustice. Subrogation is the principle whereby a fiduciary, who has indemnified a beneficiary, is substituted for that beneficiary in a suit against a third party for compensation of losses sustained by the fiduciary, caused by that third party. An insurer's subrogation rights often arise out of a contractual provision in an insurance policy.

Enforcement of these rights is disfavored by state judiciaries and legislatures, because it seems to violate the public policies against assigning personal injury claims and the prohibition against splitting causes of action. However, "over the past thirty years . . . insurers have continually sought" enforcement of these provisions. To avoid violating these public policies, the insurance industry redesigned the language of their contracts to grant them the right of reimbursement instead of subrogation. The effect of this redrafting was to "create the economic reality of subrogation . . . without . . ."

52. A fiduciary is "[a] person who . . . act[s] for the benefit of another person on all matters within the scope of their relationship." BLACK'S LAW DICTIONARY 658 (8th ed. 2004). For the purposes of this article, the ERISA insurers are the fiduciaries acting for the benefit of the ERISA beneficiaries.
53. To indemnify means "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default." BLACK'S LAW DICTIONARY 783-84 (8th ed. 2004).
55. Baron, Subrogation, supra note 54, at 238.
56. See, e.g., 75 PA. CONS. STAT. ANN. § 1720 (2006) ("In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to . . . benefits paid or payable by a program, group contract or other arrangement . . ."); Wrightsman v. Hardware Dealers Mut. Fire Ins. Co., 147 S.E.2d 860, 861 (Ga. Ct. App. 1966) (holding a subrogation provision "void and of no effect" because the provision "amounted to no more than an agreement to assign a personal injury claim"). See also State Farm Mut. Auto. Ins. Co. v. Baker, 797 P.2d 168, 172 (Kan. Ct. App. 1990) (upholding Missouri's anti-subrogation law); Nationwide Mut. Ins. Co. v. DeJane, 326 N.E.2d 701, 705 (Ohio Ct. App. 1974) (stating that not allowing subrogation of medical expenses follows the rule that one cannot split causes of action for the benefit of "the insured public and the public at large").
57. Baron, Subrogation, supra note 54, at 238-39.
59. See, e.g., In re Estate of Scott, 567 N.E.2d 605, 607 (Ill. App. Ct. 1991) (holding that "the language of the Plan's subrogation provision does not call for the full assignment of the insured's rights but, rather, mere reimbursement of amounts forwarded by the Plan").
its language." This is a prime example of the creative lawyering that will be discussed later in this Note.

III. KOUGON: THE LAW ESTABLISHED

In the landmark case Great-West Life & Annuity Insurance Co. v. Knudson, the United States Supreme Court established the law regarding ERISA subrogation and reimbursement actions brought by insurers to recover medical expenses paid on behalf of their beneficiaries. Section A of this part presents the facts and holding of Knudson, while Section B discusses the federal circuits' conflicting interpretations of the law.

A. Great-West Life & Annuity Insurance Co. v. Knudson

ERISA's text is silent as to whether it applies to a fiduciary's action for reimbursement or subrogation. However, courts have consistently applied ERISA to such actions. The United States Supreme Court decided Knudson in 2002. In Knudson, an ERISA plan beneficiary was injured in a car accident. Her ERISA insurance plan contained a reimbursement provision that provided the insurer a right to recover for any expenses it had paid on behalf of its beneficiary, from any third party settlement awarded to the beneficiary. The insurer paid $411,157.11 of the beneficiary's medical expenses. The following year, the beneficiary filed a tort action in a California state court against the third party responsible for the car accident, and


62. See id. at 221.

63. Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 130 F.3d 950, 958 (10th Cir. 1997); see also Roger M. Baron, Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom, 55 MERCEY L. REV. 595, 617 (2004) (noting that "nothing in the ERISA scheme endorses reimbursement or suggests that reimbursement is permitted under ERISA") [hereinafter Baron, Public Policy].


65. Knudson, 534 U.S. at 204.

66. Id. at 207.

67. Id.

68. Id.
subsequently recovered a $650,000 settlement. The settlement allocated approximately $250,000 to a Special Needs Trust, pursuant to California law, and the remaining sum was given to the beneficiary’s attorney for fees and other expenses. Prior to the state court’s approval of the settlement, the insurer filed an action in federal court under section 502(a)(3) to enforce the reimbursement provision, which would require the beneficiary to pay $411,157.11 to the insurer from the third party settlement proceeds. The district court granted summary judgment to the beneficiary on this claim, which was affirmed by the Ninth Circuit Court of Appeals. Thereafter, the United States Supreme Court granted certiorari and ultimately found that the insurer was seeking to impose personal liability on the beneficiary for a contractual obligation to pay money. Because “[a] claim for money due . . . under a contract is ‘quintessentially an action at law,’” it is not recoverable under the other equitable relief terminology of section 502(a)(3). The Court dismissed the insurer’s claim that its restitution action was equitable and clarified that “restitution is a legal remedy when ordered in a case at law . . . which depends on . . . the nature of the underlying remedies sought.” However, Justice Scalia also stated the following:

[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where “the property [sought to be recovered] or its proceeds have been dissipated so

69. Id.
70. Knudson, 534 U.S. at 207–08. The Court also allocated $13,828.70 to the insurer for past medical expenses but the insurer did not cash the check. Id. at 208.
71. Id. The insurer subsequently filed a complaint seeking a temporary restraining order against continuation of the state court proceedings for approval of the settlement, which was denied. Id.
72. Id.
73. Knudson, 534 U.S. at 209. The Ninth Circuit Court of Appeals affirmed on different grounds. Id.
74. Id. at 209–10.
75. Id. at 210 (quoting Admin. Comm. of the Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000)).
76. See id. at 221.
77. Knudson, 534 U.S. at 213 (quoting Reich v. Cont’l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).
that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or equitable lien upon other property of the [defendant]." 78

B. Confusion Among the Circuits

Justice Scalia's statement that a plaintiff could possibly seek equitable restitution by bringing an action for a constructive trust or equitable lien has led to some confusion as to whether reimbursement and subrogation provisions are enforceable under section 502(a)(3). 79 Knudson seems to answer this question in the negative. 80 Following Knudson, the Sixth and Ninth Circuit Courts of Appeals refused to recognize insurers' claims for reimbursement of medical expenses paid on behalf of their beneficiaries. 81 However, the Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals permitted reimbursement and subrogation actions by insurers if certain criteria were met. 82

The courts that outright opposed an insurer's action for reimbursement focused on the following portion of the Knudson opinion:

78. Id. at 213–14 (quoting RESTATEMENT (FIRST) OF RESTITUTION § 215, cmt. a (1937)) (citations omitted).
80. Knudson, 534 U.S. at 209, 221. The Court affirmed the judgment "that judicially decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party is not equitable relief and is therefore not authorized by §502(a)(3) [of ERISA]." Id. at 209.
81. Qualchoice, Inc. v. Rowland, 367 F.3d 638, 649–50 (6th Cir. 2004), abrogated by Sereboff v. Mid Atl. Med. Servs., Inc. (Sereboff III), No. 05-260, slip op. at 5, 11 (U.S. May 15, 2006) (refusing to recognize an insurer's subrogation claim and affirmed the lower court's dismissal of it for lack of subject matter jurisdiction); Cmty. Health Plan of Ohio, 347 F.3d at 624; Westoff (USA), Inc. v. Arce, 298 F.3d 1164, 1166–67 (9th Cir. 2002), abrogated by Sereboff III, No. 05-260, slip op. at 5 (refusing to recognize insurer's reimbursement cause of action by affirming the lower court's dismissal of the action).
82. See Willard, 393 F.3d at 1125 (finding that insurers were entitled to restitution in the form of an equitable lien because the criteria were satisfied); Primax Recoveries, Inc. v. Young, No. 02-2115; slip op. at 3 (4th Cir. Dec. 18, 2003) (finding for the insurer because the possession requirement was met), http://pacer.ca4.uscourts.gov/opinion.pdf/022115.U.pdf; Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 688 (7th Cir. 2003) (finding that the reimbursement action was equitable because the fund satisfied the identifiable requirement); see also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poiret & Wansbrough, 354 F.3d 348, 357, 362 (5th Cir. 2003) (finding that the reimbursement action was equitable because the possession requirement was met).
Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity. "A claim for money due and owing under a contract is 'quintessentially an action at law . . . ' " Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." [83]

The courts that opposed insurer reimbursement actions based their rationale on the underlying nature of the remedies sought, as opposed to the cause of action chosen by the plaintiff. [84] Therefore, those courts held that even if an insurer sued based upon theories of constructive trusts or equitable liens, its claim was essentially a legal contract claim, and thus unenforceable under ERISA. [85] Further, those courts emphasized that reimbursement claims are unenforceable "regardless of whether the plan participant or beneficiary recovered from another entity and possesses that recovery in an identifiable fund." [86] This statement discounts the theory on which the opposing jurisdictions relied.

The courts that entertained the idea of enforcing reimbursement and subrogation provisions of ERISA plans focused more on the following language in Knudson:

Here, the funds to which the petitioners claim an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—are not in respondents' possession . . . . The basis for the petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred. [87]

The courts that allowed reimbursement insisted that the Knudson insurer could not recover only because the beneficiary did not possess the set-


[85] See Qualchoice, Inc., 367 F.3d at 649; Cmty. Health Plan of Ohio, 347 F.3d at 623.

[86] Qualchoice, Inc., 367 F.3d at 650.

[87] Knudson, 534 U.S. at 214 (emphasis omitted).
tlement funds.88 Because of this lack of possession, it was determined that the insurer’s action is a legal contract claim, not an equitable claim.89 From this conclusion, along with Justice Scalia’s previous statement regarding constructive trusts and equitable liens,90 arose a three-part test to determine whether a claimant is seeking “[other] appropriate equitable relief under [section] 502(a)(3).”91 The three-part test, also referred to as the possession theory,92 requires that the insurer “seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the [insurer], and (3) that are within the possession and control of the defendant beneficiary.”93

IV. Sereboff III: The Law Clarified

In 2006, the issue of ERISA reimbursement was once again in front of the United States Supreme Court in the case of Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III).94 In Sereboff III, the Court established that it may be possible for an ERISA insurer to recover medical expenses paid on a beneficiary’s behalf if certain criteria are met.95 Section A of this part presents the Sereboff III case. Section B compares the facts and holding of Sereboff III with those of Knudson Finally, section C breaks down and analyzes the three-part test that must be satisfied in order for an insurer to enforce an ERISA subrogation or reimbursement provision.

88. See, e.g., Admin. Comm. of Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124 (10th Cir. 2004) (stating that in Knudson, “the Court ultimately determined that equitable restitution was not an available remedy because the funds claimed by the fiduciary were not in the plan beneficiary’s possession”). See also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Foirot & Wansbrough, 354 F.3d 348, 356 (5th Cir. 2003); Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 687 (7th Cir. 2003).

89. See, e.g., Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 548 (7th Cir. 2003) (concluding that the action sought legal relief because the plan participant possessed only an uncashed check; therefore, the participant did not possess an identifiable fund); Varco, 338 F.3d at 687–88 (concluding that the action sought equitable relief because the plan participant possessed identifiable funds); Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 445 (5th Cir. 2002) (concluding that the action sought legal relief because, like Knudson, the settlement funds were not in the beneficiary’s possession).

90. See Knudson, 534 U.S. at 213–14.

91. Bombardier, 354 F.3d at 355 (emphasis added).

92. Wellmark, Inc. v. Deguara, 257 F. Supp. 2d 1209, 1216 (S.D. Iowa 2003). “This Court finds the possession theory is the correct read of [Knudson].” Id.

93. Bombardier, 354 F.3d at 356.


95. See id. at 3–6.
A. Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III)

As a result of Knudson, the various jurisdictions treated ERISA reimbursement provisions differently.96 Some outright refused to enforce them, while others applied the possession theory.97 This resulted in inconsistent decisions which were contrary to the ERISA goal of developing a uniform common law.98 The United States Supreme Court attempted to clear up the confusion on May 15, 2006, when it decided the case of Sereboff III in which the beneficiaries of an employer-sponsored health insurance plan, covered by ERISA, were involved in a car accident and suffered injuries.99 The insurer paid the beneficiaries’ medical expenses, which amounted to $74,869.37.100 The beneficiaries filed a state tort action against third parties, seeking damages for their injuries.101 After the suit was commenced, the ERISA insurer asserted a lien on the anticipated proceeds from that suit for compensation of the medical expenses it had paid on the beneficiaries’ behalf.102 Subsequently, the beneficiaries settled with the third parties for $750,000 which was then distributed.103 Because the funds had been distributed, the insurer sought a temporary restraining order and preliminary injunction to require the beneficiaries to set aside, from the settlement proceeds, an amount sufficient to fully reimburse it for the medical expenses.104 The beneficiaries agreed to set aside $74,869.37 from the proceeds in an investment account “until the [d]istrict [c]ourt rule[d] on the merits of [the] case and all appeals, if any, [were] exhausted.”105

The district court found in favor of the insurer and ordered the beneficiaries to pay the insurer $74,869.37 from the investment account.106 On appeal, the Fourth Circuit Court of Appeals affirmed in relevant part, and then

96. See supra notes 74–93 and accompanying text.
97. Compare Westaff (USA), Inc. v. Arce, 298 F.3d 1164, 1166-67 (9th Cir. 2002), abrogated by Sereboff III, No. 05-260, slip op. at 11 (refusing to recognize an insurer’s reimbursement action), with Bombardier, 354 F.3d at 356-57 (recognizing an insurer’s reimbursement action and applying the possession theory).
98. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995) (citing Senator William’s statement that ERISA was intended to “eliminat[e] the threat of conflicting or inconsistent [s]tate and local regulation of employee benefit plans”120 CONG. REC. 29,197, 29,933 (1974)).
100. Id.
101. Id.
102. Id.
103. Id.
104. Sereboff III, No. 05-260, slip op. at 2.
105. Id. at 2–3.
106. Id. at 3.
the United States Supreme Court granted certiorari. The Court found that the insurer's action was for other appropriate equitable relief under section 502(a)(3), because the insurer sought payment by means of "constructive trust or equitable lien on a specifically identified fund" that was in the beneficiaries' possession. As such, the Court affirmed the Fourth Circuit's judgment. This resolved the issue of whether an insurer could recover upon a reimbursement or subrogation provision in an ERISA plan. However, another question arises: Why did the United States Supreme Court come to such a different conclusion in Sereboff III than it did in Knudson when the facts of the cases were so similar? This would not be an issue if the Court had overturned or abrogated Knudson after ruling on Sereboff III, but it did not, it merely distinguished the cases based on a fact that seems arbitrary.

B. Sereboff III Compared to Knudson

The United States Supreme Court notes the similarities between the facts of Knudson and those of Sereboff III. In both cases, the beneficiaries of ERISA plans were injured in car accidents. Additionally, both plans contained reimbursement or subrogation provisions entitling the insurer to be reimbursed from third party settlements recovered by the beneficiary. Further, both insurers sought to collect for the medical expenses they had paid on the beneficiaries' behalves. Even though these two cases arose from almost identical facts, the Court permitted one insurer to collect and not the other.

The Court explains that in Knudson, the other appropriate equitable relief requirement was not met because "the funds to which petitioners

107. Id.
108. Id. at 5.
109. Sereboff III, No. 05-260, slip op. at 11.
110. See id. at 5.
112. Sereboff III, No. 05-260, slip op. at 4–5 (noting the similarities between Sereboff III and Knudson yet distinguishing the cases based on how the collateral third party settlement checks were distributed).
113. Id. at 4–5.
114. Id. at 4.
115. Id.
116. Id.
claim[ed] an entitlement' were not in [the beneficiary’s] possession, but had instead been placed in a ‘Special Needs Trust’ under California law.” However, the requirement was met in *Sereboff III* because the funds ‘were ‘within the possession and control of the [beneficiaries, since the funds were]’ . . . set aside and ‘preserved in the [beneficiaries’] investment accounts.’” The Court notes that this distinction is the difference between seeking a constructive trust or equitable lien, which are equitable remedies, and imposing personal liability on a defendant, which is legal.

Based on this rationale, it appears as though a beneficiary is able to avoid enforcement of an ERISA reimbursement provision by simply allocating third party settlement funds so that the insurer could not satisfy the possession theory requirements.

C. A Deeper Understanding of the Possession Theory

As indicated above, all three requirements of the possession theory must be satisfied for an insurer to enforce a reimbursement provision. Subsection 1 presents the first possession theory requirement—that the funds sought be specifically identifiable—and illustrates how this requirement is satisfied. Subsection 2 analyzes the second requirement—that the funds belong in good conscience to the insurer—and how this requirement is met. Subsection 3 discusses the last requirement—that a beneficiary must possess the funds—and identifies which funds are and are not in a beneficiary’s possession.

1. The Specifically Identifiable Requirement

The first requirement for an insurer to exercise its reimbursement or subrogation rights is that the funds which the insurer seeks to assert a constructive trust or equitable lien on be specifically identifiable. This stems from the requirement that a constructive trust and equitable lien can only be

---

119. *Id.* at 5 (quoting Mid Atl. Med. Servs., Inc. v. Sereboff (*Sereboff II*), 407 F.3d 212, 218 (4th Cir. 2005)).
120. *Id.*
122. *Bombardier*, 354 F.3d at 356. The Plan must “seek to recover funds . . . that are specifically identifiable.” *Id.*
invoked on a specific res, either the funds belonging to the insurer or property that has been exchanged for those funds. However, where one can show only that another has received funds, but cannot demonstrate that those specific funds are still in the other's possession, there is no identifiable fund on which to assert a trust or lien. As such, the only remedy available would be a general debt that may be pursued only at law. In theory, if a beneficiary cashed a third-party settlement check and buried the money, there would be no identifiable fund on which the insurer could seek a trust or lien. However, the check would have to have been cashed and not merely deposited in a bank account, because a bank account is specifically identifiable and therefore subject to a constructive trust or equitable lien. In addition to the obvious ethical restraints, cashing and hiding funds in this manner will likely prove unsuccessful. Before a settlement agreement is even made and a check disbursed, it is likely that the insurer will place a lien on the anticipated proceeds. This lien is one that a court will likely enforce. Even if the insurer did not have such foresight, it may just as easily seek a temporary restraining order or preliminary injunction requiring a sufficient portion of the settlement proceeds to be set aside before or after distributing the funds. Because of these options, which the insurance companies' attorneys prudently exercise, the specifically identifiable requirement is generally satisfied.

---

123. A res is a fund. Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 548 (7th Cir. 2003).
125. Id.
126. Id.
127. See id.
128. See id.
129. See id., supra note 124, § 4.3(2).
131. See Sereboff III, No. 05-260, slip op. at 11 (enforcing the equitable lien on the settlement proceeds).
132. Id. at 2; see e.g., Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 350 (5th Cir. 2003).
133. See Sereboff III, No. 05-260, slip op. at 5; Bombardier, 354 F.3d at 355; Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 451 (5th Cir. 2002) (stating that the insurer was "contesting title to a specific and identifiable quantum of funds").
2. The Belonging in Good Conscience Requirement

The second requirement an insurer must meet in order to enforce a reimbursement or subrogation provision is that the identifiable funds which it seeks to assert a trust or lien on belong to the insurer in good conscience. There has been little debate on this topic mainly because these suits generally arise from a clear and unambiguous reimbursement provision of an ERISA plan, which the employee has signed. However, one might argue that the settlement funds do not belong in good conscience to the insurer. As stated previously, a constructive trust or an equitable lien can only be asserted on a res that is traceable to the insurer. Usually, either the actual funds that belong to the insurer or property exchanged for those funds will suffice. In ERISA reimbursement actions, the funds belonging to the insurer—the funds actually disbursed to the beneficiary pursuant to the ERISA policy—are generally used for their intended purpose of payment for the beneficiary’s medical expenses. Therefore, the only res belonging to the insurer would be the hospital beds, medication, or services purchased with those funds.

An insurer might argue that the settlement funds received are repayment for the medical treatment provided to the beneficiary. Since the insurer has reimbursement rights, the funds belong to it in good conscience and the insurer should be fully reimbursed before the beneficiary collects anything. Generally, however, the majority of these types of settlement funds are categorized as compensation for the beneficiary’s injuries and suffering, not medical expenses. So, perhaps the funds do not belong in good conscience to the insurers.

Further, given that the insurers have been collecting premiums and ERISA’s purpose was to protect employees, one may argue that beneficiaries...

134. Bombardier, 354 F.3d at 356. Bombardier Aerospace Employee Welfare Benefits Plan (The Plan) must seek funds “that ‘belong in good conscience’ to the plan.” Id.
135. See id. In several cases, the policy “terms contained an express, unambiguous reimbursement provision which made the disputed funds ‘belong in good conscience’ to the [insurer.]” Id. This ignores the fact that the terms of a beneficiary’s ERISA plan policy are generally negotiated by his or her employer, who may or may not be acting in the beneficiary’s best interest. Kathy L. Cerminara, Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict, 33 Loy. U. Chi. L.J. 547, 570 (2002).
136. DOBBS, supra note 124, § 6.1(3).
137. Id. n.1.
138. See Bombardier, 354 F.3d at 350; Bauhaus USA, Inc., 292 F.3d at 440.
139. See DOBBS, supra note 124, § 6.1(3) (stating that only the property regarded as the source of the debt or the property substituted for it can be the subject of a constructive trust).
140. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 207–08 (2002). Only $13,828.70 of the $650,000 settlement was allocated to medical expenses, even though the medical expenses actually amounted to over $400,000. Id.
should be fully or at least partially reimbursed before insurers. This concept is embodied in the make-whole doctrine. At least three federal circuits have adopted this doctrine. These circuits agree that the make-whole doctrine is the default rule in ERISA reimbursement actions, yet not applicable when the ERISA policy clearly and specifically gives the insurer "priority to the funds recovered and [the] right to any full or partial recovery." Other circuits have refused to adopt the make-whole doctrine. The United States Supreme Court did not address this particular doctrine in Sereboff III or in Knudson. Further, neither decision conflicts with either side of the circuit split. Therefore, one can only speculate as to how the Court would decide on the matter.

142. Moore v. Capital Care, Inc. (Moore II), Nos. 04-7121 & 7122, slip op. at 12–13 (U.S. D.C. Cir. Aug. 29, 2006). The court defines the make-whole doctrine as: "[i]n the absence of contrary statutory law or valid contractual obligations to the contrary, the general rule under the doctrine of equitable subrogation is that where an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all of the loss that the insurer acquires a right to subrogation, or is entitled to enforce its subrogation rights. The rule applies as well to instances in which the insured has recovered from the third party and the insurer attempts to exercise its subrogation right by way of reimbursement against the insured's recovery." Id. Make-whole provisions prevent insurers from being reimbursed until after the beneficiary has been fully compensated for losses suffered. See BLACK'S LAW DICTIONARY 975 (8th ed. 2004).
144. Copeland Oaks, 209 F.3d at 813 (italics omitted).
147. See id. The Knudson decision does not conflict with either side because the insurer could not recover based solely on the beneficiary's lack of possession. Knudson, 534 U.S. at 214. The Sereboff III decision does not conflict with either side because there was clear and specific language in the policy giving the insurer the right to fully recover from the settlement funds. Sereboff III, No. 05-260, slip op. at 2.
3. The Possession Requirement

The third requirement—that the beneficiary possess the funds which the insurer is seeking a trust or lien on—has been the turning point for the majority of these cases. In *Knudson*, the insurer could not recover because the Special Needs Trust was not in the beneficiary’s possession. In *Sereboff III*, the insurer was able to recover because the investment account was in the beneficiaries’ possession. Therefore, if a beneficiary could allocate funds so that they were not in his or her own possession, an ERISA insurer could not be reimbursed from those funds.

Possession is having “[t]he right under which one may exercise control over something to the exclusion of all others.” One may have actual or constructive possession over property. Actual possession is having “[p]hysical occupancy or control over property.” Constructive possession means having “[c]ontrol or dominion over [i] property without actual . . . custody of it.” Both of these types of possession satisfy the possession requirement under the possession theory. The next step in establishing whether an insurer will be able to satisfy the possession requirement is determining what types of funds one does or does not possess. An analysis of common law may aid in this determination.

a. Possessory Funds

In *Sereboff III*, the Court established that placing funds in an investment account that the beneficiary has control over satisfies the possession requirement. In *Administrative Committee of the Wal-Mart Stores, Inc. v.*

148. *Knudson*, 534 U.S. at 213. The Plan must seek funds within the control and possession of the beneficiary. *Id.*
149. *Id.* at 214.
150. *Sereboff III*, No. 05-260, slip op. at 5.
152. *Id.* at 1201–02.
153. *Id.* at 1201.
154. *Id.*
155. See Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 691 (7th Cir. 2003). Since the funds were in the beneficiary’s own account he had sole possession over them and satisfied the possession requirement. *Id.* See also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Piorot, & Wamsbrough, 354 F.3d 348, 356 (5th Cir. 2003). Since the funds were being held by the beneficiary’s agent, the beneficiary had ultimate control over them giving him constructive possession. *Id.*
"Varco," the beneficiary’s attorney held the settlement funds in a reserve account for the beneficiary which also satisfied the possession requirement. In Administrative Committee of the Wal-Mart Stores, Inc. v. Willard, the beneficiary agreed to have the settlement funds placed in the court registry. The Tenth Circuit Court of Appeals found this agreement to establish that the beneficiary exercised control over the funds and deemed him to have constructive possession of the funds. In Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, & Wamsbrough, the settlement funds were being held in a bank account in the beneficiary’s attorneys’ names. Since the attorneys were indisputably the beneficiary’s agents, the beneficiary had ultimate control over the funds which satisfied constructive possession. These cases exemplify the courts’ eagerness to enforce reimbursement provisions, furthering Congress’ ultimate goals of creating a uniform common law and encouraging employers to provide benefit plans.

b. Non-possessory Funds

Despite insurers’ best efforts, beneficiaries have on occasion been able to avoid the enforcement of reimbursement provisions of ERISA plans. One example is a Special Needs Trust. In Knudson, the United States Supreme Court determined that if settlement funds are placed in a Special Needs Trust, then those funds are not considered to be in the beneficiary’s possession. A Special Needs Trust, also referred to as a Supplemental Needs Trust, is defined as: “A trust established to provide supplemental income for a disabled beneficiary who is receiving or may be eligible to re-

157. 338 F.3d 680 (7th Cir. 2003).
158. Id. at 684, 688.
159. 393 F. 3d 1119 (10th Cir. 2004).
160. Id. at 1121.
161. Id. at 1125.
162. 354 F.3d 348 (5th Cir. 2003).
163. Id. at 356.
167. Id. at 214.
168. Id.
ceive government benefits. Another example is an un-cashed check. In Primax Recoveries, Inc. v. Sevilla, the Seventh Circuit Court of Appeals established that an un-cashed check does not give a beneficiary possession of funds even if he has the ability to cash it. A third example is funds held in a court registry. In Bauhaus USA, Inc. v. Copeland, the Fifth Circuit Court of Appeals found that funds placed in the Mississippi Chancery Court’s registry were also not in the beneficiary’s possession, contrary to the finding in Willard. These examples illustrate possible scenarios in which beneficiaries may avoid the possession requirement.

V. THE LIKELY EFFECT OF SEREBOFF III AND THE POSSESSION THEORY ON FUTURE REIMBURSEMENT AND SUBROGATION CLAIMS BY INSURERS

"[An attorney’s] task is to convert the requirements of the client into legal solutions . . . ” The combination of specific rules and an emphasis on legal form and literalism can be used artificially, in a manipulative way to circumvent or undermine the purpose of regulation,” in order to serve a client’s needs. Now that it has been established by the United States Supreme Court in Knudson and Sereboff III, that the standard for reimbursement actions in ERISA cases is the possession theory, attorneys on both sides will likely shape their legal solutions to conform to this standard.

Section A of this part will analyze how a beneficiary’s attorney may try to avoid enforcement of a subrogation or reimbursement provision of an ERISA plan through the application or manipulation of case law and the law of trusts. This section will also present the legal and ethical restraints on an attorney’s success. Section B identifies the steps an insurer’s attorney must take in order to satisfy the possession theory requirements and enforce a subrogation or reimbursement provision.

171. See Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 546 (7th Cir. 2003).
172. Id. at 544.
173. Id. at 548.
174. See Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 441 (5th Cir. 2002).
175. Id. at 439.
176. Id. at 445; see Admin. Comm. of the Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124–25 (10th Cir. 2004) (holding that the beneficiary had constructive possession of the funds placed in the court registry satisfied the possession requirement).
A. Lawyering on the Part of Beneficiaries

Despite the insurer’s success in *Sereboff III*, the United States Supreme Court’s ruling in *Knudson* and the appellate courts’ rulings in *Sevilla* and *Bauhaus USA, Inc.* still remain good law. In all three of these cases, the beneficiaries were successful, because the insurers were unable to meet all the requirements of the *possession theory*. The success of these beneficiaries may give future beneficiaries and their attorneys hope that they too can succeed in avoiding the enforcement of ERISA reimbursement provisions. For instance, an attorney may attempt to have a beneficiary’s third party settlement proceeds placed in a Special Needs Trust since this act enabled the *Knudson* beneficiary to succeed. However, this may not be as easy or successful as one might think, since not every injured beneficiary is eligible for a Special Needs Trust. Further, even if a beneficiary is eligible and successful in placing those funds in the Special Needs Trust, there is no guarantee that the funds will be unattainable by the insurer.

When the law does not support a client’s case and an attorney is under pressure to find a legal solution to the client’s problem, that attorney may be enticed to manipulate or circumvent the law, so that it appears to favor a particular client’s case. For example, combining the ruling in *Sevilla* with the specifically identifiable res requirement of the *possession theory* pre-

---

179. See *Sereboff v. Mid Atl. Med. Servs., Inc.* (*Sereboff III*), No. 05-260, slip op. at 11 (U.S. May 15, 2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 204 (2002); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 548 (7th Cir. 2003); *Bauhaus USA, Inc.*, 292 F.3d at 445. 180. See *Knudson*, 534 U.S. at 214; *Sevilla*, 324 F.3d at 548 (7th Cir. 2003); *Bauhaus USA, Inc.*, 292 F.3d at 445. 181. *Knudson*, 534 U.S. at 214. 182. See *Eichstadt*, *supra* note 169, at 636 (indicating that a Special Needs Trust must meet the requirements of 42 U.S.C. § 1396p(d)(4)(A) (2000)). The requirements include: A trust containing the assets of an individual under age 65 who is disabled... and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter. 42 U.S.C. § 1396p(d)(4)(A) (2000). 183. See *Knudson*, 534 U.S. at 220. The court stated that it did not decide on whether the insurer could have sought equitable relief from the beneficiary’s attorney or the trustee of the Special Needs Trust. *Id.* 184. Bruce D. Black, *The Use (or Abuse) of Expert Witnesses in Post-Daubert Employment Litigation*, 17 Hofstra Lab. & Emp. L.J. 269, 284 n.86 (2000) (quoting MERIT BENNETT, *LAW & THE HEART* 25 (1997)). 185. *Sevilla*, 324 F.3d at 548. 186. Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, & Wamsbrough, 354 F.3d 348, 356 (5th Cir. 2003).
sents a possible loophole. Since the un-cashed check in *Sevilla* was not subject to equitable remedies, 187 and cashing a check makes funds not specifically identifiable, 188 an inexperienced attorney may instruct his client to hold onto the un-cashed check until after the insurer's suit is dismissed, then cash it quickly, and hide the funds. Although at first glance this solution seems feasible, such unscrupulous legal advice would likely subject an attorney to professional sanctions, a malpractice suit, and possibly criminal charges. 189 Further, it will also likely prove unsuccessful for a couple of reasons. First, the facts surrounding the *Sevilla* case were unique, since the beneficiary's purpose for not cashing the check was to prevent another case from becoming moot, not to avoid an obligation. 190 Second, a court may issue a preliminary injunction or temporary restraining order preventing the beneficiary from cashing the check. 191

An attorney may also attempt to avoid the possession requirement by having settlement proceeds placed in a court registry. 192 However, this will also likely fail its intended purpose. 193 In *Bauhaus USA, Inc.*, the beneficiary was successful only because the funds were placed in the registry in anticipation of an interpleader action 194 that never developed, not in an attempt to evade a reimbursement provision. 195 Because these solutions will likely fail, a beneficiary's attorney may look to the law of trusts for further assistance.

1. Basic Trusts

A trust arises when one person holds title to property "subject to an equitable obligation to keep or use the property for the benefit of another." 196 A trust may be created inter vivos 197 or by testament. 198 A trust may ex-

---

187. See *Sevilla*, 324 F.3d at 549–50.
188. See *Bombardier*, 354 F.3d at 356.
190. *Sevilla*, 324 F.3d at 548 (noting the reason the check was not cashed was to avoid mooting a collateral case).
191. DOBBS, *supra* note 124, § 2.11(1).
192. See, e.g., *Bauhaus USA, Inc.* v. *Copeland*, 292 F.3d 439, 445 (5th Cir. 2002).
193. *Id.*
194. *Id.* at 441. In an interpleader action, property is held by an uninterested third party until the ownership rights of that property are determined. BLACK'S LAW DICTIONARY 837 (8th ed. 2004).
195. *Bauhaus USA, Inc.*, 292 F.3d at 441.
197. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 3.1 (5th ed. 2006). A trust created inter vivos is created during one's lifetime. *Id.*
pressed or implied. Express trusts are those created through a written document called a trust instrument, which details the powers, rights, duties, and terms of the trust. Implied trusts are those created by courts because the facts of a particular case warrant their creation. Furthermore, trusts can be either revocable or irrevocable, depending on the terms of the trust.

"[V]irtually all trust law is default law." This means that a settlor can make any provisions, with respect to the trust, which the trustee must implement, as long as the provisions do not offend important rules and policies of the law of trusts.

2. The Possession Requirement

Due to a settlor's ability to design the terms of the trust to his or her liking, the ERISA beneficiary may be able to set up an inter vivos express trust in such a way as to avoid the possession requirement. One possibility is the creation of a trust that mirrors a Special Needs Trust, except without the eligibility requirements. This type of trust is a possible solution, since placing funds in a Special Needs Trust enabled the beneficiary in *Knudson* to avoid an ERISA reimbursement provision.

Another possibility includes the creation of an Offshore Purpose Trust for the settlement proceeds. For example, a settlor may create this type of

198. A trust created by testament is created upon one's death. *Id.*
199. BOGERT, supra note 196, § 8.
200. *Id.*
201. *Id.* § 1.
202. *Id.* § 8.
203. 2 RESTATEMENT (THIRD) OF TRUSTS § 63 (2003).
205. A settlor is a person who creates a trust. BOGERT, supra note 196, § 1.
206. The trustee is the person who holds the title of the trust property, in trust, for the beneficiary of the trust. *Id.*
208. See, e.g., Holdeen v. Ratterree, 270 F.2d 701, 706 (2d Cir. 1959) (finding that due to the "complete absence of control in the instrument itself... the settlor did not possess such control as to be considered substantially the owner of [the trust] property"). See 1 SCOTT ET AL., supra note 197, § 2.2.4, 3.1.
211. 2 ASSET PROTECTION STRATEGIES: WEALTH PRESERVATION PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES 281–83 (Alexander A. Bove, Jr. ed., 2005) [hereinafter
trust to finance a child’s education or to take care of a pet.\footnote{212} If the settlor would likely have paid for these expenses, then he or she would essentially be receiving the benefits of the trust.\footnote{213} Before sending money overseas, a settlor should first consult with a knowledgeable attorney and consider whether such activity is financially worthwhile. Additional considerations include: “[T]he purpose and term of the trust;”\footnote{214} the laws and political stability of the foreign jurisdiction; and the settlor’s travel preferences.

A third possibility includes placing the settlement funds in an irrevocable trust created for the benefit of the settlor’s family members.\footnote{215} Because an irrevocable trust is not within the control of the settlor, the possession requirement cannot be met.\footnote{216} As such, it may be possible for the settlor’s family members to enjoy the benefits of the settlement funds, something the settlor would likely prefer over having the insurance company receive the funds.

In all of these cases, the funds would not be in the ERISA beneficiary’s possession.\footnote{217} Therefore, the insurer would be unable to satisfy this requirement of the possession theory. As a result, an ERISA beneficiary’s attorney might encourage the creation of one of these trusts.

3. Restrictions on the Use of Trusts

Even if an ERISA beneficiary is able to create one of these trusts and have the third party agree to allocate the settlement funds to the trust, a court may still have to approve the settlement.\footnote{218} Courts addressing related issues have concluded that “[a]n ERISA plan participant [cannot] unilaterally allocate settlement proceeds to something other than medical expenses in order

\begin{footnotes}
\item[212] See id. at 280.
\item[213] See id. at 279.
\item[214] ASSET PROTECTION STRATEGIES, supra note 211, at 285.
\item[215] James T. Lorenzetti, The Offshore Trust: A Contemporary Asset Protection Scheme, 102 COM. L.J. 138, 150 (1997). “By making the trust irrevocable, the settlor relinquishes control over the funds.” Id.
\item[216] Id.
\item[217] 3 RESTATEMENT (THIRD) OF TRUSTS § 76 (2006). See also 1 RESTATEMENT (SECOND) OF TRUSTS § 175 (1959). “The trustee is under a duty . . . to take and keep control of the trust property.” Id.
\item[218] See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 207–08 (2002). The settlement money was only disbursed after the court approved the settlement and allocated the funds to the Special Needs Trust. Id. at 208.
\end{footnotes}
to evade subrogation." Additionally, in *Knudson*, the settlement proceeds were placed in a Special Needs Trust pursuant to California Law, not by the parties' discretion. Thus, if the state in which the action arises does not require settlement funds to be placed in a Special Needs Trust, it may be even more difficult for a beneficiary to utilize this reimbursement evasion tactic.

Other restrictions may prevent a beneficiary from utilizing trusts to avoid reimbursement or subrogation, such as the requirement "that the trust have a purpose that is lawful [and] not contrary to public policy." If a court determines that the settlor created a trust for an illegal or contrary to public policy purpose, the trust will fail. Further, "[a]n intended trust or a particular provision in the terms of the trust [instrument] may fail for illegality where . . . the purpose of the settlor in creating the trust is to defraud creditors or other third persons." Although, the settlor will likely attempt to convince a court that the purpose of the trust was not to defraud the insurer, but rather to ensure the education of a child or the well-being of his or her family or pet, it will be an uphill battle.

Regardless of whether the beneficiary is successful in creating one of these trusts, encouraging such activity may subject the attorney to sanctions. The *Model Code of Professional Responsibility* states that an attorney "shall not . . . counsel or assist his client in conduct that the [attorney] knows to be illegal or fraudulent."

**B. Lawyering on the Part of Insurers**

As a result of *Sereboff III*, insurers now have United States Supreme Court precedent in support of their actions to enforce ERISA reimbursement

---

219. Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area (*Moore I*), 70 F. Supp. 2d 9, 39 (D.C. Cir. 1999). The beneficiary claimed entitlement to all of the settlement proceeds because she had not yet been made whole for her injuries. *Id.* at 38. See Chitkin v. Lincoln Nat'l Ins. Co., 879 F. Supp. 841, 862 (S.D. Cal. 1995) (finding that the reimbursement provision permitted repayment from any settlement funds—except from strict liability—regardless of how the settlement funds were allocated).


222. 2 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS, § 9.6 (5th ed. 2006).

223. 1 RESTATEMENT (SECOND) OF TRUSTS § 60 (1959); see also 2 RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).


225. *Id.*
provisions. 226 This will likely add to the increasing trend towards insurers seeking enforcement of such provisions. 227 Although less creativity is required on the part of the insurers' attorneys than those of beneficiaries, they must still follow the proper procedures in order to be successful. First, the insurers must make sure that the reimbursement provision in the ERISA plan is signed by and enforceable against the beneficiary. 228 This will likely satisfy the belonging in good conscience requirement of the possession theory. 229 Second, the insurers' attorneys must act promptly in anticipation of, or as a result of, the beneficiary receiving a third party settlement by seeking a preliminary injunction and temporary restraining order. 230 These orders should require the beneficiary to set aside sufficient funds from the settlement proceeds to fully reimburse the insurer. 231 However, it is important that the funds be set aside in an account that is subject to a constructive trust or equitable lien, such as the beneficiary's investment account, a court registry, or the beneficiary's attorney's bank account, so that the possession requirement is met. 232 With these three possession theory requirements satisfied, the insurers have a good chance at success. 233

VI. CONCLUSION AND RECOMMENDATIONS

The Sereboff III insurer's success confirmed that pursuant to the civil enforcement provision, section 502(a)(3) of ERISA, an insurer may succeed in a reimbursement or subrogation action against a beneficiary for medical expenses paid on the beneficiary's behalf. 234 The United States Supreme Court also clearly identified the requirements for enforcement of such provi-

---

228. See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 345 F.3d 348, 356 (5th Cir. 2003) (noting that the belonging in good conscience requirement is satisfied when the beneficiary has signed an "express, unambiguous reimbursement provision").
229. See id.
230. See e.g., Sereboff III, No. 05-260, slip op. at 2. The insurer's attorney sought a preliminary injunction and temporary restraining order to require the beneficiary to set aside sufficient funds to reimburse it. Id.
231. Id.
232. Id. at 5. See also Admin. Comm. of the Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124–25 (10th Cir. 2004); see Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 691 (7th Cir. 2003).
233. Sereboff III, No. 05-260, slip op. at 4–5 (indicating that if these three requirements are met, then the insurer will succeed).
234. Id. at 11.
However, because there are cases which indicate that a beneficiary may still be able to avoid reimbursing the insurer, Congress' goal of establishing a uniform common law may still be frustrated. Since a beneficiary's attorneys may seek to exploit possible loopholes in the possession theory, there is the potential for ethical and professional conduct violations. Because of the increasing trend towards insurers seeking enforcement of reimbursement provisions, and the fact that the majority of Americans are insured under ERISA, a more efficient solution than the three-pronged analysis is necessary.

The clearest solution to this problem is to amend ERISA, specifically indicating whether or not Congress intended for ERISA reimbursement provisions to be enforceable. If the answer is "yes," the solution may be as simple as adding the word "legal" to section 502(a)(3) of ERISA, which would enable insurers to enforce reimbursement provisions on contract theories. If the answer is "sometimes," which is more probable, perhaps a detailed outline of the situations in which enforcement is appropriate should be provided. If Congress is concerned that explicitly requiring the enforcement of these provisions will pose an undue burden on beneficiaries, it should include a make-whole doctrine provision in its revision of the statute. This provision would provide that an insurer may only be reimbursed after the beneficiary has been fully compensated for losses suffered. This would require the tortfeasor to fulfill his or her obligation to the injured party to his or her ability. It will also require the insurer to pay for the expenses covered by the premium which it has already received. Until this is done, courts will continue to exercise their discretion and attorneys on both sides will continue to exercise their own.

235. Id. at 4–5.
237. See supra notes 185–200 and accompanying text.
238. Baron, Subrogation, supra note 54, at 238–39.
240. This solution is based on the fact that ERISA is silent on the issue of reimbursement and subrogation. Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 130 F.3d 950, 958 (10th Cir. 1997); see also Baron, Public Policy, supra note 63, at 617.
241. See BLACK'S LAW DICTIONARY at 975 (8th ed. 2004).
242. Kono, supra note 141, at 449.
243. Id.